

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: STEVEN KURT WITTE, Petitioner v. UNITED STATES  
CASE NO: No. 94-6187  
PLACE: Washington, D.C.  
DATE: Monday, April 17, 1995  
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IN THE SUPREME COURT OF THE UNITED STATES

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STEVEN KURT WITTE, :  
Petitioner :  
v. : No. 94-6187  
UNITED STATES :  
- - - - -X

Washington, D.C.  
Monday, April 17, 1995

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:05 a.m.

APPEARANCES:

H. MICHAEL SOKOLOW, ESQ., Houston, Texas; on behalf of  
the Petitioner.  
EDWARD C. DuMONT, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Respondent.

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2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 94-6187, Steven Kurt Witte v. United  
5 States.

6 Mr. Sokolow, you may proceed.

7 ORAL ARGUMENT OF H. MICHAEL SOKOLOW

8 ON BEHALF OF THE PETITIONER

9 MR. SOKOLOW: Mr. Chief Justice, and may it  
10 please the Court:

11 The Double Jeopardy Clause protects against the  
12 Government seeking a second punishment for the same  
13 offense in a second prosecution. The issue in this case  
14 is whether the Government's attempt to punish Mr. Witte  
15 for cocaine offenses previously included in relevant  
16 conduct violates that protection. The facts of this case  
17 illustrate exactly what the Double Jeopardy Clause was  
18 designed to protect against. They also illustrate how  
19 these Federal Sentencing Guidelines can be defeated and  
20 eliminated.

21 Mr. Witte was sentenced to 12 years in Federal  
22 prison after buying 375 pounds of marijuana from Federal  
23 agents. That sentence was based upon two things. It was  
24 based upon a guideline range of 292 to 365 months, which  
25 included all prior marijuana offenses and all prior



1 cocaine offenses negotiated or committed by Mr. Witte. It  
2 was further based upon Mr. Witte's cooperation and a  
3 Government request to reduce his sentence.

4 The Government has now indicted Mr. Witte for  
5 the same cocaine offenses and seeks to punish him again.  
6 The express language of the sentencing guidelines shows  
7 that Mr. Witte was previously punished, and that he will  
8 be punished again. The --

9 QUESTION: May I just ask you a preliminary  
10 question about that? The petitioner here is saying he  
11 would receive a multiple punishment for the cocaine  
12 offense if this second prosecution proceeds and he's  
13 sentenced. Why is that claim ripe now? I take it he has  
14 not received a second sentence.

15 MR. SOKOLOW: That is correct. He has not yet  
16 been sentenced on the second prosecution.

17 QUESTION: He hasn't been convicted in the  
18 second proceeding?

19 MR. SOKOLOW: He has not been convicted, that is  
20 correct.

21 QUESTION: And why, then, is that claim ripe?

22 MR. SOKOLOW: The reason the claim is ripe is  
23 because under the Federal Drug Guideline and the other  
24 language of the guidelines, all offenses were merged for  
25 purposes of punishment in the first prosecution, and

1 Mr. Witte has received all punishment that he can receive.

2 The Government is barred from the end --  
3 obtaining the end of the second prosecution -- that is,  
4 any further punishment. Since there can be no punishment,  
5 there can be no criminal judgment. Thus, proceeding to  
6 the end and putting Mr. Witte through that process --

7 QUESTION: Well, I'm not sure that gives you a  
8 claim at this juncture. I was troubled by it, and I  
9 wondered how you would deal with it.

10 I also am troubled by how you would distinguish  
11 that case of Williams v. Oklahoma, where we held that the  
12 use of evidence of an uncharged crime at sentencing for  
13 the crime for which the prosecution succeeded, doesn't  
14 constitute punishment for the uncharged conduct, and it  
15 seemed to me quite close.

16 MR. SOKOLOW: It is not close at all, Your  
17 Honor, and here's why. In Williams v. Oklahoma, this  
18 Court sought in vain for a cross-reference between the  
19 murder statute and the kidnapping statute. Finding no  
20 cross-reference -- that is, no merger of the two crimes  
21 for purposes of prosecution, no merger of the two crimes  
22 for purposes of punishment, it found no violation of the  
23 Double Jeopardy Clause and said, well, this is just a mere  
24 enhancement.

25 In this case, the Federal Drug Guideline 2D1.1

1 and the policy decisions made by the Commission effect a  
2 merger for purposes of punishment, and that is exactly  
3 where the violation of the Double Jeopardy Clause --

4 QUESTION: Did the term -- did the opinion in  
5 Williams v. Oklahoma use the term merger? I read it  
6 recently, and I don't recall it using that term.

7 MR. SOKOLOW: It does not use that term, but it  
8 does look specifically for a cross-reference between the  
9 two statutes. I infer from the Court's seeking a cross-  
10 reference between the two statutes that it was looking for  
11 some sort of merger that would prohibit either the second  
12 prosecution or the second punishment, or it would not have  
13 sought some cross-reference between the two statutes.

14 QUESTION: What do you do with a case like  
15 Williams v. New York, another Williams case, which says  
16 that courts have traditionally taken into consideration  
17 all sorts of conduct in deciding what sentence shall be  
18 imposed?

19 MR. SOKOLOW: Courts have traditionally done  
20 that, and the only thing courts have had to look at prior  
21 to the sentencing guidelines was what was in the statute.  
22 Here we have a new set of sentencing guidelines that  
23 specifically prescribe punishment, that specifically  
24 merge, and --

25 QUESTION: What do you mean by the term "merge"?

1 MR. SOKOLOW: Well, for -- let's forget the term  
2 merged.

3 QUESTION: I think that's a good idea.

4 MR. SOKOLOW: Let's look at 2D1.1. 2D1.1 and  
5 the grouping provisions state, group the offenses, drug  
6 offenses, according to their weight. The guidelines also  
7 say drug offenses present a fungible harm and therefore  
8 ought to be grouped.

9 So what happens is, the drug offenses, we arrive  
10 at a guideline by grouping them, by getting a total weight  
11 of the drugs.

12 Now, if the Government brings four charges,  
13 let's say, the Drug Guidelines group them and come up with  
14 one guideline range. If the Government brings one charge,  
15 the Drug Guidelines still group the offenses and come up  
16 with the same guideline range.

17 What is happening in this case -- that is, if  
18 Mr. Witte pleads guilty to all charges or one charge, the  
19 guideline range is still the same. What's happening in  
20 this case is, the Government is bringing one charge. The  
21 guidelines, the mechanism still works the same way. Mr.  
22 Witte has the same guideline range, and the Government  
23 says, aha, all the offenses have been grouped, Mr. Witte  
24 has gotten all the punishment he could get under the  
25 guidelines, now let us lop off one of the merged offenses



1 that was punished --

2 QUESTION: I thought you weren't going to use  
3 the term "merged."

4 MR. SOKOLOW: Let us lop off one of the grouped  
5 offenses that was punished, let us go back to the Federal  
6 Criminal Code, let us charge another one of the offenses  
7 that was grouped, and let us run Mr. Witte through the  
8 sentencing guidelines again, where all offenses will be  
9 grouped, and he will receive a second punishment on the  
10 group offenses.

11 QUESTION: He was not convicted the first time  
12 of the same thing that he will be convicted of if a jury  
13 comes in against him the second time, is that right?

14 MR. SOKOLOW: That is correct, but the  
15 guidelines, the Commission expressly made the decision to  
16 minimize the significance of the charging system.

17 QUESTION: So are you saying basically that the  
18 guidelines prevent his being sentenced a second time, or  
19 tried, or that because of what the guidelines do, the  
20 Double Jeopardy Clause prevents it?

21 MR. SOKOLOW: Because of what the guidelines do,  
22 and the way they group offenses for punishment, the Double  
23 Jeopardy Clause prohibits Mr. Witte being punished again  
24 in the same exact way.

25 QUESTION: And in punishment, what is his

1 exposure? Would you explain that -- if there's one charge  
2 or two charges in the first trial, it's going to end up  
3 with the same range. What is the additional exposure in  
4 terms of length of incarceration as a consequence of the  
5 second prosecution?

6 MR. SOKOLOW: In the first prosecution, the  
7 guideline range was 292 to 365 months, based on the  
8 grouping of all offenses. Because of the Government's  
9 motion for a departure downward, the sentence was 144  
10 months.

11 In the second prosecution, the relevant conduct  
12 and guideline range will again be 292 to 365 months, so  
13 Mr. Witte is looking, for the same grouped offenses at an  
14 additional exposure at a minimum of 118 months, and for  
15 the same grouped offenses, an additional exposure of 191  
16 months, which I believe is approximately an additional 15  
17 years.

18 QUESTION: But if the sentences are  
19 concurrent --

20 MR. SOKOLOW: If the sentences are concurrent,  
21 he's still -- he is looking at an additional -- because  
22 the Government made the motion for the downward departure,  
23 and --

24 QUESTION: Let's forget the downward departure.  
25 Leave it out of it. Tell me the difference in the time

1 served among these three:

2 1) We have an indictment for both crimes, 2) we  
3 have an indictment only for one, and the other crime is  
4 considered relevant conduct, 3) we have an indictment for  
5 one, the other considered relevant conduct, but a second  
6 prosecution for the second crime.

7 Are you telling me that the total numbers will  
8 differ in that third -- the total incarceration period  
9 will differ? That's what I don't understand.

10 MR. SOKOLOW: I believe what the Government says  
11 and what the Court of Appeals for the Fifth Circuit says  
12 should happen in the second prosecution is that, let's  
13 assume Mr. Witte had gotten 292 months, a minimum under  
14 the guideline range.

15 The Government and the Fifth Circuit are saying,  
16 okay, he's been in jail 30 months when this second  
17 prosecution sentence is handed down. If he gets 365  
18 months, take off 30 months, and then run the 365 months  
19 concurrent with the 262 left, so his exposure would be an  
20 additional 15 years.

21 QUESTION: Do the guidelines require that the  
22 sentences be concurrent?

23 MR. SOKOLOW: Section 5G1.3(b) says that the  
24 sentences should be concurrent, but that doesn't mean that  
25 the second sentence will not add a significant amount to

1 the -- in other words, they're not going to be strictly  
2 concurrent with the exact same amount of time.

3 QUESTION: I understand that, but there will be  
4 substantial concurrency, and the district court has no  
5 authority to alter that result and impose a consecutive  
6 sentence?

7 MR. SOKOLOW: As the Fifth Circuit read it, and  
8 as I read it, I do not believe the district court is going  
9 to have any authority to allow Mr. Witte to walk out of  
10 prison at the same time he would have after the first --

11 QUESTION: Why not? I mean, the way it's  
12 supposed to work, isn't it -- look, there are two separate  
13 things. One is the Double Jeopardy Clause.

14 I take it from the year 2, well before the  
15 guidelines, a judge might decide, hey, I'm going to give  
16 you 15 years, because I've looked at your record and there  
17 are about three robberies here you've never been punished  
18 for, but this is a very bad guy. And then indeed, later  
19 on, a year later, if the Government decides to indict him  
20 for one of those three robberies, I've never seen a case  
21 that says they couldn't do it.

22 But the guidelines, which is a different matter,  
23 are supposed to not punish you twice for the same offense,  
24 and they can't think of every possible unusual situation,  
25 so why wouldn't you go in here and say, judge, look, I'd



1 like to tell you something. In this first case, they took  
2 all this conduct into account.

3 Now, I know that the guidelines haven't written  
4 words for every situation, but what you ought to do is  
5 depart downward in this unusual situation in order to take  
6 this fact into account, which is very unusual.

7 And you'll make all your arguments, and if the  
8 judge concludes that indeed this is really a gyp that the  
9 Government's indicting him twice, maybe he'll listen to  
10 you, and if the judge concludes that maybe your client did  
11 something that the Government didn't reasonably expect him  
12 to do, maybe they won't listen.

13 But I mean, isn't this just the situation that  
14 you should put your argument to a judge as a matter of  
15 discretion and departure, and not an argument to the Court  
16 as a matter of Double Jeopardy law?

17 MR. SOKOLOW: No, it's not, and here's why. We  
18 already know what the Fifth Circuit answer's going to be.  
19 The Fifth Circuit answer is going to be, Mr. Witte, go  
20 serve an additional --

21 QUESTION: No, no, it's not the Fifth Circuit  
22 trial, it will be up to the sentencing judge in the  
23 future, in a trial we've never even had yet.

24 MR. SOKOLOW: But we know that the sentencing  
25 judge is going to follow the guidelines. We know --

1 QUESTION: But the guidelines permit departure,  
2 is my point.

3 MR. SOKOLOW: They --

4 QUESTION: And isn't this exactly the kind of  
5 situation that if, in fact, your client is being badly  
6 treated in the way you suggest, the judge ought to listen  
7 to your argument and follow it, otherwise not.

8 MR. SOKOLOW: I don't see -- I understand that  
9 you're talking about 5K2.0, where it wasn't considered by  
10 the Sentencing Commission, but I don't see how a judge  
11 could reduce the sentence and make it run strictly  
12 concurrently. The --

13 QUESTION: Why not?

14 MR. SOKOLOW: The argument on the other side  
15 would be -- if the Government prevails in this case, the  
16 argument on the other side is, well, judge, clearly the  
17 Commission considered this under 5G1.3(b), and clearly  
18 this is the way it's supposed to work.

19 How can -- if 5G1.3(b) does apply, and  
20 Mr. Witte, as the Fifth Circuit said, is supposed to get  
21 an additional 118 months, how can you walk in front of a  
22 district judge and say, judge, the Sentencing Commission  
23 hasn't considered this, even though the Supreme Court and  
24 the Fifth Circuit say 5G1.3(b) applies, please reduce the  
25 sentence?

1           They'll say back to me, wait a minute, 5G1.3(b)  
2 expressly applies, even though we disagree with that, but  
3 that will be the answer.

4           QUESTION: This is the argument you would make,  
5 I guess, in the future. Look, the theory of the thing is,  
6 if the thing has been taken into account the first time,  
7 the judge isn't supposed to do it the second time. He's  
8 already been punished.

9           You have a very unusual situation, I take it,  
10 because the first time involved a special credit for  
11 cooperation, so that's unusual, and you'll go to the court  
12 and explain all the reasons why the judge should try to  
13 make the thing match as a departure, and the Government, I  
14 take it, would put contrary reasons, if that's what they  
15 think. But isn't yours quite an unusual circumstance, and  
16 for that reason, departure might be called for, or might  
17 not be.

18           I didn't see anything in any of the opinions  
19 that addressed that problem.

20           MR. SOKOLOW: It is an unusual circumstance. I  
21 think if Mr. Witte does not prevail here, I think that the  
22 Government will have an argument that 5G1.3(b) does  
23 expressly take that into account, and therefore I will be  
24 foreclosed.

25           But in addition, if Mr. Witte has received all

1 of the punishment he should have received under the  
2 sentencing guidelines for the group defenses, why does the  
3 Government have the right to put him through the jeopardy  
4 of facing more punishment that he should not get under the  
5 sentencing guidelines? Why should Mr. Witte be waiting in  
6 Harris County Jail to see if the judge is going to agree  
7 with us or not?

8 Why should he go through that anxiety when the  
9 sentencing guidelines have worked the way they should have  
10 worked in accordance with the policy of Congress to bring  
11 about uniformity in sentencing, to bring about  
12 proportionality in sentencing, in accordance with the  
13 policy and the sentencing guidelines to reduce the  
14 significance of the charging decision, to avoid double  
15 counting for drug crimes, to treat them as fungible harms?

16 When Mr. Witte goes up and faces his Maker to  
17 receive from 262 to 365 months on all those offenses, why  
18 should he again go to meet his Maker for the very same  
19 offenses?

20 And Mr. Witte's argument does not apply across  
21 the board. The guidelines are not monolithic. The  
22 guidelines make policy decisions about what is a fungible  
23 harm and what isn't a fungible harm. I think we would  
24 have a different situation if Mr. Witte had committed five  
25 bank robberies, because those are not grouped under the



1 guidelines, or assaults are not grouped under the  
2 guidelines.

3 QUESTION: There wouldn't be any problem if they  
4 were all tried in the same proceeding. You wouldn't say  
5 these -- you wouldn't have any objection.

6 MR. SOKOLOW: That is correct. That is correct.

7 QUESTION: So I -- there's nothing that seems so  
8 obvious to me about the injustice of doing it one way or  
9 the other. When you say that all that injustice can  
10 simply be eliminated by trying them all in one proceeding,  
11 the double punishment doesn't seem to me such a horrible  
12 thing. You're just saying -- really, it isn't the double  
13 punishment that's the problem, it's not bringing them all  
14 in one proceeding that's the problem.

15 MR. SOKOLOW: It's not bringing them all in one  
16 proceeding, because he's forced to be put in jeopardy  
17 again for the same guideline range and additional  
18 punishment.

19 QUESTION: You're not worried about the  
20 jeopardy, you're complaining about the punishment.

21 MR. SOKOLOW: That's correct.

22 QUESTION: And you say that's perfectly okay, so  
23 long as they all did it in one proceeding? I find it hard  
24 to, you know, get righteously indignant about that  
25 injustice.

1 QUESTION: But do you agree -- I just want to be  
2 clear on one thing. Do you agree that in a single  
3 proceeding he could have received as much punishment as he  
4 might now receive?

5 MR. SOKOLOW: Yes. The way it would have worked  
6 is, if the Government brought four charges -- you know,  
7 conspiring, importing, conspiring to possess with intent  
8 to distribute, and attempting to possess, if they brought  
9 four charges the guideline range still would have been 262  
10 to 395 months. The judge would have imposed the sentence,  
11 whatever it is. Then that sentence would have run  
12 concurrent, each of the four sentences would have run  
13 concurrent with each other.

14 QUESTION: Then that's a different answer than  
15 the one I thought you gave. I asked you -- I gave you  
16 three situations. Now I'll just give you two.

17 MR. SOKOLOW: Okay.

18 QUESTION: One trial, two charges, guilty of  
19 both, sentenced. One trial, one charge plus relevant  
20 conduct. Second trial, one charge.

21 Is the total exposure, assuming the sentences  
22 are going to run concurrently and that you get credit in  
23 the second case for the time that you served earlier, is  
24 there any difference in the time that this person can be  
25 made to serve between consecutive trials, one on the two

1 charges, or one trial on both charges?

2 MR. SOKOLOW: There -- if I understand the  
3 hypothetical correctly, the danger of having the second  
4 prosecution and trial is that a second trial judge gets to  
5 impose a sentence anywhere within the guideline range.

6 QUESTION: Is the range any different?

7 MR. SOKOLOW: The range -- the range is not  
8 different.

9 QUESTION: So the exposure is the same whether  
10 it's one trial on two charges or consecutive trials each  
11 on one of the charges.

12 MR. SOKOLOW: The exposure under the range is  
13 the same, yes, but the way the Fifth Circuit calculated  
14 it, you only get credit for time that you've served, so if  
15 the same sentence is imposed --

16 QUESTION: Isn't the answer -- I mean, the  
17 answer is, it's supposed to work out the same. It's  
18 supposed to, but because of the way in which two  
19 consecutive trials can come about, unusual circumstances  
20 can arise where the literal wording of the guideline can't  
21 do it because, for example, one might have been a State  
22 trial and the other a Federal trial, or one -- the second  
23 trial might have taken place while the man isn't in  
24 custody any more.

25 So you can have unusual circumstances, not all

1 of which could be foreseen, and so therefore there's a  
2 general instruction to the judge or to the bar and so  
3 forth, try to make it work in accordance, using your  
4 departure power so it works in unusual circumstances.

5 I mean, the guidelines are filled with  
6 statements like that, and that's why I find this more of a  
7 guidelines problem than a jeopardy problem, and your case  
8 is not a case, I wouldn't think, where there's unfairness,  
9 necessarily, one way or the other. There's some reason  
10 here that the Government's decided to prosecute this case  
11 again, and I'm sure that that reason is going to be  
12 presented to the judge.

13 I mean, doesn't it all work out in the  
14 guidelines roughly, and -- I guess -- you haven't shown me  
15 that it could be some serious problem --

16 MR. SOKOLOW: The serious --

17 QUESTION: -- with their application if you  
18 apply them intelligently.

19 MR. SOKOLOW: Well, the Fifth Circuit has  
20 already told us if you apply them as they see it Mr. Witte  
21 is facing an additional -- at a minimum, an additional 118  
22 months, and that is a serious problem. There --

23 QUESTION: That's only because of the departure  
24 for -- because of cooperation in the first case.

25 MR. SOKOLOW: That's correct.



1 QUESTION: But there was no cooperation as to  
2 the second charge.

3 MR. SOKOLOW: That's right. There's nothing to  
4 show -- nothing in the record, nothing that I know that  
5 will show that there will be any departure in the second  
6 case, so what happens is, the first judge reviewed all  
7 offenses, as grouped under the guidelines, looked at  
8 Mr. Witte's cooperation, exercised the discretion that was  
9 granted to him under the guidelines with a motion to  
10 depart downward, decided what the case was worth.

11 Now the Government lops off one of those  
12 offenses, goes back, indicts it, and we get back to the  
13 grouped offenses, and it will completely nullify the  
14 judge's discretion in the first case. It will take away  
15 the motion for departure downward.

16 The consequences of the Government's case are  
17 that it does away with the Commission's attempt to limit  
18 the significance of the charging decision. It does away  
19 with the grouping of all offenses. It defeats the  
20 congressional goals of uniformity. It defeats the judge's  
21 discretion to depart downward.

22 For the guidelines to work and to be consistent,  
23 both parties have to be bound by them.

24 QUESTION: Well now, Mr. Sokolow, earlier I  
25 thought you said your claim here was a double jeopardy

1 claim, that given the way that the guidelines operated,  
2 the necessary sentence would be imposed after the  
3 forthcoming trial, would be a violation of double  
4 jeopardy, but now you seem to be arguing that if you  
5 interpret the guidelines properly that would satisfy your  
6 client's interest. Is that right?

7 MR. SOKOLOW: No. I think what I'm arguing is  
8 that the guide -- that the Double Jeopardy Clause would be  
9 violated if he is again sentenced under the guidelines,  
10 but that in addition it also is contrary to the goals that  
11 Congress sought in the Sentencing Reform Act, and the  
12 goals that the Commission sought in writing the  
13 guidelines.

14 It's not that they're both the same. It's just  
15 that number 1, the Double Jeopardy Clause will be  
16 violated, and number 2, by the way, the purposes of  
17 Congress will be defeated.

18 QUESTION: Well, ordinarily we would take those  
19 up in reverse order. That is, we wouldn't reach a  
20 constitutional question if there were some statutory  
21 question to be answered first.

22 MR. SOKOLOW: Well, if the Court decides, of  
23 course, that it would violate the intent of Congress under  
24 the Sentencing Reform Act and it would violate the intent  
25 of the Commission and the express language of the

1 guidelines to prosecute and to punish him again, then the  
2 Court -- you're correct, the Court need not reach the  
3 double jeopardy decision.

4 QUESTION: Well, I simply wanted to inquire  
5 about what you were urging upon the Court. I wasn't  
6 trying to give you any ideas of my own.

7 MR. SOKOLOW: No. I believe it is a double  
8 jeopardy decision. The problem here is, Congress and the  
9 Commission didn't need to promulgate, or there was no  
10 necessity to promulgate guidelines, but having promulgated  
11 those rules for use, and Mr. Witte having been punished  
12 under those rules, putting him -- punishing him again  
13 under those rules violates the Double Jeopardy Clause.

14 Mr. Chief Justice, with your permission I would  
15 like to reserve the rest of my time.

16 QUESTION: Very well, Mr. Sokolow. Mr. DuMont,  
17 we'll hear from you.

18 ORAL ARGUMENT OF EDWARD C. DuMONT

19 ON BEHALF OF THE RESPONDENT

20 MR. DuMONT: Thank you, Mr. Chief Justice, and  
21 may it please the Court:

22 This Court's cases have always permitted  
23 consideration at sentencing of conduct that is not part of  
24 the offense of conviction, whether or not that conduct has  
25 led to other convictions, precisely because the sentence

1 imposed at any given proceeding constitutes punishment  
2 only for the offense that is actually before the court in  
3 that proceeding.

4 QUESTION: Will you tell us, in response to the  
5 question Justice O'Connor asked of the petitioner's  
6 counsel, if in your view there is no prematurity here,  
7 that we have the issue squarely before us, and subsidiary  
8 to that, why are you prosecuting this person a second time  
9 if you don't intend to enhance his punishment?

10 MR. DuMONT: In response to the first question,  
11 we think that, although there is some slight doubt on it,  
12 we think the issues are squarely presented. The only  
13 doubt would arise if you could not reach the double  
14 jeopardy question until the sentencing stage of the second  
15 trial.

16 That would depend on the determination that  
17 conviction could be had in the second proceeding  
18 without -- as long as there was no sentence, there would  
19 be no jeopardy problem. That seems to us somewhat  
20 inconsistent with the Court's decision in Ball v. United  
21 States, and also there's another case called Woodward, I  
22 believe, where the Court took notice of the \$50 special  
23 assessments that are required under Federal law, and said  
24 that those were enough to prevent two sentences from being  
25 completely concurrent.

1 QUESTION: Yes. The sense I have is that the  
2 whole purpose of prosecuting him is so that you can impose  
3 some additional punishment. Now, maybe that -- and that  
4 leads to the second question I asked.

5 MR. DuMONT: Well, I --

6 QUESTION: Or is that correct?

7 MR. DuMONT: I think there are a variety of  
8 interesting and difficult questions raised by the notion  
9 of what the proper sentence would be at the second  
10 proceeding. I don't think it's necessary -- it is not why  
11 we prosecuted the crimes separately that we intended  
12 additional punishment.

13 QUESTION: Well, what if, at the second  
14 proceeding, if the conviction were obtained and if the  
15 sentence imposed were identical to the one previously  
16 imposed, credit given for time served, run concurrently,  
17 could there be a double jeopardy violation, if that were  
18 the case?

19 MR. DuMONT: Assuming no special assessments?

20 QUESTION: Right.

21 MR. DuMONT: That's an interesting and difficult  
22 question that has not been reached. Our position would be  
23 that --

24 QUESTION: And I just wonder if we aren't  
25 jumping the gun a little bit here to assume it's going to



1 be different.

2 MR. DuMONT: I think my position on behalf of  
3 the Government ought to be that it is not necessarily  
4 punishment for the second offense to be convicted for, but  
5 I think in all candidness that would be a very difficult  
6 position to maintain if we were forced to maintain it,  
7 so --

8 QUESTION: Have you explained yet what the  
9 Government's purpose might be in having a second  
10 prosecution? Might it be to encourage, if you will, the  
11 defendant to cooperate in connection with the second  
12 offense?

13 MR. DuMONT: The reason --

14 QUESTION: Is that a possibility?

15 MR. DuMONT: I suppose there are many  
16 possibilities. That's not what happened here, and I  
17 should --

18 QUESTION: Or a three-times-you're-out sort of a  
19 statute? The Government might want another prosecution  
20 and conviction for purpose of a three-time-loser statute?  
21 I mean, I'm just trying to figure out why the Government  
22 wants to do this.

23 MR. DuMONT: I think in general we might be  
24 entitled to the benefits of a three-time-loser statute  
25 even if we brought one prosecution, but what happened here

1 is that we had two different -- what the Government viewed  
2 and still views as two very different offenses. They  
3 involved different people. Mr. Witte was a common  
4 conspirator in the two. That's about the only thing the  
5 two had in common.

6 Now, we had in jail at the time Mr. Witte and  
7 his codefendant in the first case. We chose to go ahead  
8 and prosecute that case, which seems to me the right  
9 answer when we have people in jail.

10 We did not prosecute the cocaine conspiracy  
11 because his coconspirator was at large for most of this  
12 period, and the investigation was not yet completed. Once  
13 we picked up the coconspirator, we promptly charged the  
14 second conspiracy, the cocaine conspiracy, and proceeded  
15 to try that.

16 QUESTION: Then I didn't understand the answer  
17 to Justice O'Connor's question. If in the first trial the  
18 cocaine is simply relevant conduct, how could it count as  
19 two strikes? Wouldn't you have to bring the second  
20 prosecution to make it a second strike?

21 MR. DuMONT: Oh, certainly, if it's only in the  
22 first prosecution as relevant conduct. I understood the  
23 question to be -- then I misunderstood the question. I'm  
24 sorry.

25 If we had brought several charges, several

1 counts in the first indictment, it seems to me we might  
2 very well be able to impose a recidivist enhancement on  
3 the fourth one of conviction, but if it's just counted as  
4 relevant conduct, then there's certainly no question about  
5 it, we would have to bring a second prosecution, and that  
6 really gets to the point, which is that under all of this  
7 Court's cases there's always been quite a clear  
8 distinction between conviction for an offense and a  
9 sentence imposed after that conviction, and other --

10 QUESTION: Before you get into that, could I ask  
11 you one question about your explanation of why the second  
12 prosecution was appropriate?

13 You said the coconspirator had not been  
14 apprehended, so you couldn't proceed against the  
15 coconspirator, but I don't understand why that made it  
16 necessary to proceed a second time against this defendant,  
17 because you could have proceeded against him without  
18 indicting this person again.

19 MR. DuMONT: I think it might have been possible  
20 to proceed in this trial. It would have complicated the  
21 marijuana trial quite considerably, and it would have  
22 required us to put on all the cocaine evidence in two  
23 trials, both -- first at Mr. Witte's trial and then at the  
24 trial of his coconspirator.

25 QUESTION: No, I'm assuming this case went just

1 as it did. Am I correct -- let me make sure I -- this is  
2 kind of complicated. Am I correct in assuming that all of  
3 the relevant conduct -- put it the other way around, that  
4 all of the cocaine activity that is alleged in the second  
5 indictment was taken into account as relevant conduct in  
6 the first trial?

7 MR. DuMONT: And somewhat more, yes.

8 QUESTION: And then, tell me again, why is it  
9 you need the second trial against this particular  
10 defendant, if it's not to get additional punishment?

11 MR. DuMONT: First of all, the investigation had  
12 not been completed, so it was not at the time a foregone  
13 conclusion that there would not have been additional  
14 conduct discovered --

15 QUESTION: No, but by the time you brought the  
16 second trial it was.

17 MR. DuMONT: Correct.

18 QUESTION: Why did you have to bring the second  
19 trial against this defendant if it was not for the purpose  
20 of getting more punishment?

21 MR. DuMONT: You mean having had the judge  
22 already impose the sentence that he did?

23 QUESTION: Yes.

24 MR. DuMONT: The Government is entitled, it  
25 always has been entitled to bring those two prosecutions.

1 As it prosecutes for --

2 QUESTION: Well, that may be. It's entitled  
3 because it wants to get additional punishment.

4 MR. DuMONT: Because the Government was going to  
5 prosecute the other coconspirator in any event, we were  
6 entitled to seek a second conviction against Mr. Witte on  
7 the --

8 QUESTION: I'm not arguing about what you're  
9 entitled to do. I'm just asking about, is there any  
10 reason for doing it other than to get additional  
11 punishment?

12 MR. DuMONT: I believe the Government felt that  
13 we were entitled to get the conviction on the record as a  
14 conviction.

15 QUESTION: Oh, the reason was simply to get  
16 another conviction on his record.

17 MR. DuMONT: I believe that was a reason, and a  
18 legitimate reason for -- and a sufficient reason for  
19 bringing the second prosecution.

20 QUESTION: Sort of like a declaratory judgment  
21 proceeding.

22 MR. DuMONT: Well, as I said, the issues of what  
23 punishment will be imposed at the second trial are not  
24 ripe here, and involve a lot of things, including what  
25 version of the guidelines will be applied, and so on.



1 QUESTION: I thought the Government was busy,  
2 that it had a heavy criminal case load.

3 MR. DuMONT: We do, and I think if you read the  
4 transcript of the dismissal hearing on the second charge  
5 you will find the judge was very concerned about that, but  
6 I don't think it has ever been considered to take away our  
7 right to bring a second charge on a different offense, no  
8 matter what punishment may or may not -- no matter whether  
9 that conduct may or may not have been taken into account  
10 in a prior separate offense prosecution at sentencing.

11 QUESTION: But the difference in this case from  
12 the Williams and the other cases is that the conduct may  
13 have been taken into, or in fact was taken into, but under  
14 the guideline system, the trial judge at the first trial  
15 was required by law to take into account the relevant  
16 conduct. Doesn't that make a difference? I guess you'd  
17 say no.

18 MR. DuMONT: No.

19 QUESTION: No, okay.

20 MR. DuMONT: First of all, of course --

21 QUESTION: Why not?

22 MR. DuMONT: Assuming that he was required,  
23 because assuming that it was relevant conduct, which of  
24 course we didn't believe at the time and don't believe  
25 now, the Court has made quite clear that what counts as

1 mandatory for sentencing purposes is the statutory maximum  
2 and minimum prescribed by Congress for the offense, which  
3 in the case of his marijuana conduct was 5 to 40 years.

4 Now, it turns out that however you applied the  
5 guidelines, or whatever conduct you took into account,  
6 that's a broad enough range so there was no question, but  
7 that's the relevant mandatory maximum-minimum. It's the  
8 one prescribed by Congress.

9 The fact that Congress in the sentencing  
10 guidelines chose to guide and channel the district court's  
11 discretion in imposing a sentence within that range is  
12 completely irrelevant to whether it was a sentencing  
13 factor or a conviction factor, as the Court made very  
14 clear in MacMillan. Really, there's no distinction  
15 between the kind of issue that was posed in MacMillan and  
16 that issue here.

17 I'd like to point out that petitioner's theory  
18 being that consideration at the sentencing phase of his  
19 prior prosecution of this particular conduct amounts to  
20 punishment for that conduct has one very dramatic  
21 consequence, which is that every recidivist statute in  
22 every jurisdiction in this country is unconstitutional,  
23 because every one of those statutes involves considering  
24 at sentencing for one offense conduct that has previously  
25 been considered at the guilt phase --

1 QUESTION: No, but none of those statutes  
2 require consideration at the first trial of the conduct  
3 for which he is indicted in the second trial. None of  
4 them require that, whereas this statute does require that  
5 the cocaine conduct be considered at the marijuana trial,  
6 if it's known.

7 MR. DuMONT: If it's known?

8 QUESTION: And that distinguishes all of the  
9 recidivist statutes that you refer to.

10 MR. DuMONT: Well, with respect, I don't think  
11 so, because in both cases what we are talking about is  
12 consideration at sentencing on a preponderance standard of  
13 certain uncharged conduct, conduct that was not required  
14 to be proven to the court that's doing the sentencing  
15 beyond a reasonable doubt after an indictment, and so on  
16 and so forth.

17 QUESTION: No, but it was required to be proved,  
18 and it was proven, and was relied on just as if it had  
19 been proved beyond a reasonable doubt.

20 MR. DuMONT: That's right, but if it is  
21 punishment in violation of the Double Jeopardy Clause to  
22 consider at sentencing conduct that has previously been  
23 proved, then it is a violation of the Double Jeopardy  
24 Clause to enhance someone's sentence at a subsequent  
25 prosecution on the basis of criminal conduct that was

1 previously proved to another jury in another charge.

2 QUESTION: Your point is it doesn't matter  
3 whether it was required to be previously proved or was  
4 previously proved and considered as a discretionary  
5 matter. The fact that it has been done previously makes  
6 the later one a second one, whether it was done  
7 discretionarily or not.

8 MR. DuMONT: That's absolutely right, and in our  
9 view it cannot possibly make a difference. That has  
10 always been --

11 QUESTION: No, what --

12 MR. DuMONT: -- part of the fabric of sentencing  
13 law.

14 QUESTION: What the problem, I think, was -- I  
15 mean, I don't want to put words in other people's mouths,  
16 but I thought that Justice Stevens was driving at the  
17 different problem of a later prosecution, and what you are  
18 prosecuting this person for is the thing for which he was  
19 punished previously, required by law.

20 That's not the recidivism statute at all. In a  
21 recidivism statute you're punishing the person for what he  
22 did later, and the amount of the punishment is a function  
23 of what happened before. But in this case, what you're  
24 doing later is you're convicting him of an activity for  
25 which he was previously punished.

1           You're not increasing punishment because of what  
2 he previously did for a different thing. You are  
3 convicting him of what he has previously been punished  
4 for, and that -- and since these matters are matters of  
5 criminal -- of congressional intent, there is an open  
6 question, I suppose, about whether the Congress in passing  
7 these sentencing guidelines has, in fact, manifested some  
8 kind of relevant intent.

9           I'm not saying you're wrong. I'm simply saying  
10 it's not so obvious a question as the recidivism quotation  
11 would suggest.

12           MR. DuMONT: Well, let me make two responses, if  
13 I may. The first is that there is a, if I may, a crucial  
14 flaw in the way you --

15           QUESTION: Yes.

16           MR. DuMONT: -- posed the problem, which is to  
17 say that it is conduct for which he has previously been  
18 punished. That is not true. It is conduct that has been  
19 taken into account --

20           QUESTION: That's right.

21           MR. DuMONT: -- in punishing him previously --

22           QUESTION: Yes.

23           MR. DuMONT: -- for a different offense, and  
24 that has never been considered to be a problem --

25           QUESTION: Yes, that's right, up till now. That



1 is a good point.

2 MR. DuMONT: -- under the Double Jeopardy Clause  
3 or the Due Process Clause or anything else.

4 QUESTION: Right.

5 MR. DuMONT: Now, the second point you make --

6 QUESTION: That's true.

7 MR. DuMONT: -- is an excellent one and you  
8 made it before, which is, there are really two possible  
9 arguments the petitioner can be making here, and he  
10 conflates them, but I think it's necessary to separate  
11 them out.

12 One is an argument based on the Constitution,  
13 that what we are doing violates double jeopardy per se and  
14 that, we think, is wrong for all the reasons that we've  
15 been discussing, that all these Court's cases are to the  
16 contrary on both sentencing and due process.

17 Now, there is also a statutory argument, I  
18 suppose, that could be made, that Congress intended when  
19 it passes -- passed the guidelines and the Sentencing  
20 Reform Act to so transform the sentencing system that it  
21 would in effect forbid, as a matter of statutory law,  
22 subsequent prosecution and successive prosecutions of this  
23 type.

24 Now, we think that that cannot hold up, first of  
25 all because there is no positive indication anywhere in

1 the language or the history of the Sentencing Reform Act  
2 or the guidelines to suggest that that's what Congress had  
3 in mind, and second because the guidelines themselves in  
4 section 5G1.3 have an explicit mechanism which is designed  
5 to take care of exactly this kind of situation, where you  
6 have successive prosecutions for the same kind of conduct,  
7 in fact, the same exact conduct.

8 Now, it is implausible that Congress addressed,  
9 then the Sentencing Commission addressed that issue  
10 specifically in 5G1.2 if they thought that it was  
11 unconstitutional anyway, given what they had done to the  
12 definition of offenses.

13 To return for a moment to the issue of what you  
14 are punished for when you are punished, no matter what is  
15 being taken into account, I'd like to just point out one  
16 example. The amount of marijuana involved in the first  
17 prosecution here happened to be 370 pounds, and that put  
18 Mr. Witte in the statutory sentencing category of 5 to 40  
19 years, a very broad category which, as I mentioned,  
20 accommodated any of the possible changes in the guidelines  
21 range depending on the relevant conduct.

22 But supposing it had been 50 kilograms of  
23 marijuana, then his statutory maximum sentence under  
24 section 841, leaving aside unlikely other events, would  
25 have been 5 years.

1 Now, suppose that the guidelines range, as it  
2 would have been, would have been 33 to 41 months, in the  
3 middle of that 5-year range, and suppose the district  
4 court had taken account of the other 232,000 kilograms of  
5 marijuana equivalent that it took account of in this case  
6 as relevant conduct.

7 It would have wanted -- it would have been  
8 required to enhance his sentence, but it would have hit a  
9 statutory maximum of 5 years, and it would have been able  
10 to impose no sentence greater than 5 years, because that's  
11 the statutory maximum for the offense of conviction.

12 QUESTION: Yes, but that's not this case, and  
13 you don't have a statutory maximum.

14 MR. DuMONT: It's not this case.

15 QUESTION: Supposing just the opposite,  
16 supposing that that would have required a 20-year  
17 sentence, say there was no statutory maximum, and then --  
18 but they only indicted him for the lesser amount, and  
19 you're saying they could impose that sentence and then  
20 subsequently indict him for the larger amount and then  
21 impose an additional sentence. That's your position, is  
22 it not?

23 MR. DuMONT: As a constitutional matter, if the  
24 two offenses are separate, that's absolutely right.

25 QUESTION: Yes.

1 MR. DuMONT: Now, as a guidelines matter --

2 QUESTION: And there's no precedent --

3 MR. DuMONT: -- it's unlikely that that --

4 QUESTION: Do you have a precedent for that ever  
5 having been done by any court, where at the first trial  
6 there was a requirement by statute or rule or whatever it  
7 might be that certain relevant conduct aggravate the  
8 sentence, and it was imposed, and then subsequently the  
9 person was indicted and convicted of the aggravating  
10 offense?

11 MR. DuMONT: I have no case where there was a  
12 statute that required it as a matter of guidelines. Now,  
13 I think the Court said in both Williams v. Oklahoma --

14 QUESTION: But in the Williams case the --

15 MR. DuMONT: -- and Williams v. the State of New  
16 York that the Court has an obligation to consider all  
17 conduct that comes before it.

18 QUESTION: But in the Williams case --

19 MR. DuMONT: In fact, there's a statutory  
20 obligation in this case --

21 QUESTION: -- when he was indicted for  
22 kidnapping, at the prior proceeding for murder there was  
23 no indication that the kidnapping aggravated his offense.  
24 It couldn't have been, because he got a lesser sentence  
25 that time.

1 MR. DuMONT: Well, he got a -- he was sentenced  
2 to life for murder and then to capital --

3 QUESTION: And for the kidnapping he got death.

4 MR. DuMONT: That's right, explicitly on the  
5 basis of having committed the murder.

6 QUESTION: That's right, but at the murder  
7 trial -- the point is that at the murder trial there was  
8 no reliance on the kidnapping as relevant conduct that  
9 would aggravate the offense, and that's what you've got  
10 here.

11 MR. DuMONT: Well, that's --

12 QUESTION: All of your cases, I don't think you  
13 can cite a single case where the relevant conduct at the  
14 first offendment aggravated the sentence and then was the  
15 subject matter of a second indictment. Or can you? Maybe  
16 you can give me a case like this.

17 MR. DuMONT: Well, not that I can think of.

18 QUESTION: Yes, but there should be. There  
19 should be, because there are a lot of --

20 MR. DuMONT: I can also say there's no case  
21 holding to the contrary. There's no case holding, and you  
22 know, certainly Williams v. New York is to the contrary,  
23 where the Court took into account uncharged conduct in  
24 imposing a death penalty, and there's no suggestion that  
25 if the Government had wanted to and hadn't thought it a



1 waste of resources it couldn't have gone and prosecuted  
2 him for those burglaries later.

3 QUESTION: No, but it seems somewhat  
4 counterintuitive to me to say that a man could be punished  
5 for relevant conduct in proceeding A, yet have that  
6 aggravate a sentence that would not otherwise have been  
7 imposed, then say in proceeding B, we can go ahead and  
8 punish him again for the same relevant conduct, and all  
9 I'm suggesting is, your position is without any precedent.

10 MR. DuMONT: Well, I would say that my position  
11 is I think with a great deal of precedent, although I  
12 can't cite you a specific case where, as you say, the  
13 judge was required in the first case to take account of  
14 the same conduct, although I suspect that there are such  
15 cases. I can't think of one off the top of my head. That  
16 should not be taken as an indication that they don't  
17 exist.

18 Now, what I think the logic of your argument and  
19 petitioner's argument has to be is that it makes a  
20 difference whether the court in the first case is required  
21 by Congress to take into account certain things as  
22 sentencing factors, or whether it is not required to take  
23 them into account but is allowed to do so as a matter of  
24 discretion.

25 And we think that as a constitutional matter it

1 cannot make a difference whether the Court takes account  
2 of uncharged conduct as a purely discretionary matter  
3 within the statutory range, as a prescribed matter under  
4 the guidelines, as criminal history -- who knows what they  
5 might do, how they might take account of it. If it's  
6 constitutional --

7 QUESTION: Would you take the same position if  
8 in the first trial --

9 MR. DuMONT: -- one way, it's constitutional  
10 every --

11 QUESTION: -- the guidelines or some procedure  
12 required proof beyond a reasonable doubt before they could  
13 take into account relevant conduct? Would you still take  
14 the same position?

15 MR. DuMONT: I don't see why we wouldn't.

16 QUESTION: I wouldn't think you would, either,  
17 right, actually.

18 MR. DuMONT: That's entirely a matter of -- it  
19 goes to the fact that the Court has always said that it is  
20 Congress or the legislature in any given case that is  
21 entitled to choose what is an element of the offense and  
22 what is a sentencing factor.

23 Now, the Court has recognized that there are  
24 cases where that might potentially be manipulated. ..  
25 MacMillan, I think, stands for this proposition, that the

1 Court will take cognizance that the legislature might try  
2 to manipulate that and slip something that should really  
3 be an offense element into the sentencing phase.

4 But until the legislature does that, and there's  
5 no case that has ever held that the legislature has done  
6 that, until they do that, what the legislature decides is  
7 an offense element and a sentencing factor controls, and  
8 if it's a sentencing factor, it need only be proved by a  
9 preponderance, although of course Congress could prescribe  
10 something greater, and it does not go to the question of  
11 whether you've been punished for that conduct. You've  
12 only had that conduct taken into account in enhancing your  
13 punishment for something else, of which you have been duly  
14 convicted.

15 QUESTION: You probably agree with this, so  
16 don't let me go down the wrong track though if it's not.  
17 I think it's quite a difficult question, and rather deep.

18 Why isn't there this precedent, and there  
19 should -- it should turn out there is such, because lots  
20 of States have guidelines systems now, and you should find  
21 the State might try to prosecute somebody for a thing  
22 where there has been, you know, this kind of situation  
23 federally or the other way around, and the difficulty, I  
24 think, is that they don't always call the crimes by the  
25 same name.

1           You have a civil rights conviction and an  
2 assault conviction, you see, in two different  
3 jurisdictions, and what's worrying me is if you suddenly  
4 bring the Constitution into this, I don't see how the  
5 Constitution's going to get it -- when has there been a  
6 prior -- because the underlying things are described in  
7 terms of behaviors. They're not described in terms of  
8 crimes.

9           I'm saying this because maybe it will jog your  
10 recollection that you have found such similar things,  
11 or --

12           MR. DuMONT: Unfortunately, it doesn't jog my  
13 recollection on the point of having found another case.  
14 It does bring up an excellent point, and I do agree with  
15 it entirely.

16           QUESTION: You would agree with that because  
17 it's favorable to you, but --

18           MR. DuMONT: I agree with it entirely, and I  
19 think it points up that the relevant conduct provisions of  
20 the guidelines talk, as you say, in terms of conduct, not  
21 in terms of offenses, and petitioner's argument requires  
22 courts, would require courts to go through an analysis  
23 where you take that conduct and try to figure out what  
24 offense it constituted and then compare it under the  
25 Blockburger test, the elements of offense of a new

1 prosecution.

2 Now, I'm not saying that would be impossible,  
3 but it is difficult, and --

4 QUESTION: But you'd only have to do it --

5 MR. DuMONT: -- in places where --

6 QUESTION: But you'd only have to do it when the  
7 Government sought to indict somebody for the same conduct  
8 which had already enhanced punishment. I mean, that  
9 doesn't happen very often. I mean, this is a very unusual  
10 case, I think, or maybe it isn't. I don't know. It seems  
11 to me it's somewhat unusual.

12 MR. DuMONT: I think it's unusual.

13 QUESTION: But the guidelines do seem to  
14 expressly provide that if the offense has been fully taken  
15 into account in the determination of the sentence already  
16 given, that the new sentence will run concurrently.

17 MR. DuMONT: That's absolutely right.

18 QUESTION: I mean, the guidelines seem to  
19 contemplate this very occurrence on occasion.

20 MR. DuMONT: That's absolutely right.

21 QUESTION: And accommodate it by requiring a  
22 concurrent sentence.

23 MR. DuMONT: That's quite right, and I would  
24 point out again that the -- as respondents, or as  
25 petitioners have pointed out, the Sentencing Commission



1 has not been notably satisfied with the way that 5G1.3  
2 works. It's been amended several times. There are some  
3 extensive amendments that have been proposed for public  
4 comment right now.

5 I think that part of what that indicates is that  
6 there are a lot of vexing problems about how you decide  
7 whether prior conduct has really been taken into account  
8 and whether it's comparable to the current offense of  
9 conviction and how exactly one ought to accommodate all of  
10 that.

11 QUESTION: But doesn't it boil down the fact  
12 that if the sentences have to run concurrently, that --  
13 and the Government thinks the first judge was too lenient  
14 and too much of a downward departure or something, it gets  
15 a second bite at the apple, says well, maybe the second  
16 judge, even though it will run concurrently, will give a  
17 longer sentence the second time. That's what it gives the  
18 Government the opportunity to do, it seems to me, is to  
19 get the maximum sentence for the relevant conduct.

20 MR. DuMONT: It gives the opportunity -- it  
21 gives the Government the opportunity to do what the  
22 Government has always had the opportunity to do, which is  
23 to charge and convict for separate offenses at separate  
24 trials at separate times, and allows the judge --

25 QUESTION: It's always had this opportunity, but

1 you haven't been able to find a case where they've ever  
2 done it before.

3 MR. DuMONT: And allow the judge in each case to  
4 impose the sentence that he or she thinks fit within the  
5 statutory maximum and minimum for the offense of  
6 conviction at every trial.

7 If the Court has nothing further --

8 QUESTION: Thank you, Mr. DuMont.

9 Mr. Sokolow, you have 5 minutes remaining.

10 REBUTTAL ARGUMENT OF H. MICHAEL SOKOLOW

11 ON BEHALF OF THE PETITIONER

12 MR. SOKOLOW: Thank you, Mr. Chief Justice.

13 Let me point out first that the Government says  
14 that it has always had the opportunity to bring separate  
15 charges and obtain different punishments. The Sentencing  
16 Reform Act and the Federal Sentencing Guidelines changed  
17 that system because of the disproportionate sentences that  
18 came about.

19 It changed that system because Congress wanted  
20 uniformity and honesty in sentencing. The fact that the  
21 Government cannot now bring subsequent prosecutions to try  
22 to get different sentences is something that Congress  
23 wanted to bring about.

24 Now, let me say a few words about the record in  
25 this case. The record in this case show -- shows that

1 number 1, the Government filed a criminal complaint  
2 alleging all acts and all offenses at the outset of the  
3 case. There's no reason --

4 QUESTION: We're talking about now the first  
5 prosecution?

6 MR. SOKOLOW: The first prosecution started out  
7 with a criminal complaint, and the affidavit alleged all  
8 of the facts and transactions in both the cocaine offenses  
9 and the marijuana offenses. The Government didn't file it  
10 under seal. It didn't try to keep it secret.

11 The Government, in the motion to dismiss hearing  
12 in this case, when questioned by the judge about a  
13 Castlebaugh problem said, oh, no, judge, we had all the  
14 evidence before Mr. Witte pleaded guilty in the first  
15 case.

16 So they had all the evidence to prosecute him.  
17 They could have filed an indictment then, and could have  
18 gotten their conviction. If there was a problem finding  
19 Mr. Parkorny, they had plenty of tools in their arsenal.  
20 They can get a continuance under the Speedy Trial Act to  
21 try to apprehend fugitives. They can try the cases  
22 separately and merge them for sentencing. The Government  
23 is not precluded by getting another conviction at the same  
24 time when it alleged all those facts at the outset of the  
25 first prosecution.

1                   Finally, I'd like to point out the Government  
2 cannot cite a reason for pursuing this prosecution that  
3 puts Mr. Witte, according to the Fifth Circuit's opinion,  
4 in jeopardy for an additional 118 months. I think the  
5 Court can only infer that the reason it's going after this  
6 is to get a second bite at an apple, to get additional  
7 punishment, which is exactly what the Double Jeopardy  
8 Clause prohibits.

9                   Your Honors, we request that you reverse the  
10 decision of the Fifth Circuit Court of Appeals and remand  
11 for dismissal of the indictment in this case.

12                   Thank you, Mr. Chief Justice.

13                   CHIEF JUSTICE REHNQUIST: Thank you,  
14 Mr. Sokolow.

15                   The case is submitted.

16                   (Whereupon at 11:58 a.m., the case in the above-  
17 entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

STEVEN KURT WITTE, Petitioner v. UNITED STATES

CASE NO.: 94-6187

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Ann Marie Federico

(REPORTER)



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