EXHIBIT 3

Government's brief filed in the D.C. Court of Appeals in Melvyn A. Johnson v. United States, No. 90-566, 91-1406, on December 1, 1992

BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 90-566, 91-1406

MELVYN A. JOHNSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. No. F-9926-89

I N D E X

TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked with an asterisk.

DISTRICT OF COLUMBIA
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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

On September 6, 1989, the grand jury indicted appellant on one count each of possession with intent to distribute heroin and possession of cocaine (D.C. Code § 33-541) (R 7-8)[1/]. A bench trial before Judge Ronald Wertheim began and ended on February 26, 1990, when the court returned guilty verdicts on both counts (Tr. 111). On May 9, 1990, Judge Wertheim sentenced the defendant to an enhanced ten-to-thirty year term of incarceration for the

1/ "R." refers to the record on appeal for appeal #90-566. "R. II" refers to the record on appeal for appeal #91-1406. "Tr." refers to the 114-page transcript of proceedings held before Judge Ronald Wertheim on February 26, 1990. "Hr." refers to the 77-page transcript of proceedings held before Judge Ronald Wertheim on October 30, 1991.

possession with intent to distribute heroin count because of his two prior drug distribution convictions, followed by one year's incarceration for cocaine possession (R. 5). Trial counsel, Susan Borecki, filed a notice of appeal on May 25, 1990 (Id.).

On May 16, 1991, appellant's appellate counsel, Joseph Virgilio, filed a motion for a new trial, pursuant to Rule 33 of the District of Columbia Rules of Criminal Procedure and the District of Columbia Code, Section 23-110 (R. II 14). In his motion, appellant alleged that his right to effective assistance of trial counsel had been violated and that newly discovered evidence had been uncovered (Id.). Appellant's appeal was stayed pending his motion for a new trial.

On October 30, 1991, Judge Ronald Wertheim determined after a hearing that appellant's motion for a new trial should be denied (Hr. 76). Following the denial of appellant's motion for a new trial, appellant sought the appointment of new counsel. Michael L. Spekter was appointed on January 22, 1992.

The Trial

The Government's Evidence

At 7:00 p.m., on August 22, 1989, Detective Gary O'Neal was walking west in an alley behind 146 L Street, S.E., an area known as one of the most prodigious "open air drug distribution centers within the first district" (Tr. 5-7, 9). Detective O'Neal observed appellant with an unidentified black female in the alley walkway (Tr. 5-7, 9). As he approached, Detective O'Neal could see

appellant with his right hand opened and outstretched, and the female with her hand reaching within one inch of appellant's hand (Tr. 5-6, 21). Appellant had several blue-tinted glassine plastic packets containing white powder protruding from his outstretched hand (Tr. 5-6,8). Although Detective O'Neal could not determine whether there had been actual contact between appellant's hand and the female's hand, he believed that he was observing a drug transaction (Tr. 18). Although Detective O'Neal's view was unobstructed, he could not determine whether the female was moving her hand toward appellant's or away from appellant's (Tr. 13, 24). Once Detective O'Neal was within five to six feet of appellant and the female, he identified himself and demanded that they emerge from the walkway (Tr. 6-7, 18-21, 24). Appellant quickly dropped his hand to his side and the female "snatched" her hand back and fled (Tr. 6-7, 47). Detective O'Neal struggled with appellant and eventually was able to retrieve the nine small blue-tinted packets of white powder from appellant's hand (Tr. 6-7).

Detective O'Neal then led appellant to the mouth of the alley, to the 1000 block of Second Street, where Officer Kemper Agee searched appellant (Tr. 7). Pursuant to the search, Officer Agee found an off-white rock-like substance and $74 in currency inside a small, zippered, bicycle pouch strapped around appellant's waist (Tr. 7, 29-30). Field tests revealed that the white powder was heroin and the rock was crack cocaine (Tr. 55).

At trial, Detective O'Neal stated that he was an eighteen year veteran of the Metropolitan Police Department's First District and

a member of its drug enforcement section (Tr. 3-4). Based on the area and his experience that heroin was sold in blue glassine bags, Detective O'Neal concluded that he had interrupted what he believed to be a drug transaction (Tr. 8-9, 19). Furthermore, he stated that the packaging of the heroin and the number of packets was more consistent with an intent to distribute than personal use (Tr. 9).

Officer David Stroud, an expert in the street trafficking and packaging of illicit drugs in the District of Columbia, testified that the nine small blue-tinted glassine bags of heroin, ordinarily sold for twenty dollars apiece on the street, were of an amount, percentage purity, weight and packaging consistent with street distribution, not personal use (Tr. 54-56). Officer Stroud further stated that addicts do not purchase nine individually wrapped bags of heroin for $180 because they can buy the same amount in bulk for only $60 (Tr. 57). Besides saving money, Officer Stroud explained that addicts also buy in bulk or buy at most two bags at a time as opposed to multiple bags to reduce the risk of getting a "burn" bag instead of heroin (Tr. 54-59).[2/] Moreover, he explained, heroin addicts do not "stockpile" their supply, they employ a "use as you go" method (Tr. 59).

In Officer Stroud's experience, the most a heroin addict would use in a one-day period was six bags (Tr. 58). Even the rare addict with a six-bag-a-day habit would not buy six bags at a time, but instead would "sell or do a little bit of running" to support

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2/ Officer Stroud explained that a "burn" bag was a bag that contained for example: baking soda, a fake drug or a plain cutting agent (Tr. 57).

his habit (Tr. 58). Typically, he continued, "they'll work for somebody who actually is holding the heroin and for every ten bags they sell they're allowed to keep, like, one out of that ten. And once that's done they'll take the bag, ingest it, go off in a corner somewhere and nod off for a few hours" (Tr. 58-59). He added that drug dealers will sometimes sell heroin and cocaine so that they will appeal to all segments of the drug-buying community (Tr. 59). Furthermore, dealers often store their stash in pouches, whereas users will likely have their drug paraphernalia in a pouch along with one or two bags of heroin for ready-to-use access (Tr. 60, 66, 68).

The Defense Case

Appellant claimed that on August 22, 1989, he took his girlfriend's camcorder to the 2d and L Street, S.E., area to trade it for drugs (Tr. 70-71, 85).[3/] Although appellant initially wanted to get $200 worth of heroin for the camcorder, he settled for $180 worth of heroin (Tr. 71-72).[4/] Since the bags of heroin

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3/ On cross-examination, appellant explained that he had not paid anything for the camcorder because it was a gift from his girlfriend. When the court asked appellant exactly when it was that he had received this gift, appellant stated that it had not really been a gift, and added, "I borrowed it. I don't take from my girlfriend. We share what we got . . . I took it that day. We was [sic] staying together" (Tr. 85-86).

4/ On direct examination, appellant explained that he had wanted to receive at least $200 worth of money or heroin for the camcorder, but instead sold the camcorder for nine bags of heroin--approximately $180 worth (Tr. 71). On cross-examination, Mr. Klingenstein [the prosecutor] asked appellant why he did not use the $74 in currency to purchase heroin instead of taking a loss on the value of the camcorder. Appellant replied, "I wanted to sell the camera" (Tr. 85).

sold for $20 apiece, appellant ended up with nine bags of heroin (Tr. 71). According to appellant, he sold the camcorder to a woman he had grown up with -- a known drug dealer (Id.). Appellant further revealed that he had previously bought heroin from the same woman (Tr. 72). On cross-examination, appellant reluctantly revealed that the woman's name was Robin Lyles (Tr. 82).

On direct examination, appellant explained that he intended to use the nine bags of heroin within the next twenty-four hours, using seven bags on August 22 and saving two bags for the following day (Tr. 72-73, 75-76).[5/] The amount of heroin he used daily had increased since he began injecting in 1980, because the strength of the drug sold on the street had decreased (Tr. 76). He elaborated that "cut heroin," the kind one would normally purchase from a dealer, had to be sold the day it was cut, otherwise the cutting agent would destroy the quality of the heroin (Tr. 76, 91). On cross-examination, appellant claimed that he did not purchase heroin in bulk because "it's easy to buy nine bags, but to buy a spoon or a dipper or uncut dope, you're not likely to find that person on the corner selling those. It's easy to get individual bags of scramble that's already cut up" (Tr. 84). Furthermore,

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5/ On cross-examination, Mr. Klingenstein asked:

> Q: How much at one time of this heroin you intended to use?
>
> A: Like I said, within 24 hours, all nine bags. I could have done three and then done two and then probably about six hours later about two more. I'm going to save two for the next day so I won't wake up and be sick (Tr. 75).

dealers do not usually sell "cut heroin" in bulk, rather they sell it in $20 bags (Tr. 91).

Appellant claimed that in addition to $74 and the rock of crack cocaine, he had his identification card, "cookers" and a few drug needles in his bicycle pouch (Tr. 87). Admitting that he had no bicycle, appellant said that it was easier to carry his identification and drug paraphernalia in a pouch, particularly since his sweat suit had no pockets (Tr. 91-92). Appellant maintained that he was buying and not distributing heroin on August 22, 1989 (Tr. 76-77). When asked whether he had ever sought help for his drug addiction, appellant explained that he had been in several drug programs and had already received the "addict exception" (Tr. 77).[6/]

The Verdict

The court, crediting Detective O'Neal's testimony, found that appellant was interrupted during a drug transaction in which he was the seller (Tr. 111). Applying "common sense" and recognizing appellant's "powerful motivation to lie" to avoid the mandatory minimum sentencing, the court found appellant guilty on both counts (Tr. 111).[7/] In explaining his findings, the court stated that he

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6/ Appellant was impeached with his previous convictions of distributing heroin (1985), distributing PCP (1985), forgery (1984), carrying a pistol without a license (1983), and burglary II (1982) (Tr. 78-79).

7/ In explaining his verdict, Judge Wertheim said the following:

"But I think the quantity of heroin

(continued...)

did not believe that appellant purchased the heroin for a "trade-in" on the camcorder, nor did the court believe that appellant had drug paraphernalia in his bicycle pouch. The court remarked that had the police found paraphernalia in appellant's pouch, they likely would have charged him with its unlawful possession (Id.).

Post-Trial Proceedings

Appellant was sentenced on May 9, 1990, and his trial counsel, Susan Borecki, filed a notice of appeal on May 25, 1990 (R 5). Almost a year later, on May 16, 1991, appellant's counsel, Joseph Virgilio, filed a motion for a new trial (R. II 14). In his motion, appellant alleged that he was entitled to a new trial because his trial counsel had been ineffective (Id.). Specifically, trial counsel was alleged to have (1) failed to adequately investigate appellant's case prior to trial and to call witnesses to corroborate his version of the incident and his long-term drug addiction; (2) failed to object to the testimony of

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1/(...continued)

> found on the defendant, interpreted in the light of Officer Stroud's testimony, and sommon sense as to what a drug dealer will accept in return for a bag of heroin, I don't believe we've got any real doubt. I think I am entitled to take into account the defendant's desire to avoid the mandatory minimum sentence in evaluating his credibility. That does not substitute evidence but it does give him a very powerful motivation not to tell the truth on this specific narrow point of intent to distribute (Tr. 110-111).

Officer David Stroud with respect to the quantity of heroin purchased and consumed by heroin addicts; (3) failed to object to the trial court's consideration of appellant's mandatory minimum sentence when determining appellant's credibility; (4) failed to file a Motion to Suppress Evidence; and (5) failed to request the lesser included offense of possession of heroin (R. II 5). The court scheduled a 23-110 hearing for October 30, 1991 (R. II 86).

At the 23-110 hearing, appellant stated that trial counsel, Susan Borecki, had met with him only two to three times (Hr. 4). Appellant further stated that he had explained to Ms. Borecki that he had traded a camcorder for the nine bags of heroin and that he had three witnesses who could verify it (Hr. 5). Although, before trial, appellant only had the first name of one of the witnesses, he stated that Ms. Borecki should have been able to locate the three witnesses simply by going to the scene of the crime (Hr. 8). Furthermore, appellant stated that he told Ms. Borecki that he had purchased the heroin from Robin Lyles and that Ms. Lyles could also be found at the scene of the crime (Hr. 12). Appellant stated that, on the day of trial, Ms. Borecki had not gone to the scene of the crime, had not sent her investigator to the scene of the crime and therefore had not obtained any photographs or witnesses to be presented at trial (Hr. 7, 12).

Appellant further complained that Ms. Borecki failed to obtain records from his drug treatment programs (Hr. 12-14). Appellant argued that the introduction of such records at trial would have verified the fact that appellant at one point had a six-bag-a-day

heroin habit (R. II 23).

Appellant admitted to signing a form prepared by his trial counsel which indicated that he was rejecting all felony plea offers and, against the advice of Ms. Borecki, was choosing to have a bench trial (Hr. 8-10). However, appellant complained that he signed the form because Ms. Borecki had informed him that he could not start the trial until he signed it (Hr. 9).

Appellant stated that, after trial, he was able to obtain affidavits from three fellow inmates, two who could verify that appellant was trying to sell a camcorder on the day he was arrested and one who could verify that Ms. Lyles had the camcorder after appellant was arrested (Hr. 5).[8/] Additionally, after trial, appellant was able to obtain his drug treatment records with the assistance of appellate counsel, Mr. Virgilio (Hr. 13-14).

On cross-examination, appellant stated that he had given Ms. Borecki the name and a previous address of one of the witnesses, Ivan Driver, before trial (Hr. 16-18). Appellant further stated that he had spoken to Anthony Sally and Charles Upshur, two of the three witnesses, before he was arrested on August 22, and that he had provided their first names to Ms. Borecki before trial (Hr. 18-

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8/ Appellant submitted three affidavits at the 23-110 hearing. Anthony Salley's affidavit said that he "ran into Melvyn Johnson" between 5:00 p.m. and 6:00 p.m. on August 22, 1989, before appellant was arrested. Likewise, Ivan Driver's affidavit related that he "was approached by Melvyn Douglas" on August 22, 1989, between 5:00 p.m. and 6:00 p.m. Charles Upshur's affidavit stated that he saw appellant being arrested on August 22, 1989, between 5:00 p.m. and 6:00 p.m. Furthermore, Upshur's affidavit said that a woman named "Robin" approached him after appellant had been arrested and asked him to hold a video camera for her.

19).

As for Robin Lyles, appellant stated that he provided her full name to Ms. Borecki before trial (Hr. 21). In fact, although Ms. Borecki failed to locate her, appellant's family was able to speak to Ms. Lyles before trial and Ms. Lyles indicated that she would not be willing to go to court for appellant (Hr. 20). Appellant admitted that he had not wanted to get Ms. Lyles involved and that he would only have wanted her to testify if there were "some arrangement where it could be where she won't get herself in trouble" (Hr. 21).

When asked why he did not have his girlfriend testify about the camcorder, appellant stated that he did not want to get his girlfriend involved at the trial or the hearing, although she was available to testify (Hr. 22-23). When the court asked appellant why he did not want to get his girlfriend involved, appellant merely stated that his reasons were "personal" (Hr. 23). When asked why he did not have Sally, Upshur or Driver testify at the hearing, appellant stated, "I don't know why I don't have 'em. I don't know why" (Hr. 25). When asked why he did not ask for a continuance at the time of trial to look for his witnesses, appellant replied, "Well, she -- she didn't have 'em then. So I -- so I say, well, I just wanted to get it over with because I feel that in my -- well, I was going to go in there with what I had" (Hr. 28).

Ms. Borecki testified that she had met with appellant seven times prior to trial and had given him her home phone number so

that he could call her whenever he needed to (Hr. 35). Additionally, Ms. Borecki sent an investigator to speak with appellant, visit the crime scene and attempt to locate witnesses (Id.). When referring to her many conferences with appellant, Ms. Borecki stated that appellant was not helpful, was fairly belligerent, and only told her of one witness named "Robin" (Hr. 37). Furthermore, during her initial conference with appellant, he stated that there was a woman named "Robin" in the alley when he was arrested and, although he was not with her, the police probably thought that he was with her (Id.). After her investigator spoke to appellant and obtained a statement from him, Ms. Borecki contacted appellant and questioned him about the discrepancies between his initial statement to Ms. Borecki and his later statement to the investigator (Hr. 41).[9/] Appellant verified the statement that he had given to the investigator (Id.). Based on her discussion with appellant, Ms. Borecki went to the scene of the crime and sent her investigator to the scene of the crime at least two times (Hr. 42). Nobody seemed to know anything about appellant's arrest (Id.). When appellant mentioned to Ms. Borecki that he believed that "Robin" had been "locked up," Ms. Borecki tried to locate her through the records office of the Department of Corrections, but was unsuccessful (Hr. 43).

Although appellant had given Ms. Borecki several different

9/ Appellant initially informed Ms. Borecki that he did not know the woman he was with when he was arrested (Hr. 39). Appellant later told Ms. Borecki's investigator that he and the woman, known to him as "Robin", were going out together to buy drugs when he was arrested (Hr. 44).

versions of what he was doing prior to his arrest, appellant never mentioned anything to Ms. Borecki about trying to sell a camcorder (Hr. 44). In fact, the first time Ms. Borecki heard anything about a camcorder was during appellant's testimony at trial (Id.). Up until that point, Ms. Borecki was under the impression that Robin Lyles was a drug dealer and that she and appellant were going to use the drugs together (Hr. 44-46).

At no point prior to or during trial did appellant mention the names of Charles Upshur, Ivan Driver or Anthony Salley to Ms. Borecki (Hr. 45). In fact, immediately prior to trial, Ms. Borecki stated that she asked appellant whether he was satisfied with the trial preparation and informed him that she could ask for a continuance if he was not satisfied (Hr. 47). Appellant told Ms. Borecki that he was satisfied with the trial preparation and signed a statement to that effect (Id.). The first time appellant voiced any displeasure with Ms. Borecki's representation was after he had already been sentenced (Hr. 51).

The court found Ms. Borecki's testimony to be "fully credible and I do not credit [appellant's] testimony in those areas where there are factual differences between witnesses" (Hr. 74). On the issue of whether appellant informed Ms. Borecki about the three witnesses -- Upshur, Driver and Salley -- before trial, the court was satisfied that appellant had not. This decision was based on the testimony of appellant and Ms. Borecki at the hearing, and the

discrepancies found in the affidavits (Hr. 75).[10] The court further noted that the affidavits did not "carry very much weight in the circumstances when the witnesses were available to be called today" (Id.) The court concluded that the other issues were addressed well in the government's opposition to appellant's Motion for a New Trial and accordingly denied appellant's motion (Hr. 76).[11]

ARGUMENT

I. The evidence was sufficient to support appellant's conviction for possession with intent to distribute heroin, and therefore appellant's motion for judgment of acquittal was properly denied.

Appellant argues that there was insufficient evidence presented at trial to prove that he was guilty of more than simple possession as to both counts of the indictment (Brief for Appellant at 10). Appellant moved for a judgment of acquittal at the close of the government's case but did not renew it after the close of all the evidence (Tr. 69). This motion was denied and the court, after appellant put on his defense, found appellant to be guilty as charged (Tr. 69, 110-111).

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[10] At the 23-110 hearing, Judge Wertheim concluded the following: "It does in particular seem very unlikely that three people who [appellant] encounters in prison subsequent to his conviction and sentencing should all coincidentally have been at the scene of his offense. He didn't have at least their last names before that. And they all have the same recollection, placing themselves at this scene between 5:00 and 6:00 p.m. And they are all consistently inaccurate in view of the evidence both at trial and the police reports that the offense and the arrest occurred at 7:00 p.m.

[11] A copy of that opposition is attached to this brief as an appendix as a convenience to the Court.

Appellant's contention that the evidence was insufficient to support his conviction should be rejected. The circumstances surrounding his arrest, and the quantity, packaging and variety of drugs he possessed, provided a sufficient basis for the court to have found that he was guilty of possession with intent to distribute heroin.[12/]

In reviewing a trial court's denial of a motion for judgment of acquittal, this Court must determine whether there was sufficient evidence from which a reasonable juror, or in this case a reasonable judge, could fairly conclude guilt beyond a reasonable doubt. Head v. United States, 451 A. 2d 615, 622 (D.C. 1982). In so doing, the Court must review the evidence in the "light most favorable to the government, giving full play to the right of the [trier of fact] to determine credibility, weigh the evidence and draw justifiable inferences of fact." Hall v. United States, 454 A. 2d 314, 317 (D.C. 1982). The Court should not make a distinction between direct and circumstantial evidence. Chambers v. United States, 564 A.2d 26, 30-31 (D.C. 1989); Jackson v. United States, 395 A.2d 99, 102 (D.C. 1978). The government is not required to negate every possible suggestion of innocence, nor must the evidence compel a verdict of guilty. Fox v. United States, 421 A.2d 9, 12-13 (D.C. 1980); Chaconas v. United States, 326 A. 2d 792 (D.C. 1974). Only if the Court concludes that no reasonable [trier of fact] could have been convinced beyond a reasonable doubt of

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12/ Appellant does not challenge on appeal his conviction for possession of crack cocaine.

appellant's guilt should the denial of a motion for judgment of acquittal be reversed. Chambers, supra, 564 A.2d at 31; Smothers v. United States, 403 A. 2d 306, 312 (D.C. 1979).[13/]

In order to establish that appellant possessed a controlled substance with intent to distribute, the government must prove that (1) appellant possessed a useable amount of a controlled substance, (2) appellant did so knowingly and intentionally, and (3) appellant did so with the specific intent to distribute the controlled substance. See Harris v. United States, 489 A.2d 464, 470 (D.C. 1985); D.C. Code § 33-541(a)(1); Criminal Jury Instructions for the District of Columbia, No. 4.32 (3d ed. 1978). Appellant challenges only the element of intent to distribute the crack in this appeal.

In the instant case, the evidence viewed in the light most favorable to the government was sufficient to sustain the convictions. Since "intent" must often be proven through circumstantial evidence, it is important to look at the types of such evidence the court could have reasonably relied upon in finding beyond a reasonable doubt that appellant possessed the seized heroin with the intent that it be distributed.

Clearly, an important factor in establishing specific intent to distribute a controlled substance is possession of a quantity of

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13/ Since appellant chose to put on evidence at trial, he waived any challenge in this Court to the sufficiency of the government's evidence. Franey v. United States, 382 A.2d 1019, 1021-1022 (D.C. 1978). There is also authority for the notion that, since appellant did not renew his motion for judgment of acquittal after the close of all the evidence, he waived any appellatE claim of that issue. United States v. Sherrod, 295 U.S. App. D.C. 148, 964 F.2d 1501 (1992). Because appellant's trial was not before a jury, however, we do not press a waiver claim in this case.

drugs exceeding a reasonable supply for personal use. Hinnant v. United States, 520 A.2d 292, 294 (D.C. 1987); Shorter v. United States, 506 A.2d 1133, 1135 (D.C. 1985); United States v. Raper, 219 U.S. App. D.C. 243, 247, 676 F.2d 841, 845 (1982); United States v. Staten, 189 U.S. App. D.C. 100, 108 n. 72, 581 F.2d 878, 886 n.72 (1978); United States v. (Joseph) Davis, 183 U.S. App. D.C. 162, 166-167, 562 F.2d 681, 685-686 (1977). Another important factor in establishing an intent to distribute a controlled substance is the value and packaging of drugs found in the defendant's possession. Chambers v. United States, supra, 564 A.2d 26, 31 (D.C. 1989). Hinnant v. United States, supra, 520 A.2d at 294; United States v. Raper, supra, 219 U.S. App. D.C. at 247, 676 F.2d at 845. Additionally, an intent to distribute a controlled substance can be inferred from a defendant's arrest in an area with a high incidence of drug trafficking. United States v. Payne, 256 U.S. App. D.C. 358, 362, 805 F.2d 1062, 1066 (1986); Hinnant v. United States, supra, 520 A.2d at 294; United States v. Raper, supra, 219 U.S. App. at 247, 676 F.2d at 845. At trial, the government introduced facts supporting each of these factors as well as expert testimony explaining precisely how these facts demonstrate appellant's intent to distribute the cocaine. Thus the government amply provided evidence sufficient for a reasonable trier of fact to find appellant guilty beyond a reasonable doubt.

First, appellant was in possession of a quantity of drugs (nine packets of heroin and one rock of cocaine), which was, according to Detective O'Neal and Officer Stroud, more consistent

with an intent to distribute than possession for personal use since an individual user would not "stockpile" such a significant quantity of drugs (Tr. 9, 56 and 59). See Shorter v. United States, supra, 506 A.2d at 1135 (possession of a quantity of drugs that exceeds reasonable supply is significant evidence of an intent to distribute); see also United States v. Raper, supra, 219 U.S. App. at 247, 676 F.2d at 845 (the court determined that thirteen packets of heroin "was far greater than that needed for personal use"). Second, the packaging and value of nine individual packets of heroin seized from appellant additionally suggests possession with intent to distribute. See Chambers v. United States, supra, 564 A.2d 26, 31 (D.C. 1989) (court held cocaine possessed in three separate packages rather than one large mass was evidence of an intent to distribute). As expert testimony at trial pointed out, an individual user of drugs would not be likely to purchase nine separate packets, but rather would be more likely to purchase drugs in "bulk" (Tr. 57). In this case, it is not only the actual value of the nine packets that is important. It is that value's relationship to the cost at which a heroin buyer could buy the same amount for his own use. Judge Wertheim was entitled to view appellant as a sophisticated and knowledgeable heroin addict who would not purposely pay more for his habit than he needed to.

Possession of two types of a controlled substance, as in this case, heroin and cocaine, is also consistent with an intent to distribute. A dealer possessing two types of drugs, according to the expert testimony, increases his potential clientele by

appealing to more segments of the drug buying community (Tr. 59). Finally, although the value of the heroin possessed by appellant, $180, is not as large as in some decided cases, we believe that it also tends to suggest an intent to distribute. See United States v. Raper, supra, 219 U.S. App. D.C. at 247, 676 F.2d at 844 (the court determined that possession of heroin valued at $520 and $780 was consistent with an inference the drugs were being possessed with an intent to distribute). Cf. United States v. Johnson, 174 U.S. App. D.C. 72, 74-75 n.6, 527 F.2d 1381, 1383-84 n.6 (1976) (court allows expert testimony which explains that drug users tend to possess drugs of minimal value since they are often in fear of being robbed).

The circumstances surrounding appellant's arrest also support an inference that he was possessing the seized heroin with an intent to distribute. He was arrested in an area known for a high incidence of drug dealing. In fact, it was referred to at trial as one of the "more pervasive open air drug distribution centers within the first district" (Tr. 9). When Detective O'Neal walked up to appellant, appellant had his hand open and outstretched toward an unknown female. Inside of appellant's hand, Detective O'Neal could see what he initially suspected and later confirmed were bags of heroin (Tr. 5-8). The female appeared to be reaching into appellant's open hand, bringing her hand within one inch of appellant's hand, when Detective O'Neal identified himself. At that point, the female "snatched" her hand back and appellant closed his hand and put it by his side (Tr. 7). The trial court

certainly could have reasonably inferred from these facts that appellant possessed the seized heroin with an intent to distribute it. See Hinnant v. United States, supra, 520 A.2d at 294 (a factor in establishing intent to distribute is possession in an area known for a high incidence of drug trafficking); United States v. Gibbs, 284 U.S. App. D.C. 232, 237, 904 F. 2d 52, 57 (1990).

Appellant argues, however, that these aforementioned facts and circumstances equally support a conclusion that appellant was possessing the drugs as a buyer and not a seller (Brief for Appellant at 16). This argument is without merit. Based on the facts presented at trial (i.e. high drug area quantity, packaging, variety, value of heroin and circumstances of the arrest), the court had evidence sufficient to establish beyond a reasonable doubt that appellant had the intent to distribute the heroin in question. Cf. Bourjailly v. United States, 483 U.S. 171, 179-180 (1987) ("Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.") Appellant's presence in a high drug area, joined with the fact that he possessed nine individual packets of heroin, one rock of cocaine, $74, and none of the requisite drug paraphernalia for personal use, provided the court with sufficient basis to reasonably conclude that appellant's possession of the heroin in question was with the intent to distribute.

Moreover, it is well recognized that the government is not

required to negate all possible inferences of innocence.[14/] See also Irick v. United States, 565 A.2d 26, 30-31 (D.C. 1989). In Irick, for example, the defendant, in an attempt to establish that evidence presented at trial was insufficient to convict him of possession of cocaine with intent to distribute, argued that his actions were also consistent, as the government's expert at trial acknowledged, with someone who had no intention of selling drugs, but rather intended to steal a would-be drug purchaser's money (Id. at 30). In rejecting this argument, this Court noted that it is well settled that in evaluating a motion for judgment of acquittal, the government's evidence need not "exclude every reasonable hypothesis other than guilt." Id., citing Holland v. United States, 348 U.S. 121, 139-140 (1954); Chaconas v. United States, supra, 326 A.2d 792, 798 (D.C. 1974).

Appellant argues that Detective O'Neal's testimony was too vague and contradictory to support a conviction for possession with intent to distribute heroin (Brief for Appellant at 20). Specifically, appellant asserts that Detective O'Neal initially stated that he saw appellant with his right hand outstretched and an unknown female reaching into appellant's hand (Brief for Appellant at 15). Later, on cross-examination, appellant points out that Detective O'Neal admitted that he could not determine whether the female was "actually taking or reaching in" (Brief for Appellant 15-16). Appellant claims that this admission is "crucial" and further asserts that Detective O'Neal's observation

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14/ See text at 15, supra, and cases cited.

merely indicates that appellant was in possession of heroin (Brief for Appellant at 16). Appellant misreads the record. Clearly, Detective O'Neal stated that he saw the unknown female reaching into appellant's outstretched hand, placing her hand within one inch of appellant's hand (Tr. 20-21). When the government asked Detective O'Neal to describe how the female was reaching into appellant's hand, Detective O'Neal explained, "The right hand was outstretched. The right hand of [appellant] was outstretched. She was reaching in. And I couldn't tell whether or not she had gotten all the way or just where, but she was reaching in and his head was looking right at it when I identified myself as an officer" (Tr. 20-21). Detective O'Neal further explained that he did not know whether he had interrupted the unknown female "before she had actually gotten to this stage of the actual taking" (Tr. 21). When the government asked Detective O'Neal whether he saw anything fall from the female's hand, Detective O'neal stated, "I can't say. I don't know" (Tr. 22). Clearly, based upon the above testimony, the trial court had a sufficient basis to determine that appellant was in the process of distributing heroin to the unknown female when Detective O'Neal identified himself.

Appellant also argues that there was a six-foot high wooden fence between appellant and Detective O'Neal at the time of the alleged drug transaction and that therefore Detective O'Neal could not have seen what he testified to (Brief for Appellant at 14). Contrary to appellant's assertion, Detective O'Neal testified that the wooden or metal fence was not between him and appellant and

therefore did not obstruct his view of appellant and the unknown female (Tr. 12-14). As a result of Detective O'Neal's testimony about the wooden or metal fence near where appellant and the buyer stood, the prosecutor inquired whether O'Neal's view had been obstructed (Tr. 13). O'Neal responded, "No, no, no. There was not a wall or fence between us." (Id.). The witness even stepped down from the witness stand to demonstrate his line of sight (Id.).

Next, appellant argues that Officer Stroud's testimony pertaining to drug "use" was insufficient to base a conviction on because Officer Stroud did not have any expertise in the area of drug "use" (Brief for Appellant at 19). Again, appellant misreads the record. Officer Stroud testified that he had been a police officer with the Metropolitan Police Department for about twenty-one years and had worked on the narcotics task force for approximately seven years (Tr. 51). On direct examination, both parties stipulated that Officer Stroud qualified as "an expert in street trafficking and packaging of illicit drugs" (Tr. 54). When questioned on cross-examination about his direct experience with heroin addicts, Officer Stroud stated that his experience stemmed from watching heroin addicts "shoot-up" and interviewing heroin addicts after they have been arrested (Tr. 61-62). Appellant claims that Officer Stroud's testimony should have been discounted in its entirety based on the fact that the officer had not conducted any laboratory analysis, consulted any psychoanalytical experts or spoken to any drug counselors (Tr. 19).

Appellant does not explain an appeal why he believes that the

trial court should have completely discounted Officer Stroud's opinion about how many bags of heroin on addict is likely to buy at one time. In the context of his sufficiency claim, it should be too late to raise this issue since appellant did not mention it as a ground his motion for acquittal (Tr. 69). Abdulshakur v. United States, 589 A.2d 1258 (D.C. 1991). Moreover, with no objection at trial to Stroud's testimony (Tr. 51-68), the trial court was entitled to credit that opinion if he found it persuasive, which the court must have done.

Appellant seems to suggest that Stroud's opinion was inadmissible or improperly considered because it was based in part on conversations with arrestees and not on "laboratory analysis" or consultations with "psychoanalytical experts" or "drug counselors" (Brief for Appellant at 19). Surely, admission of and reliance upon Officer Stroud's opinion could not, on this basis, constitute error, much less plain error, in light of In re Melton, 597 A.2d 892 (D.C. 1991)(en banc), where this Court held that an expert's reliance upon hearsay statements in forming his opinion is generally permissible. Id. at 901-903. There are many safeguards to protect against any undue prejudice from such testimony, almost none of which appellant utilized here. However, appellant did cross-examine Stroud on this very point, and called to the trial court's attention his position that the officer's opinion on this matter was not worth very much. The trial court evidently disagreed and, having lost the argument before Judge Wertheim, appellant is extremely hard-pressed to overturn on appeal what is

really a credibility determination or, perhaps, a decision about what weight to give such testimony. Either decision is clearly a matter for the trier of fact and appellant has given this Court no reason to reverse the judgment on this basis.

II. Appellant's Constitutional Right to the Effective Assistance of Counsel was not Violated.

Appellant argues that his right to the effective assistance of counsel was violated and that therefore he is entitled to a new trial (Brief for Appellant at 24). In decrying counsel's performance, appellant asserts that Ms. Borecki divested him of his Sixth Amendment right to representation by failing to investigate his case before trial, failing to call witnesses at trial, failing to object to what appellant believes to be improper expert testimony, failing to file a motion to suppress the drugs before trial, failing to introduce appellant's drug treatment records and failing to explicitly ask the trial court to consider the lesser included charge of heroin possession (Brief for Appellant at 24-26). However, appellant's brief fails to offer any evidence that Ms. Borecki's actions either separately or in the aggregate constituted ineffective assistance of counsel or prejudiced him. In fact, it is clear from the record that appellant received effective assistance and a fair trial.

In evaluating claims of ineffective assistance of counsel, this Court applies the two-prong Strickland test. See Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the defendant must show both that his counsel's performance was

deficient, -- i.e., "that [she] made errors so serious that counsel was not functioning as the counsel guaranteed defendant by the Sixth Amendment," -- and that he was prejudiced by those deficiencies. Strickland, supra, 466 U.S. at 687-689. Significantly, "judicial scrutiny of counsel's performance must be highly deferential . . . [A] Court must indulge a strong presumption that counsel's conduct falls with the wide range of reasonable professional assistance." Strickland, supra, 466 U.S. at 689. Accord, McAdoo v. United States, 515 A.2d 412, 419 (D.C. 1986). Accordingly, the Court should not "engage in vague speculation about the kind of investigation counsel might have made or what witnesses he might have called," Atkinson v. United States, 366 A.2d 450, 453 (D.C. 1976); accord, Curry v. United States, 498 A.2d 534, 540 (D.C. 1985), and should not find ineffective assistance on the basis of tactical decisions gone awry or errors in judgment that became apparent in light of subsequent events. Carter v. United States, 475 A. 2d 1118, 1123 (D.C. 1984), cert. denied, 469 U.S. 1226 (1985); Wesley v. United States, 449 A.2d 282, 284 (D.C. 1982).

Under Strickland, the defendant must show that counsel's ineffective assistance prejudiced him, i.e., there must be "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland, supra, 466 U.S. at 694. Thus, even if perchance he demonstrates counsel's deficiency, the defendant is not entitled to relief unless counsel's incompetence led to a trial with an

"unreliable" result. Id. at 697. See McAdoo v. United States, supra, 515 A.2d at 426-427; Godfrey v. United States, 454 A.2d 293, 295 (D.C. 1982). Moreover, the Court may address the Strickland prongs in any order and need not consider both prongs if it finds that the defendant has made an insufficient showing on either.

A. Counsel Investigated Thoroughly.

Appellant asserts that had counsel investigated properly, she would have unearthed Ivan Driver, Anthony Salley and Charles Upshur -- the three fellow inmates appellant obtained affidavits from -- and thus would have been able to present their testimony at trial to bolster appellant's story about attempting to sell a camcorder for drugs (Brief for Appellant at 24). This is nonsense. Appellant testified at the 23-110 hearing that he had only given Ms. Borecki the first name of one of the above witnesses (Tr. II 8). Ms. Borecki then testified that appellant never mentioned the above three witnesses to her before or during trial (Hr. 44). The trial court credited Ms. Borecki's testimony. With the little information that appellant gave her, Ms. Borecki and her investigator were unable to locate any defense witnesses at the scene of the crime despite numerous attempts (Tr. 42). Counsel plainly has no obligation to interview witnesses of whom she is unaware. See Townsend v. United States, 549 A. 2d 724, 728 (D.C. 1988) (counsel is not ineffective for failing to unearth witness whose testimony would not have changed result), cert. denied, 109 S. Ct. 2457 (1989); White v. United States, 484 A. 2d 553, 558-559

(D.C. 1984) (investigatory decisions of counsel are necessarily reliant on information supplied by the defendant). Cf. Harris v. United States, 441 A.2d 268, 273-274 (D.C. 1982) ("failure to make reasonable efforts to interview and utilize known witnesses having a direct bearing on the substantial defense" may be considered ineffective assistance of counsel).

Appellant also argues that Ms. Borecki was deficient in opting not to present evidence to corroborate his testimony regarding the magnitude of his drug addiction (Brief for Appellant at 22). This claim is insupportable. At trial, appellant quantified his habit on the date of his arrest by saying that within twenty-four hours, all of the nine bags of heroin in his possession would be gone (Tr. 73). Officer Stroud then testified the maximum amount of heroin one would consume in a day was six packets (Tr. 58). Appellant's Veteran's Hospital discharge summary presentenced at the post-trial hearing reveals that in 1985, appellant claimed that he had a "5 to 6 quarters of 'street' heroin per day" habit. (See attached exhibit). The discharge summary thus adds little or nothing to the testimony already submitted on appellant's behalf at trial. It was, if relevant, merely cumulative. Ms. Borecki was not ineffective in failing to present cumulative evidence. Moreover, the document did not contradict Officer Stroud's expert opinion about an addict's maximum heroin intake, but supported it. At the zenith of his addiction, i.e., when seeking treatment, appellant claimed that he was consuming precisely the amount Officer Stroud predicted the heavy user would inject.

Ms. Borecki's failure to call any other witnesses to support appellant's claim that his habit was great enough to justify purchasing nine packets at once, when testimony on that subject was merely cumulative of his own, does not constitute ineffective assistance. As a matter of law, "[a]lthough [defendant] may disagree with his counsel's reasoning, the decision of whether to put witnesses on the stand is clearly a tactical decision." Curry v. United States, supra, 498 A.2d at 545; Smith v. United States, 454 A.2d 822, 825 (D.C. 1983) (decision to call witnesses is judgment left entirely within defense counsel's discretion); Atkinson v. United States, supra, 366 A.2d at 453 (decision to call witnesses is a choice of trial tactics that must be left to counsel's judgment). Counsel's possible "[e]rrors in judgment and tactics as disclosed by hindsight do not, by themselves, constitute ineffectiveness." Curry v. United States, supra, 498 A.2d at 545.

Finally, counsel's decision not to further corroborate appellant's habit did not affect the outcome of the trial. The court based its verdict on Detective O'Neal's testimony that he saw an aborted transaction where appellant was the seller, and discredited appellant's claim that he was trading in a camcorder for drugs (Tr. 110-111). The court did not specifically discredit appellant's testimony regarding the magnitude of his heroin habit. In fact, the government never disputed that appellant was a drug user and appellant informed the court that he had unsuccessfully

undergone treatment on two previous occasions (Tr. 77).[15/] Given his prior record, however, there was also no dispute that appellant was a drug seller. In short, any failure by counsel to corroborate appellant's testimony regarding the magnitude of his habit did not affect the outcome because that evidence did not address the most important element of the government's case -- Detective O'Neal's observation of the aborted transaction. Thus, its omission was "not so prejudicial as to deprive [defendant] of a fair and reasonable trial." Curry v. United States, supra, 498 A.2d at 545.

B. Counsel Properly Chose not to File a Frivolous Pretrial Suppression Motion.

Appellant asserts that Ms. Borecki was deficient in failing to move to suppress the heroin and cocaine found on appellant (Brief for Appellant at 22). This claim is legally and factually unsupportable.

Appellant's claim here is without merit because Ms. Borecki's decision not to file a motion to suppress was not deficient and because appellant plainly was not prejudiced by Ms. Borecki's failure to challenge a legal detention, search and seizure. Where, as here, counsel had no grounds upon which to question the admissibility of the drugs, she obviously could not in good faith file a motion to suppress them. Fernandez v. United States, 375 A.2d 484, 487 (D.C. 1977) (counsel "not required to file frivolous

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15/ In fact, appellant testified that he had attended the Veterans Hospital program (Tr. 77). The hospital summary quantifying his habit was thus plainly cumulative of his testimony.

or baseless motions."); see United States v. Madewell, 917 F.2d 301, 304-305 (7th Cir. 1990) (if defendant's motion to suppress evidence on Fourth Amendment grounds would have failed, counsel was not ineffective in failing to file it).

Appellant's support for this claim must come solely from the allegations in his post-trial motion since he did not address it at the October 30, 1991, hearing. We have attached a copy of both appellant's and the government's pleadings as appendices to this brief. Manifestly, appellant has not produced, as he could not, "whatever evidence will be necessary to succeed with suppression." Hockman v. United States, 517 A.2d 44, 50 n.9 (D.C. 1986). Moreover, as the government's proof at trial established,[16] appellant had no Fourth Amendment claim to challenge the admissibility of the drugs. Detective O'Neal, an eighteen-year Metropolitan Police veteran who had made hundreds of drug arrests (Tr. 4), testified that on August 22, 1989, he was on foot, in plain clothes, in a high drug area (Tr. 5, 9). As he came to within five to six feet of appellant and the unknown female, he saw what he believed to be a drug transaction (Tr. 5). Detective O'Neal made this determination based on the fact that appellant had several packets of suspected heroin in the palm of his open, outstretched hand (Id.). When he announced his presence, the unknown female fled and appellant closed and dropped the hand

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[16] In deciding whether a motion to suppress would have been denied, the Court may consider the undisputed trial testimony. See Lewis v. United States, 594 A.2d 542 (D.C. 1991) (citing Masiello v. United States, 113 U.S. App. 32, 34, 304 F.2d 399, 401 (1962) and Carroll v. United States, 267 U.S. 132, 134 (1925).

containing the drugs to his side. Given this sequence of events, Detective O'Neal plainly had an articulable suspicion that appellant was involved in a drug transaction. His observations amply supported a Terry[17/] investigatory stop and, once appellant resisted, the brief detention that occurred. See Price v. United States, 429 A.2d 514, 516 (D.C. 1981). Once he retrieved the bags from appellant's hand, field-tested the contents and determined that they contained heroin, he had probable cause to arrest appellant. Rucker v. United States, 455 A.2d 889, 891 (D.C. 1983); Price v. United States, supra, 429 A.2d at 516. Once lawfully arrested, the officers were entitled to conduct a search of the defendant's person. Gustafson v. Florida, 414 U.S. 260 (1973). Seizure of the rock of crack cocaine and $74 in currency from appellant's bicycle pouch plainly did not violate appellant's Fourth Amendment right against unlawful seizures. In sum, had counsel sought to suppress either the drugs or the money, the trial testimony establishes that the court would have denied the motion. Thus, even if for some unapparent reason, counsel was deficient in failing to file a motion to suppress, appellant plainly was not prejudiced because the evidence was admissible. See United States v. Wood, 279 U.S. App. D.C. 81, 87, 879 F.2d 927, 933 (D.C. Cir. 1989) (when the ineffectiveness claim concerns an attorney's failure to raise a Fourth Amendment issue, the defendant must show that the Fourth Amendment claim has merit and that there was a reasonable possibility that the verdict would have been different

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17/ Terry v. Ohio, 392 U.S. 1 (1968).

absent the excludable evidence).

C. Counsel Timely Objected to the Trial Court's Consideration of the Mandatory/Minimum Sentence to Judge Appellant's Credibility.

Appellant claims that Ms. Borecki failed to object to the court's consideration of the potential mandatory minimum sentence in determining appellant's credibility (Brief for Appellant at 22). This is simply incorrect. Counsel did object to the court's consideration of appellant's possible sentence in assessing the credibility of his testimony (Tr. 104). Despite counsel's objection, the court ruled that it could consider appellant's motivation to lie to avoid the mandatory minimum sentence when determining whether he had the requisite intent to distribute (Tr. 105-106). Counsel properly preserved the issue for appeal and therefore was not deficient.

The issue arose in the following context. During the prosecutor's closing argument, the court asked him whether it could consider appellant's interest in avoiding the mandatory minimum when assessing appellant's credibility (Tr. 102). The prosecutor told the court that it could (Tr. 103-104). At the beginning of her closing argument, however, defense counsel disagreed:

> Ms. Borecki: With regard to the last point, Your Honor, I would simply note that the court is the trier of facts in this case, as obviously, with a jury. And it would appear to me in answering your question that it would be improper for the court to take all that into consideration with regard --

that is potential punishment.

The jury wouldn't be able to hear it. I would not object to it today simply because I know that Your Honor is aware of such things and Your Honor does not read your instruction to himself.

The Court: But isn't every citizen presumed to know the law, and that would, I imagine, include sentencing law?

Ms. Borecki: Well, if the idea is to instruct the jury about sentencing that's not proper.

The Court: No. I'm not talking about that. Assuming that the jury, without any instruction on the subject, because like all good citizens, they all know the law, they are aware that about four weeks before the arrest the applicable sentences for distribution of a controlled substance in the District of Columbia were very substantially increased and the mandatory minimums were very substantially increased and that the defendant's p r i o r record disqualifies him for the addict exception, you have ordinary citizens who spend their time reading Title 33 of the District of Columbia Code knows that because the law, presuming; so even if he had given him no instruction wouldn't they be free to take that into account in evaluating the credibility of the defendant?

Ms. Borecki: No, Your Honor. You are getting two very, very fine lines of --

The Court: Well, it doesn't sound so fine to me. I have been sitting here wondering why [appellant] would go to trial in this case and the minute I hear about his prior record. I say, uh-huh, he wants to avoid a

mandatory minimum.

> Ms. Borecki: Well, I think that one can [sic] say that if the jury would know about any kind of increased penalty. I think that they are asked to put those things out of their minds. And with regard to punishment, because of the punishment, therefore, we have a defendant who is therefore more likely to misrepresent his intent, I think that is a leap that cannot be made simply because the initial surmising regarding the punishment is not allowed and they are not allowed to consider that.
>
> The next move stems directly from what the punishment is and since they are not already supposed to consider that, therefore, they cannot even reach the point as to whether or not [appellant] is simply avoiding the mandatory minimum. So I would simply submit that it just wouldn't even get to that point were we to have a jury in this case, Your Honor (Tr. 104-106).

Contrary to appellant's claim, the above passage illustrates that Ms. Borecki strenuously objected to the court's consideration of appellant's desire to avoid his looming mandatory punishment as a factor in assessing his credibility regarding his intent to distribute. The court considered it anyway. Counsel's performance was not deficient simply because the court ruled against her.

D. Appellant was not Harmed by Counsel's Failure to Explicitly Request the Court to Consider the Lesser Included Offense of Possession.

Appellant claims that counsel's failure to explicitly request the court to consider the lesser included offense of possession of

heroin was harmful to him (Brief for Appellant at 22). This argument is without merit. It is clear from the record that appellant's entire defense to the charge of possession with intent to distribute heroin was that he merely possessed the nine packets. The court, unlike a jury which has not been informed about the alternative lesser-included offense, was well aware that appellant was asking it to decide that he committed the lesser offense and not the greater. Indeed, the court's findings clarify its options:

> The Court: But I think the quantity of heroin found on the defendant, interpreted in the light of Officer Stroud's testimony, and common sense as to what a drug dealer will accept in return for a bag of heroin, I don't believe we've got any real doubt. I think I am entitled to take into account the defendant's desire to avoid the mandatory minimum sentence in evaluating his credibility. That does not substitute evidence but it does give him a very powerful motivation not to tell the truth on this very specific narrow point of intent to distribute. (Tr. 111).

Even if counsel was remiss in not ceremoniously requesting the court to consider simple possession, the court plainly did consider it and thus the defendant simply cannot demonstrate that he was harmed by counsel's technical omission. Cf. Chaverria v. United States, 505 A.2d 59, 66 (D.C. 1986) (where failure to give cautionary instruction is not plain error, defense counsel's failure to request it cannot be said to raise to a reasonable probability that the result of the proceeding would have been different); Curry v. United States, 498 A.2d 534, 545 (D.C. 1985)

(counsel's failure to request jury instruction though error deemed to be harmless and thus defendant cannot meet his burden to show that he was denied his Sixth Amendment right to effective representation.)

E. There was no Ineffective Assistance from Failing to Object to Officer Stroud's Expert Testimony.

Appellant complains that his counsel failed to object to a portion of Officer Stroud's testimony that fell outside his area of proffered expertise (Brief for Appellant at 22). However, as demonstrated below, it is clear that Officer Stroud's testimony adhered to the proffer. The following exchange precipitated the parties' stipulation that Officer Stroud was qualified as a drug expert:

> The Court: What is it that you wish to have Officer Stroud qualified as an expert in?
>
> Mr. Klingenstein [the prosecutor]: I want him qualified as an expert in now [sic] the way that the drugs are sold in the street.
>
> The Court: You mean trafficking patterns?
>
> Mr. Klingenstein: Right, trafficking patterns.
>
> The Court: Anything else?
>
> Mr. Klingenstein: Also the way these drugs are packaged. We are stipulating as to the chain of custody --
>
> The Court: Wait a minute. Let's get the one thing at a time. This

isn't a chain of custody witness, is he?

Mr. Klingenstein: Not any more he's not, Your Honor.

The Court: All right. Well, what is it you want to stipulate he's an expert in?

Mr. Klingenstein: Those two areas.

The Court: Not usable amount?

Mr. Klingenstein: Yes, Your Honor, although -- yes. I don't think he needs specifically to be qualified as an expert.

The Court: All right. Just the way drugs are sold and packaged on the street?

Ms. Borecki: That's my understanding is the stipulation, Your Honor, yes.

The Court: Well, do you agree that the witness is an expert in those subjects?

Ms. Borecki: Yes, he's qualified to testify in those areas. Thank you.

The Court: I've got a page-and-a-half of notes on his background in the last case he testified in. I'm tired of writing about every three day seminar.

Ms. Borecki: Yes, Your Honor.

The Court: All right. By agreement of the parties, the court will find the witness qualified as an expert in street trafficking and packaging of illicit drugs (Tr. 54-55).

Although the parties did not use the term heroin "use", when Officer Stroud was accepted as an expert, he implicitly was

qualified as such. By definition, "street trafficking" includes "use". [18] In any event, had counsel raised the matter at trial, it surely would have been within the court's broad discretion to qualify Stroud as an expert in the "use" of heroin, based upon what the officer testified to at trial as the basis for his opinion. See Melton, supra, 599 A.2d at 901-903. Thus, appellant cannot make any showing that Ms. Borecki was ineffective or that the outcome of the trial would have been different had the baseless objection been made. Cf. Fernandez, supra, 375 A.2d at 487. Moreover, defense counsel effectively cross-examined Officer Stroud in this area of his expertise. Through counsel's probing, Officer Stroud admitted that his opinion regarding the amount of heroin an addict might use in a single day was gleaned from his conversations with incarcerated addicts (Tr. 62-63). Appellant plainly was not harmed by this testimony. Finally, because the court based its findings on whether appellant was credible when he testified that a drug dealer might take a camcorder as a "trade-in" for heroin and not upon whether appellant actually could consume all of the heroin he possessed within twenty-four hours, appellant was not harmed by any of Officer Stroud's testimony that disputed his on that point (Tr. 110-111).[19]

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[18] The American Heritage Dictionary (2d Ed. 1985) defines "trafficking" as (1) "to carry on trade" and (2) "to utilize something."

[19] For the reasons set out in this section, as well as in response to appellant's sufficiency claim, this Court should reject his separate claim that it was plain error to admit Officer Stroud's opinion because it was outside the scope of his expertise (Brief for Appellant at 31).

F. Counsel's Failure to Renew her Motion for a Judgment of Acquittal at the End of the Defense Case Did Not Result in Ineffective Assistance of Counsel.

Appellant argues that Ms. Borecki was ineffective in her representation when she failed to renew her motion for a judgment of acquittal at the close of the Defense case (Brief for Appellant at 22). Clearly, this argument is without merit. Appellant fails to recognize the fact that his was a bench trial and not a jury trial. There was no need for the trial court to consider a renewed motion for acquittal after all the evidence. The question presented by such a motion, i.e., whether a reasonable trier of fact could find guilt beyond a reasonable doubt, is subsumed by Judge Wertheim's decision demonstrating that he in fact found appellant guilty. There was no deficiency or harm from Ms. Borecki's actions in this regard. The transcript indicates that the court weighed all of the evidence presented at trial, determined which witnesses to believe and which witnesses to discredit, and then applied its common sense in determining the verdicts in this case (Tr. 110-111). The record also reflects that appellant's motion for a judgment of acquittal was denied at the close of the government's case (Tr. 69). The only evidence presented in the defense case was the appellant's testimony. Since the court discredited appellant's testimony, it follows that the court would have certainly denied any renewal of the motion for judgment of acquittal (Tr. 110-111).

III. The Trial Court Did Not Commit Reversible Error When it Considered the Possible Punishment Appellant was Facing in Determining Appellant's Credibility.

Appellant argues that the trial court committed reversible error when it considered the potential punishment in determining appellant's credibility (Brief for Appellant at 27). This argument is without merit. The court chose to discredit appellant's testimony by stating the following:

> ". . . I don't believe we've got any real doubt. I think I am entitled to take into account the defendant's desire to avoid the minimum mandatory sentence in evaluating his credibility. That does not substitute evidence but it does give him a very powerful motivation not to tell the truth on this specific narrow point of intent to distribute. I see no reason at all why Detective O'Neal, with eighteen years experience, would lie in order to get just one more street drug bust. I have no real reasonable doubt of the defendant's intent to distribute and I find him guilty on both counts as charged (Tr. 111).

A trial court sitting as a trier of fact, just as a jury, is permitted to take into account a defendant's interest in the outcome of the case when judging the party's credibility. White v. United States, 582 A.2d 774, 780 (D.C. 1990), reversed in part on other grounds, 613 A.2d 869 (D.C. 1992)(en banc). In this case, Judge Wertheim did no more than articulate the extent of appellant's bias, which depended upon the almost certain imposition

of a mandatory minimum sentence.[20/] The court took account of no information he was not entitled to have and he made no improper use of the fact of the application of the mandatory sentence. The use of that information was limited to its effect upon appellant's credibility.

Admittedly, a jury would not be entitled to base its credibility assessment of appellant upon the length of his likely prison sentence if convicted. That prohibition, however, derives from the reality that since the jury has no role in imposing sentence, it should not be informed of the offense's possible punishment. See Criminal Jury Instruction for the District of Columbia 2.71 (3rd ed. 1978). There is also a question of the jury's improper use of the information about punishment that counsel against allowing them to learn of it. Manifestly, Judge Wertheim had a right to know, and could not be expected to misapprehend, the consequences of appellant's two admitted convictions disqualifying him for the addict exception (see Tr. 77). The court's use of that information here also raises no question of possible misuse since Judge Wertheim carefully considered whether he was permitted to take it into account and, as a judge, is knowledgeable of the law and capable of refraining from any improper use of the information. See Moore v. United States, 609 A.2d 1133, 1136 (D.C. 1992) (quoting Singletary v. United States, 519 A.2d 701, 702 (D.C. 1987); see also Harris v. Rivera,

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[20/] It is noteworthy that appellant seemed to inject the issue into the trial first when, on direct examination, he admitted to having received the addict exception before (Tr. 77).

454 U.S. 339, 346 (1981). For these reasons, appellant's claim fails.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the Superior Court should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief have been mailed to counsel for appellant Melvyn A. Johnson: Michael P. Spekter, Esquire, 1660 L Street, N.W., Suite 316, Washington, D.C. 20036, on this 1st day of December 1992.

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