OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: VINCENT EDWARDS, REYNOLDS A.WINTERSMITH,

HORACE JOINER, KARL V. FORT, AND JOSEPH

TIDWELL Petitioners v. UNITED STATES

CASE NO: 96-8732

PLACE: Washington, D.C.

DATE: Monday, February 23, 1998

PAGES: 1-53

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1	IN THE SUPREME COURT OF THE UNITED STATES
2	X
3	VINCENT EDWARDS, REYNOLDS A. :
4	WINTERSMITH, HORACE JOINER, :
5	KARL V. FORT, AND JOSEPH :
6	TIDWELL :
7	Petitioners :
8	v. : No. 96-8732
9	UNITED STATES :
10	X
11	Washington, D.C.
12	Monday, February 23, 1998
13	The above-entitled matter came on for oral
14	argument before the Supreme Court of the United States at
15	1:00 p.m.
16	APPEARANCES:
17	STEVEN SHOBAT, ESQ., Chicago, Illinois; on behalf of
18	the Petitioners.
19	EDWARD C. DUMONT, ESQ., Assistant to the Solicitor
20	General, Department of Justice, Washington, D.C.; on
21	behalf of the Respondent.
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1	PROCEEDINGS
2	(1:00 p.m.
3	CHIEF JUSTICE REHNQUIST: We'll hear argument
4	this afternoon in Number 96-8732, Vincent Edwards, et al.
5	v. United States.
6	Mr. Shobat. Am I pronouncing your name
7	correctly?
8	MR. SHOBAT: Yes.
9	CHIEF JUSTICE REHNQUIST: Thank you.
LO	ORAL ARGUMENT OF STEVEN SHOBAT
1	ON BEHALF OF THE PETITIONERS
.2	MR. SHOBAT: Mr. Chief Justice and may it please
.3	the Court:
4	The ambiguous general verdicts returned in this
.5	case cannot support the sentencing court's finding that
-6	the conspiracy embraced both objectives charged in this
.7	dual object conspiracy, the two objectives being the
.8	distribution of powder cocaine and the distribution of
9	crack cocaine, and they cannot be for four reasons.
20	First, Congress required the jury to determine
21	the type of drug involved in the drug conspiracy before
22	sentence could be imposed upon that object.
23	Second, the Fifth and Sixth Amendment rights to
24	a jury determination of all the essential elements of a
5	conspiracy requires the jury to determine what the object

1	of the offense was, and particular to the type of drug.
2	Third, the Due Process Clause of the Fifth
3	Amendment does not permit punishment to be imposed in
4	excess of the statutory maximum provided by Congress and,
5	finally, nothing in the Sentencing Guidelines, to the
6	extent that they ever could, undermines these principles.
7	With respect to what Congress intended, it's
8	clear that in enacting section 846 Congress wanted to fix
9	the maximum punishment available to a person convicted of
LO	that section to the offense, the object of which the
1	conspiracy was intending to accomplish.
12	QUESTION: Mr. Shobat, does your argument depend
1.3	on finding that both the type and the quantity of drugs
.4	are elements of the section 846 conspiracy?
.5	MR. SHOBAT: No, Your Honor, it does not. It's
.6	clear that Congress, in listing the various different
7	factors in section 841(b), intended that some of them be
.8	elements of the offense and some of them not be. Congress
.9	made it explicitly clear in enacting section 851 that the
20	existence of a prior conviction was one of the factors
21	listed in 841(b) that should not be considered by the
22	jury, and it did so by removing it from the jury's
23	consideration, placing it in a separate statutory
24	provision, and saying that the judge should make that
25	determination.

1	It is also clear that, in considering whether or
2	not
3	QUESTION: Where is that?
4	MR. SHOBAT: Section 851, Your Honor? Section
5	851
6	QUESTION: You say by placing it in 851 rather
7	than as one of the subsections of 841, you say?
8	MR. SHOBAT: Yes. By removing it from the
9	subsection of 841(b) and placing it in a separate
10	statutory provision, and then having the judge, not the
11	jury, determine and interestingly, beyond a reasonable
12	doubt, whether the
13	QUESTION: Do you have 851 in your appendix? I
14	don't think you do, do you?
15	MR. SHOBAT: I'm I don't I'm not sure that
16	it is in the appendix, Your Honor.
17	QUESTION: Okay.
18	MR. SHOBAT: But it did remove that
19	consideration from the jury.
20	What it did not remove were the type of drugs
21	and the quantity, but it is not necessary that those be
22	treated identically for purposes of an 846 conspiracy, and
23	there are several reasons for that.
24	First, Congress could well have intended that a
25	conspiracy to commit a specific objective, which is an

1	inchoate offense which does not require the completion of
2	the object of the conspiracy and has separate elements
3	from an 841(a) conspiracy to embrace a more specific
4	object than would, say, an ordinary 841(a)(1) violation of
5	possession, or a distribution.
6	In addition
7	QUESTION: I don't understand what you just
8	said. Do you want to say it again?
9	MR. SHOBAT: Yes, Your Honor.
10	A conspiracy offense under 846 is an inchoate
11	offense and therefore the only two elements that the
12	Government need satisfy beyond a reasonable doubt for an
13	846 offense is that a conspiracy with a particular
14	objective exists and that a particular defendant that was
15	being considered by the jury be a member of that
16	conspiracy.
17	In many conspiracies there are no actual drugs
18	involved, very typically, in the case in which the agents
19	pose as the sellers of drugs and they engage in
20	negotiations and discussions with respective buyers and
21	then a seizure or a bust takes place, an arrest at a
22	planned exchange of drugs for money, and there is, in fact
23	no actual controlled substance. In that case
24	QUESTION: Well, surely there's an attempt to
25	huy a particular I mean are these drug dealers that

- stupid that they don't contract to buy a particular
- 2 substance?
- MR. SHOBAT: Not at all. Not at all, Your
- 4 Honor.
- 5 QUESTION: Well, that would be the conspiracy
- then, wouldn't it, in substance?
- 7 MR. SHOBAT: Absolutely, it would be a
- 8 conspiracy conviction, but now the question becomes, what
- 9 maximum penalty did Congress provide for that conspiracy,
- and the answer to that question is, what was their
- 11 conspiratorial objective.
- 12 That's what Congress expressly says in section
- 13 846, punish persons who agree to commit a very specific
- object as if they had committed that object, and in the
- case of the type of drug, that specific -- excuse me. In
- the case of a distribution offense, that specific offense
- is only knowable by reference to the specific type of
- 18 drug.
- 19 QUESTION: But why not an amount as well, since
- 20 there's such a --
- 21 QUESTION: Right.
- 22 QUESTION: So much turns on amount. Why does it
- 23 turn on the type of drug more or less than the amount of
- 24 the drug?
- MR. SHOBAT: Your Honor, it can be and, in fact,

- it's not squarely raised in this case, but we would submit
- that quantity could be considered an element by Congress.
- 3 Congress could have intended it to be an element, but it
- 4 isn't necessarily the case. That question isn't squarely
- 5 presented, we believe --
- 6 QUESTION: You're saying, type of drug is an
- 7 element of the offense, but amount of drug is not an
- 8 element of the offense?
- 9 MR. SHOBAT: Justice Breyer, we're not saying
- definitively that it is not an element of the offense.
- 11 QUESTION: Are you -- well, what is the
- 12 argument? Is the argument --
- MR. SHOBAT: The argument is that it might be an
- 14 element of the offence.
- 15 OUESTION: Well, I --
- MR. SHOBAT: We believe that it is. However --
- 17 QUESTION: You believe that amount is as well?
- 18 So in other words, we have a big list in 841(b) of
- 19 penalties, and the penalties vary, sometimes dramatically,
- 20 depending upon the amount of the drug and depending upon
- 21 what kind of drug and, as you said recidivism, which is
- 22 treated specially.
- 23 All right. Now, your point is that jury has to
- 24 find type and probably amount.
- MR. SHOBAT: Yes. Yes.

1	QUESTION: The difficulty with doing that is,
2	why does it have to find it, because Congress intended it?
3	MR. SHOBAT: Because Congress intended it.
4	QUESTION: Why would Congress have intended the
5	following: a person is accused, for example, of
6	possessing with intent to distribute more than one more
7	than between 5 and 10 kilograms of heroin, let's say,
8	and the person's defense is, I wasn't there. I was in
9	Chicago. Is he supposed to make the alternative defense,
LO	oh, by the way, if I was there, it was only 1/2 a kilo?
1	I mean, why would we ask a jury to decide that
.2	kind of thing? Why would we want to put a defendant in
.3	that kind of position?
4	MR. SHOBAT: Your Honor, I suppose there are two
.5	answers to that question. The first is, the question
.6	becomes, what is the appropriate punishment for an
.7	individual like that who had that agreement?
.8	QUESTION: And that's why I would think that
.9	841(b) includes punishment factors, and if it is supposed
20	to be punishment factors there's no problem for the
21	defendant, and if it's supposed to be punishment factors
22	in respect to amounts, I don't see how you could
23	distinguish why it shouldn't be punishment factors in
24	respect to type.
25	MR. SHOBAT: One of the ways that we attempt to

1	distinguish it, Justice Breyer, is to note that as part of
2	the 841(a)(1) elements the jury is asked to conclude that
3	the substance being agreed to be distributed or
4	manufactured under an 841(a)(1) and 846 offense, the jury
5	is going down the road of determining and must determine
6	that the agreement impacted a controlled substance.
7	Now, not every substance is a controlled
8	substance, so the jury must make a decision, a finding,
9	that the particular substance contemplated in 846 was one
10	of the substances listed in section (a)(12).
11	QUESTION: When you say finding you're not
12	talking about a special verdict, you're just talking about
13	a finding in its deliberative process that results in a
L4	verdict of guilty.
15	MR. SHOBAT: That's correct, Mr. Chief Justice.
16	They are asking themselves, was there an agreement to
17	distribute a controlled substance?
L8	To know that, that this is not salt or sugar,

To know that, that this is not salt or sugar, they must come to the view that it's one of those substances under (a)(12), at least that that was contemplated in this conspiracy.

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24

25

That means that the jury is already going down that road in determining what the substance is. We think that's distinguishable --

QUESTION: All the jury perhaps has to determine

10

1	is that it was a controlled substance, but not a specific
2	type or amount. I mean, that's possible under the
3	structure of the statutes, it seems to me.
4	MR. SHOBAT: That's possible Justice O'Connor,
5	but in concluding that it is a controlled substance, they
6	are concluding that it is one of the substances identified
7	in section (a)(12), which lists all the controlled
8	substances there can be, and so they're making that
9	finding.
10	They may not come out and say, we find it was
11	cocaine, or we find it was heroin, but they are saying we
12	find it was a controlled substance, and therefore
13	QUESTION: It means that there's been a
14	violation of the statute, and then perhaps the punishment
15	is up to the sentencing authority, the judge.
16	MR. SHOBAT: We submit, Your Honor, that the
17	jury going down that road to make that finding, Congress
18	made clear that that's the kind of finding that the jury
19	should make, and that the jury must make, and not leave it
20	solely to the sentencing
21	QUESTION: But ordinarily a finding in terms of
22	the statute is perfectly sufficient, isn't it? Here 841
23	says, it shall be unlawful for any person knowingly or
24	intentionally to manufacture, dispute or distribute or
25	possess a controlled substance.

1	So isn't it one would think that a verdict
2	that says, guilty of 841, or guilty of possessing or
3	conspiring to distribute a controlled substance, would be
4	sufficient for the guilt element.
5	MR. SHOBAT: Mr. Chief Justice, we don't believe
6	that that is sufficient, that particularly in a case such
7	as this, where the Government charges not just any
8	controlled substance but a very specific controlled
9	substance, that
10	QUESTION: You think it would have been okay if
11	the Government just charged a controlled substance
12	generally and left itself free to prove any number of
13	other things?
14	MR. SHOBAT: I think that it would be
15	permissible for the Government to have charged simply a
16	controlled substance, but I think it would have additional
17	problems of its own.
18	That is to say, I think there might be a case in
19	which it's not exactly clear whether which of the
20	controlled substances a particular defendant conspired to,
21	and in that case the Government might not want to commit
22	that it was particularly heroin, or a jury might be able
23	to conclude, well, I think it was heroin, or I believe
24	beyond a reasonable doubt it was heroin, I believe beyond
25	a reasonable doubt it was cocaine, I'm not sure whether it
	12

1	was marijuana. Under the instructions that the judge
2	gives me, I must find this individual guilty.
3	So that in this case, the jurors could have
4	decided that these individuals conspired to distribute
5	crack cocaine, or they might have decided that they
6	distributed powder cocaine.
7	QUESTION: Well, regardless, wouldn't evidence,
8	if there was such, showing there was some involvement with
9	cocaine base, be factored in as relevant conduct under the
10	guidelines?
11	I don't see how the sentences would change in
12	any event.
13	MR. SHOBAT: Justice O'Connor, they would change
14	in the for a number of significant reasons. First of
15	all, the statutory penalty is not based on a consideration
16	of the guidelines or relevant conduct, but it's based on
17	what was the agreement, what was the offense of
18	conviction, so that if the offense of conviction were
19	QUESTION: Well, the offense was a conspiracy to
20	possess and/or distribute a controlled substance.
21	MR. SHOBAT: That's not the offense that was
22	charged in this case, and we would submit that to know
23	what the statutory maximum penalty is, that there needs to
24	be a determination as to the type of drug.

After all, the differential in the punishment

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1	between the two objects was 100 to 1. 100 grams of powder
2	cocaine is treated equivalently under the guidelines
3	excuse me, under the statutory penalty as the same as
4	1 gram of crack cocaine, and that was why the particular
5	problem that arises in this case is especially important,
6	depending on which objective
7	QUESTION: What was the difference in the
8	maximum sentence that could be imposed under the one or
9	under the other?
10	MR. SHOBAT: That's a very difficult question to
11	answer, Justice Scalia, because the indictment in this
12	case charged no specific threshold quantity in terms of
13	giving us notice as to the particular drug.
14	Under the indictment the Government suggests
15	in its brief that we should just simply look at the
16	indictment and look at the statute, and that's how we know
17	our maximum penalty.
18	If that's in fact the standard, looking at this
19	indictment, in which there's no specific quantity or
20	threshold quantity even alleged, no reference to any
21	subsection under 841(b), the maximum penalty is 20 years
22	for that type of offense and when there's a schedule 1 or
23	schedule 2 narcotic involved, so the maximum penalty would
24	be 20 years.

But what happened in this case is that at

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1	sentencing the judge made some findings with regard to a
2	different sort of conspiracy, that is, one which embraced
3	both the crack cocaine and the powder cocaine, made
4	specific findings about exact amounts, of type of drug,
5	and quantity, and determined that with respect to some of
6	the petitioners the maximum was life imprisonment, but
7	with respect to other petitioners the maximum was 40
8	years.
9	QUESTION: So what you're saying is, if it was
10	powder cocaine it was the maximum was 20, and if it was
11	crack, the maximum was 100?
12	MR. SHOBAT: Well, if it was crack the maximum
13	would also be 20 if the sole basis for determining the
14	maximum punishment is to look at the indictment and to
15	read the statute.
16	That's what the Government says you should do,
17	but in reality, what the district court did was not simply
18	look at the indictment. What the district court said is,
19	quantity determinations are mine to make, and so once I
20	make these quantity determinations, that alters the
21	maximum penalties.
22	QUESTION: Well, of course, I guess conspiracy
23	is a completed offense even before the drugs are actually
24	purchased. Suppose the conspiracy is the conspirators
25	are apprehended before they effected the buy. How does

1	the judge determine the sentence in that case?
2	MR. SHOBAT: What the judge must do in that case
3	is first determine what the statutory penalty is. It
4	first must say to itself, what was the offense of
5	conviction, and once it determines that let's say there
6	were negotiations, recorded conversations, and it appeared
7	that the person was trying to acquire 5 kilograms of
8	crack.
9	QUESTION: My hypothetical is, they're not sure.
10	They want to just acquire some how much do you have?
11	and then they're apprehended.
12	MR. SHOBAT: In that case, the only way that a
L3	sentencing judge could determine what the maximum penalty
L4	would be, first under the statute is to make a finding as
L5	to what the amount was, or at least what the threshold
L6	amount was. That is, was it more than 50
L7	QUESTION: He can't.
L8	MR. SHOBAT: was it more than 5 kilos
L9	QUESTION: He can't. They haven't gone far
20	enough in the negotiations. I assume then he would have
21	to use whatever the minimum is.
22	MR. SHOBAT: In the event the
23	QUESTION: The most he can say is that there was
24	some transaction, but I can't say that there's enough to
25	kick it over into any punishment higher than the minimum.

1	Isn't that your position?
2	MR. SHOBAT: In
3	QUESTION: If you don't know, the minimum is
4	what governs.
5	MR. SHOBAT: Exactly, and it also depends, then,
6	on the type of drug, and if he doesn't know the type of
7	drug, then there is absolutely
8	QUESTION: The same thing. If you don't know,
9	you assume it's the one that's punished the least
10	severely.
11	QUESTION: Is your argument it can't be
12	about the indictment says these particular people
13	conspired to distribute, to possess with intent to
14	distribute cocaine, and they also conspired with intent
15	possessed with intent to distribute cocaine base crack.
16	There's 26 very specific paragraphs, and it says that
17	violated 846 and 841.
18	So the person, to get the penalty, would look up
19	846 and look up 841, and he'll see the big list, and
20	there's a big list of maximums.
21	There's nothing wrong with that, is there?
22	MR. SHOBAT: Well, there's nothing wrong with
23	that if he knows what the threshold quantity is.
24	QUESTION: No. That's true of every instance of
25	guideline sentencing, and it's true of every instance in

- which Congress has passed a statute that increases maximum
- 2 penalties for what is called a sentencing factor. Am I
- 3 right that you must be complaining about one or about the
- 4 other?
- MR. SHOBAT: I don't believe --
- 6 QUESTION: All right. Then I'm not sure what
- 7 your argument --
- 8 MR. SHOBAT: -- that you're exactly correct,
- 9 because in this statute, under this specific statute the
- 10 statutory maximum changes based on not only the type of
- drug but the threshold quantity of drugs involved in the
- 12 offense.
- 13 QUESTION: That's true of every instance in
- which Congress increases a penalty for what they call a
- 15 sentencing factor. Am I right?
- MR. SHOBAT: That the possible -- generally most
- of them fall within a statutory maximum.
- 18 QUESTION: But sometimes Congress passes a
- 19 statute -- drugs, immigration -- you know, where they say,
- if you've done X in committing the crime, the maximum goes
- 21 from 2 years to 20 years, or from -- so you're complaining
- about all those, is that right, or is there something
- 23 special here?
- MR. SHOBAT: We're complaining about that, but
- 25 we're also complaining about the particular charge in this

1	case and the way the jury was instructed, because what we
2	don't know is what the offense of conviction was.
3	We don't know whether this jury determined
4	because the jury was instructed that it could find either
5	powder cocaine or crack cocaine as an objective and, give
6	that instruction, we don't know whether the jury found
7	that this was a powder cocaine conspiracy, a crack cocaine
8	conspiracy, or perhaps both.
9	QUESTION: And of course, it made no finding
LO	whatsoever on quantity, so you don't know that, either
11	MR. SHOBAT: We don't know that.
L2	QUESTION: as far as the jury is concerned.
L3	MR. SHOBAT: We don't know that.
L4	All the findings that happened that fixed the
1.5	sentencing occurred right on the eve of sentencing, during
16	the sentencing process.
L7	QUESTION: I didn't do the math, but I is it
L8	correct that if you draw this distinction between type of
L9	drug and quantity of drug, and you win your argument, and
20	the Court says yes, the jury must make the determination
21	on type of drug, is it necessarily the case that all of
22	these sentences would, in fact, have to be have to be
23	vacated, given the fact that you let the judge make the
24	quantity determination?
25	I guess my question is, did the judge make a

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1	quantity determination even with respect to the lesser of
2	the two drugs that would support the sentences, or the
3	ranges within which he's sentenced?
4	MR. SHOBAT: I think that the answer to that
5	question is yes, that it would necessarily affect some of
6	the petitioners. Each of the five petitioners
7	QUESTION: Some but not all?
8	MR. SHOBAT: Some but not all, and it would
9	necessarily affect all of them in determining first what
10	the statutory maximum penalty is.
11	Remember that the sentencing judge utilized the
12	Sentencing Guidelines and said, here's what I conclude
13	everybody is held accountable for. Considering that the
14	offensive conviction embraced both objectives, his
15	findings as to what was relevant conduct or what amounts
16	should be attributable would be vastly different if he
17	were to analyze this from the question of what if the
18	conviction was merely a powder cocaine conspiracy.
19	QUESTION: Did you request an instruction that
20	the jury be required to specify amounts or choose as
21	between cocaine and cocaine base?
22	MR. SHOBAT: No, Your Honor. The jury was
23	instructed that it could find the defendants guilty if
24	they found either cocaine or powdered
25	QUESTION: And you didn't object to that

1	instruction?
2	MR. SHOBAT: There was no objection to that.
3	It's our position, however, Your Honor, that
4	since the Government brought the dual object conspiracy,
5	and since the Government wanted to seek punishment on the
6	higher objective that is, the objective carrying the
7	higher penalty that it was incumbent upon them to seek
8	such either a special
9	QUESTION: You're not complaining about the
LO	jury's finding your clients guilty. You're saying you're
11	willing to accept that verdict, but you're saying the way
L2	it went to the jury, all you can punish them for is the
L3	least of what was charged.
14	MR. SHOBAT: That's correct, and the only way
.5	we would complain about what the jury determine excuse
16	me, about what happened at trial is if the Government
17	tried to take what resulted and say, but we the judge
18	concludes that what you were convicted of was a crack
19	conspiracy conviction.
20	That, we say, is completely impermissible,
21	particularly when the statutory penalties for powder
22	cocaine are significantly less than those for crack
23	cocaine.
24	QUESTION: But you agree, don't you, Mr. Shobat
25	that if there had not been this ambiguity in the jury

1	verdict, nonetheless a sentencing judge could have taken
2	into consideration a wide number of things in deciding
3	what to sentence your clients to, a prior offense, prior
4	indictment, prior conduct?
5	MR. SHOBAT: Under the Sentencing Guidelines
6	that's absolutely correct. That is that it would
7	not be true, however, in fixing the statutory penalty, but
8	we acknowledge that under this Court's decision in Witte
9	and Watts, that the juge is free to consider a wide range
10	and not just simply say, well, I thought about it, but
11	actually to make the findings required under the
12	Sentencing Guidelines but that is, again, a guideline
13	determination.
14	In this case, there were no statutory maximum
15	penalty determinations made. What the judge did is just do
16	the guideline analysis and then say, based on these
17	guideline results, I'm now determining what the statutory
18	maximum was.
19	QUESTION: If that changes in another case
20	we've been involved in this, but the if that changes,
21	because it's not just guideline but also statutory add-
22	ons let's call them sentencing factors.
23	If you think that changes the fact that it's a
24	statutory sentencing factor that increases a penalty, if
25	you think that makes a difference in your favor here, what

1	do you do with the earlier Supreme Court cases, McMillian
2	and so forth, that we've been looking into, which say that
3	where you have a sentencing factor such as possession of
4	gun, which increases the maximum penalty, that can be a
5	determination to be made by a judge. It needn't be
6	charged in the indictment, and it needn't in fact, in
7	McMillian I think we found beyond a reasonable doubt.
8	So how do you deal with those cases and also win
9	your case?
LO	MR. SHOBAT: McMillan supports our position,
11	Your Honor because
L2	QUESTION: Because?
13	MR. SHOBAT: in McMillan there was no
L4	increase in the statutory maximum penalty. The only
15	increase was in a mandatory minimum so that the visible
16	possession of a firearm in McMillan caused there to be a
17	minimum of 5 years imposed but did not in any way increase
L8	the statutory maximum.
19	QUESTION: Why isn't that worse? Why aren't
20	mandatory minimum penalties from a defendant's point of
21	view actually a lot worse than an increase in the maximum?
22	MR. SHOBAT: We think that they're bad, but the
23	reason they're not worse in part, I think, lies in the
24	power of a sentencing judge to grant an upward departure.
25	The statutory maximum provides protection to a

1	defendant to prevent a sentencing court from going beyond
2	the statutory maximum. In this case, had there been a
3	reason to grant an upward departure, for example, with
4	respect to petitioners Joiner or Edwards, who received a
5	10-year sentence, they might have gotten a 20-year
6	sentence if that were the statutory maximum for them.
7	If they had been considered to have the same
8	statutory maximum as petitioner Fort, who had a life
9	maximum, then it would be very significant to know that,
LO	even if there was an upward departure granted in this
11	case, it would not exceed 20 years and risk, you know,
L2	possibly a life sentence.
L3	And so under McMillan, the reason one of the
L4	reasons we say that this is an essential element of the
L5	offense is because it not only alters the range, but it
16	alters the statutory maximum penalty.
L7	Mr. Chief Justice
L8	QUESTION: Are you saying that a special verdict
L9	would have been compatible with your view of this case?
20	That is, the judge says, jury, the Government has charged
21	both powdered cocaine and crack cocaine, and so I want you
22	to find specially as to each. That would be all right.
23	MR. SHOBAT: Yes, Your Honor. The jury
24	QUESTION: Even though defendants don't
25	ordinarily like special verdicts.

1	MR. SHOBAT: The jury could have been instructed
2	as it was that you could find either-or, but then, in
3	addition, the jury should have been asked which do you
4	find, either powder, crack, or perhaps both.
5	QUESTION: And ask that in a special verdict?
6	MR. SHOBAT: Yes, and then there would be a jury
7	determination as to what the object of the conspiracy was.
8	QUESTION: Yes. Does it follow from what you've
9	been telling us that it would be perfectly proper under
LO	your theory for the Government to charge two separate
11	conspiracies, one for powdered cocaine, the other for
L2	crack, and then for the punishments to be consecutive?
13	MR. SHOBAT: It yes, Your Honor. It is the
L4	logic of our position that the Government is free to do
L5	that and, in fact, they are doing that every day with
16	respect to distributions.
17	In fact, the Government in response to defense
L8	arguments that you can't do that, that violates double
L9	jeopardy, crack and cocaine are the same thing, the
20	Government has said no, crack cocaine and powered cocaine
21	are different substances. They can't be punished
22	consecutively, or cumulatively, and now in this case the
23	Government is saying, oh, no, it's really just a
24	controlled substance.
25	And so we think that's a significantly

1	inconsistent position that the Government is taking, We
2	acknowledge that that is possible to be done.
3	Mr. Chief Justice, I would like to reserve
4	whatever time I have.
5	QUESTION: Yes, Mr. Shobat.
6	Mr. DuMont, we'll hear from you.
7	ORAL ARGUMENT OF EDWARD C. DUMONT
8	ON BEHALF OF THE RESPONDENT
9	MR. DUMONT: Thank you, Mr. Chief Justice, and
10	may it please the Court:
11	There is one issue that's rather straightforward
12	that is genuinely presented on the facts of this case and,
13	if I may, I'd like to address that just for a moment
14	first.
15	Some of the courts of appeals have held that
16	when a drug conspiracy verdict does not reveal exactly
17	what drug the jury may have concluded was involved, or
18	more than one drug, that under the guidelines the court is
19	limited to sentencing only on the basis of the drug that
20	will produce the lower penalty.
21	QUESTION: Under the guidelines, or under the
22	statute?
23	MR. DUMONT: Under the guidelines. There are at
24	least three
25	QUESTION: How can the guidelines control what

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1	statutory maximum is available? I don't understand that.
2	MR. DUMONT: In our view they don't control that
3	at all, but three of the courts of appeals have held that
4	even if you're talking about a case where the statutory
5	maximum and minimum are clear, that in terms of applying
6	the guidelines the district court at sentencing must
7	apply must take into account only the drug that will
8	produce the lower guidelines sentence.
9	QUESTION: But the statutory maximum and minimum
10	cannot be clear if you don't know what the substance is,
11	can they?
12	MR. DUMONT: I'm not sure that's true now,
13	because you could have a couple of possibilities, both of
14	which would put you into, say, the minimum category, the
15	zero to 20 category, but one of which would put you at 19
16	years under the guidelines, and one of which would put you
17	at 5 years, so it can make quite a difference.
18	QUESTION: But they wouldn't be similarly
19	inconsequential as far as the guidelines are concerned,
20	they're only inconsequential as to the statutory grades?
21	MR. DUMONT: Well, my only point is
22	QUESTION: I mean, would the guidelines treat
23	differently two substances that are treated the same in
24	the statute?
25	MR. DUMONT: The guidelines are much more

1	specific about what how you do the quantity
2	calculations and how you take things into account, but my
3	point is only that even in cases where there is no
4	controversy about what the statutory range is, the
5	guidelines range can differ quite a bit, depending on
6	whether you take into account some crack or don't take
7	into account some crack.
8	And some of the courts of appeals have, in fact,
9	held that in a case like this, if you accepted the verdict
10	was ambiguous, the judge would be limited to taking into
11	account only the powdered cocaine that was involved.
12	Now, we think that those cases are that issue
13	is presented here on the facts of this case, because it
14	would make a big difference to these petitioners whether
15	they are sentenced for powder or for crack, but we think
16	that those cases that would limit the court to powder
17	under the guidelines are flatly inconsistent with this
18	Court's sentencing jurisprudence, most recently,
19	obviously, the decision last term in Watts and the Court's
20	decision in Witte.
21	We know from Watts that even if they had been
22	charged, as petitioners say they could have been, with two
23	separate conspiracies and the jury had acquitted on the
24	crack conduct, that the crack cocaine could have been
25	taken into account at sentencing by the judge, and it

1	cannot be true that that is permissible but then it's not
2	permissible to do so here, where
3	QUESTION: The commission could deal with that
4	as it wishes, couldn't it?
5	I mean, if the commission said, look, what we
6	think you have to do is sentence the person to 10 years if
7	he has 5 grams of crack, and you have to sentence him to 2
8	years if it's 5 grams of cocaine, and you, the sentencing
9	judge, are to take as a an assumption of what the
LO	amounts are that which is found by the jury and if there
11	is no jury finding you will assume, blah, blah, blah.
L2	They could write a guideline like that, couldn't
L3	they?
L4	MR. DUMONT: Well
L5	QUESTION: And if they don't like the way the
16	judges are doing it, they can write the opposite
L7	guideline.
L8	MR. DUMONT: I think there may be some question
L9	about whether the commission would have power to do
20	anything that would seem to trench on what this Court said
21	in Watts and required by
22	QUESTION: But if the courts that find the way
23	you think is wrong are finding that way because they think
24	the guidelines require them to do so, then the answer
25	would be that the commission could make clear that that

1	isn't
2	MR. DUMONT: Oh
3	QUESTION: what the guidelines require.
4	MR. DUMONT: Yes, absolutely. That's true.
5	If
6	QUESTION: So there's nothing for us to
7	decide
8	MR. DUMONT: If the courts feel they are being
9	bound by the guidelines. But as we pointed out in our
10	acquiescence in this case, there is no indication the
11	cases in the courts of appeals that have held that the
12	district judge is limited in sentencing to the lesser drug
13	not only don't address that issue, they don't even mention
14	the guidelines. I mean, it's one of our quarrels with
15	them. They seem to be innocent of the developments in the
16	sentencing law under the guidelines.
17	So we would submit that those cases are flatly
18	wrong, and that's what this case is really about. It's
19	what's presented on the facts here, and the decision on
20	that issue ought to be clear.
21	Now, it is true, as petitioners argue, that
22	statutory maxima and minima trump whatever is in the
23	guidelines, and it is therefore relevant to ask what the
24	verdict ambiguity does or should or might have to do with
25	setting the statutory minimum and maximum

1	Now, the short answer, as we pointed out in our
2	brief, in this case is no effect, because if you
3	calculate and we did do the math, and it's been
4	petitioners have not demonstrated that there's anything
5	wrong with our math that if you calculate the statutory
6	ranges in this case based purely on the district judge's
7	powder cocaine findings, you will find that the sentences
8	actually imposed in every case fall within permissible
9	statutory range, so our submission would be there's no
LO	issue on the facts of this case under the statute.
1	But should the Court wish to proceed and
12	consider that issue, we think it's plain from the
13	structure and language of the relevant statutes here,
.4	sections 846 and 841, that the answer to that is that
.5	these are sentencing factors for the trial judge.
16	Now, section 846, which is on pages 1 and 2 of
17	the appendix in the blue brief, says any person who
18	attempts or conspires to commit any offense defined in
19	this sub-chapter shall be subject to the same penalties,
20	and so on.
21	The offenses are defined by the other sections
22	in that portion of the United States Code. If you then
23	look at 841, which is the object defense here, 841(a)
24	defines the offense, and the offense is either possession
25	or with the intent to distribute, or distribution

1	QUESTION: Well, it can't define the offense if,
2	indeed, as you just read, you are to be punished with the
3	same penalties as those prescribed for the offense. There
4	are no penalties prescribed for 841(a). When you read
5	841(a) you have no idea what the penalties are, so that
6	cannot be the offense
7	MR. DUMONT: Well
8	QUESTION: referred to in 846.
9	MR. DUMONT: Well, with respect, we would
10	obviously disagree with that.
11	What you know from 846 is that you're looking
12	for an object offense. The object offense is defined in
13	841(a), which says, unlawful acts, except as authorized
14	and so on you may not distribute, or possess
15	QUESTION: Right.
16	MR. DUMONT: with intent to distribute
17	controlled substances.
18	QUESTION: Right, and if all I had before me was
19	841, I would agree. But you have before you 846, which
20	you just read, which says any person who attempts or
21	conspires to commit any offense defined in this chapter
22	shall be subject to the same penalties as those prescribed
23	for the offense. There are no penalties prescribed for
24	the offense of violating 841(a).
25	MR. DUMONT: Well

1	QUESTION: I can read you 841(a) and you can't
2	tell me what penalty is prescribed for that.
3	MR. DUMONT: Well, with respect
4	QUESTION: You have to go down to (b) to figure
5	it out.
6	MR. DUMONT: With respect, I can, because what
7	I'll say is, you look down to (b), which prescribes the
8	penalties for the offense defined in (a).
9	QUESTION: Fine. I'm willing to accept (b).
10	Then (b) becomes part of the offense.
11	MR. DUMONT: We disagree about that.
12	QUESTION: That's fine.
13	MR. DUMONT: We disagree about that, obviously,
14	and our analysis is that 841(a) defines an offense which
15	is complete once the jury finds that you have distributed
16	or manufactured or possessed with the intent a controlled
17	substance, and it's true they in a substantive count,
18	then in the nature of things they will have to find a
19	controlled substance involved.
20	I would point out, as came out from some of the
21	questions, in a conspiracy offense that's not at all
22	clear. There are certainly conspiracies for which you
23	could be charged and which you could be found guilty where
24	you would have no idea what the type of substance involved
25	was.

1	Now, I grant you, that will give rise, in those
2	cases, if they actually happen, to strange sentencing
3	issues under both 841(b) and under the guidelines, because
4	it's not clear what you do with something where you really
5	don't know even what type of drug was involved, but the
6	fact is the conviction would
7	QUESTION: You apply the minimum. I think
8	that's an easy answer, isn't it? It's up to the
9	Government to prove whatever is necessary to prove in
10	order to impose a penalty and if you can't figure out what
11	it was, the most you can impose is the minimum, I would
12	assume. What's hard about that?
13	MR. DUMONT: That's a potential answer to that
14	question.
15	QUESTION: It seems to me it's the only answer.
16	The burden's on the Government to establish what needs to
17	be established to impose the penalty, isn't it?
18	MR. DUMONT: Well, for present purposes my point
19	would be, we would establish that at sentencing to the
20	judge, and the conviction would be valid.
21	Even if it were true that we could not impose a
22	term of imprisonment, the conviction, the special
23	assessment and the record and so on would reflect a
24	conviction for a felony, and that felony would be defined
25	by 841(a). It would have nothing to do with 841(b).

1	841(b) has to do with prescribing the penalties
2	that are appropriate under particular circumstances for
3	violations of 841(a).
4	QUESTION: And if you commit the offense of
5	conspiracy you perhaps under one view would simply be
6	subject to the risk of being sentenced based on what the
7	conspiracy turned up and the judge says, it's 5 grams, or
8	10 grams, or whatever.
9	MR. DUMONT: That's absolutely right, and our
10	point here is, when you move into the realm of
11	conspiracy now, 846 obviously covers a wide range of
12	different target statutes and so on, and in this
13	particular case we're dealing with 846, referring to 841
14	as the object statute.
15	We think it's fairly clear that what Congress
16	would have intended here is when you are convicted of
17	conspiracy to violate 841 what happens is the judge at
18	sentencing looks at the complex of offense conduct
19	involved in that conspiracy under very traditional
20	Pinkerton-type conspiracy vicarious
21	QUESTION: May I interrupt with just one
22	question to be sure what if, in this case, instead of a
23	general verdict you have a special verdict and the jury
24	a whole stream of different alternatives, and the jury
25	found not guilty as to 9 out of the 10, but on one they

1	said he was guilty of conspiring to distribute 5 grams of
2	powder, and that's all.
3	Under your view, could the judge nevertheless
4	sentence the judge has a different view of the
5	evidence. He thinks he really committed 100 kilograms of
6	crack. That's the judge's view. The judge could
7	nevertheless sentence on the basis of his view of the
8	evidence even in the conspiracy context.
9	MR. DUMONT: Well
10	QUESTION: With specific findings.
11	MR. DUMONT: I would say particularly in the
12	conspiracy context in the conspiracy context, the
13	answer is clearly yes, because as long as the conviction
14	is valid, everything else is a sentencing factor and, as
15	the court pointed out in Watts, the difference in standard
16	of proof makes a huge difference there, because all the
17	jury has said by declining to convict on the other counts
18	is they weren't convinced beyond a reasonable doubt, but
19	there's a big range there between that and preponderance
20	of the evidence where the court can operate.
21	Now, what I will say is, it's a harder case if
22	you have a substantive a set of substantive
23	distribution counts and the jury acquits on several but
24	convicts on only one, because in that case there's a I

think a substantial statutory interpretation question that

1	arises about what 841(b) means when it says, in the case
2	of a violation of subsection (a), involving.
3	Now, the circuits are split on that issue and
4	it's certainly not presented here, but it would not be
5	unreasonable for a court to hold, and several courts of
6	appeals have taken this route, that in a substantive
7	distribution case you are limited in terms of your
8	statutory maximum by the offense conduct that would be
9	dealt with in that one substantive distribution count.
10	QUESTION: That's not the Government's view, is
1	it?
.2	MR. DUMONT: We haven't taken a position in this
.3	Court on that question, and I hesitate to concede it in
.4	this case because it's not presented, but it would
.5	certainly be a plausible a plausible statutory outcome.
.6	The Tenth Circuit has gone the other way on that
.7	question and has said that no, all of these things are
.8	sentencing factors to be dealt with by the judge, even
.9	under the statute.
20	I think so we think that just to refer
21	back to that language that I was just quoting, again, if
22	we're talking about what is an element here and what is a
23	sentencing factor, we think that the language of 841 is
24	pretty clear on that. It's about as clear as you get.
25	QUESTION: It's your position that as with the
	2.7

1	guidelines those sentencing factors only require judgment
2	by a preponderance of the evidence
3	MR. DUMONT: That's right.
4	QUESTION: by the judge, so the judge makes
5	the decision that it's more likely than not, by a hair,
6	that this was crack rather than powdered, and therefore
7	you get 40 more years, or 20 more years, by a
8	preponderance. Gee, I
9	MR. DUMONT: Well, subject to statutory minimum
10	and maximum that might supervene, and
11	QUESTION: No, I'm talking about the maximum,
12	that the statutory maximum I could have given you if it
13	was one, you know, if it was powdered, is, say, 20, and
14	the statutory maximum I can give you if it was crack is
15	40, or 60. There's a big difference depending on the
16	quantity, I guess.
17	And all the judge has to say is, well, it's a
18	close question, but by a hair I think it's more likely

And all the judge has to say is, well, it's a close question, but by a hair I think it's more likely that it was crack than powder and therefore I'm going to give you 60 years instead of 20.

That doesn't seem to you, something wrong with that?

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MR. DUMONT: Well, if we're talking about the simple distribution offense, and we're -- if the question is, under 841(b), are all of those always just at the

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1	decision of the judge, I think that is a difficult
2	question, and we will certainly address it in the cases i
3	arises in
4	It doesn't arise in this case, partly because
5	this is a conspiracy case. In a conspiracy case we think
6	what happens is what happened here, which is the judge
7	goes through all the evidence very carefully I commend
8	to you the very, very detailed sentencing findings that
9	the judge made in this case, and he goes through all the
LO	evidence, sifts it and decides in this case, not very
11	favorably to the Government, I would add, what the
12	quantities of drugs are, what types of drugs are involved,
L3	and what quantities can be properly attributed to any
L4	given defendant.
15	And in this case it makes no difference under
16	the statute because whatever all of his findings that
L7	he made for purposes of the guidelines put these
L8	defendants in the right statutory minimum and maximum
19	range, or the same range, depending on how you calculate
20	it.
21	QUESTION: Well, what if it did make a
22	difference, that's the point. The Government
23	MR. DUMONT: It did make a difference. I think
24	in a conspiracy case the result would be the same, because
2.5	even the courts that have held even the courts of

1	appeals that have held that you need to be limited by the
2	offense of conviction have said well, of course, in a
3	conspiracy case, when you're talking about defining what
4	was involved in the offense of conviction for 841(b)
5	purposes you pick up Pinkerton principles, and principles
6	of vicarious liability.
7	So that ends up being either indistinguishable
8	from or very, very close to the relevant conduct inquiry
9	under the guidelines, so in a conspiracy case we really
10	think there is no substantial issue about that, that your
11	statutory maximum and minimum are going to set by the same
12	process as your guidelines sentence, and there's really
13	nothing wrong with that.
14	QUESTION: And if it's not a conspiracy case and
15	it makes a huge difference, you want to say you're not
16	going to say.
17	MR. DUMONT: Our position for purposes of
18	argument in this case is that the judge has the authority
19	to decide that, but I acknowledge that it's a very
20	difficult
21	QUESTION: There are several I mean, are you
22	talking which question? I mean, there's a question
23	reserved in Watts, I take it. The question reserved in
24	Watts is whether a sentencing factor can be decided by a
25	judge by a preponderance of the evidence or whether the

1	judge might decide it beyond a reasonable doubt. That's
2	one question which we haven't decided, I guess. Is that
3	right?
4	MR. DUMONT: That's correct.
5	QUESTION: A separate question is who has to
6	decide. Another question might be whether you had to get
7	notice in an indictment, and whether it's called an
8	element or something. I mean, there are a bunch of
9	questions there.
10	MR. DUMONT: There are
11	QUESTION: What do we have to decide here?
12	MR. DUMONT: There are any number of questions
13	that you don't have to decide here, and we would urge the
14	Court to stick generally to the facts of this case,
15	because I think that's useful and I think the facts of
16	this case are typical.
17	But in response to Justice O'Connor's question,
18	I understood that to be about the limited question of, in
19	a simple distribution case where there is a certain amount
20	of there's one distribution, for instance, at issue,
21	and the question is then does the judge get to decide what
22	is involved in that distribution.
23	And I would submit the following intermediate
24	position, which is, there may be circumstances where all

that is proved to the jury might be a small amount of one

1	drug, for instance, but that on particular facts the judge
2	might be able to conclude that because of a suppression
3	motion or for some other reason the jury didn't see all or
4	the conduct that was involved in that particular
5	distribution, and we would say certainly in that case that
6	it is a sentencing decision for the judge to make about
7	what was involved with that particular offense.
8	But it's a substantially difficult question. I
9	can't honestly tell you what the Government's position
10	would be in this Court on the question of, when it was
11	perfectly clear what was involved in that distribution,
12	perfectly clear that was the only conviction, and then
13	there was
14	QUESTION: Would you refresh my recollection
15	on
16	MP DIMONT. other conduct that was sought

MR. DUMONT: -- other conduct that was sought

17 to be taken into account.

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QUESTION: -- on one minor point. Had we decided that the judge in the sentencing proceeding can rely on illegally seized evidence in making this determination? You just suggested he might know about it through a suppression motion, for example. Have we said that's permissible?

MR. DUMONT: I don't think this Court has said --

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1	QUESTION: But your position is, it's
2	permissible?
3	MR. DUMONT: I think that under the statutes
4	QUESTION: Because that's your example you
5	happened to pick to explain what the judge could see that
6	the jury might not see.
7	MR. DUMONT: It's another question that's not
8	presented, but yes, I think under the statutes that say
9	that anything can come under sentencing
10	QUESTION: So he can he only has to do it by
11	a preponderance. He can do it even if the jury finds him
12	not guilty, and even if he relies on illegally seized
13	evidence. It's a pretty extreme position.
14	QUESTION: Well, we decided the issue if it's a
15	not guilty finding, haven't we?
16	MR. DUMONT: In Watts.
17	QUESTION: In Watts.
18	QUESTION: Yes.
19	MR. DUMONT: Yes, absolutely.
20	QUESTION: Mr. DuMont, would you explain again,
21	because I don't understand it, how it's possible that you
22	can come out with one response to Justice O'Connor's
23	question, where it's a conspiracy charge but a different
24	response where you're being prosecuted for simple
25	distribution?

1	I mean, it seems to me, if your answer is in
2	simple distribution we're not going to let the judge do
3	it, I don't see why it why you can let the judge do it
4	in the conspiracy thing, since the conspiracy statute
5	refers to the distribution statute.
6	MR. DUMONT: Well, it's not a constitutional
7	question. It's a statutory question.
8	QUESTION: Yes.
9	MR. DUMONT: The point is, the statutory
10	analysis proceeds as follows. 18 841(a) defines an
11	offense, unlawful acts, then (b) says as to penalties any
12	person who violates subsection (a) shall be sentenced as
13	follows.
14	QUESTION: Right.
15	MR. DUMONT: Then the form of the following
16	phrase is, in the case of a violation of subsection (a)
17	involving.
18	QUESTION: Right.
19	MR. DUMONT: Now, it's always been the
20	Government's position, as my colleague points out, that
21	for distribution, simple distribution, each possession or
22	distribution of each drug is a separate offense, and it is
23	consistent with that to say that if you're convicted of
24	only one substantive count, then when you get to (b) what
25	you have to look at is, what is involved in that

2	What's different about conspiracy is that when
3	you come to apply 846 in the 841 context you're told by
4	846, okay, if they've conspired to commit an 841 offense
5	you need to they'll be subject to the same penalties as
6	those for 841.
7	The same we interpret that language, as have
8	the courts of appeals that have looked at this, to say,
9	well, what you are liable for in the conspiracy context
LO	under Pinkerton and all the vicarious liability cases is
11	your conduct and the conduct of your coconspirators in
12	furtherance of the conspiracy, and so that is the universe
13	of what you're liable for.
4	You take all of that, making those findings, and
.5	then you come up with a number of drugs and a quantity of
.6	drugs, and then you apply the statutory guidelines in
7	effect that Congress has provided in 841(b).
.8	QUESTION: Well, I guess what I'm saying, I
.9	don't see how that's rational. I mean, if it refers to
20	the offense in 841, and if you're treating 841 as
21	consisting not of one offense in (a) but of each one being
22	a separate offense for purposes of double jeopardy and
23	everything else, I don't see how you can treat it any
24	differently for purposes of 846, which refers to the
25	offense in 841. But I understand your position.

1 substantive count.

1	MR. DUMONT: You understand our position, and
2	I
3	QUESTION: Let's yes.
4	MR. DUMONT: And I would point out that the
5	Court reviewed in Chapman the history of the drug statute.
6	QUESTION: Yes.
7	MR. DUMONT: And one thing I would point out
8	about that is, when Congress enacted the current form of
9	841(b) in 1986, what it had in mind was setting three
LO	broad categories, which were king pin distributors,
11	serious street level distributors, and then regular
12	distributors.
L3	And we think it would be odd if what Congress
L4	accomplished through all of this was to say that in a
15	conspiracy case, where every normal principle of
L6	construction tells us that when you're found guilty of the
L7	conspiracy you are then liable for all the conduct
L8	involving the conspiracy, it would be a passing odd result
19	to find that when you apply that under the statutory
20	structure you end up with something different.
21	So that if you have somebody who has
22	participated in a long-term, broad-scale wide distribution
23	conspiracy, that suddenly you are limited at sentencing to
24	taking into account something other than that conduct.
25	I think I'd just like to clear up two

1	persistent sources of misconception, I think, in this
2	case. One
3	QUESTION: May I ask first if you agree with
4	Judge Easterbrook that it would be sufficient if the
5	indictment simply alleged controlled substance, without
6	any identification?
7	MR. DUMONT: For the purposes we are centrally
8	controlled with here, yes, it would be sufficient.
9	Now, it raises another set of questions, and I
10	think the courts have consistently said that. They've
11	said, well, an indictment is sufficient if it charges in
12	terms of the statute, and the statute says
13	QUESTION: But the defendant has to know enough
14	about the case to defend
15	MR. DUMONT: But of course. There are notice
16	principles that come in both under the rules, under
17	practice, and under the Constitution that require the
18	defendant have adequate notice of what he's being charged
19	with both for purposes of defense at trial and for
20	purposes of pleading and bar, and I would point out that
21	there is a whole body of cases in the courts of appeals
22	about how you distinguish one conspiracy from another for
23	purposes of double jeopardy, and I think that would be,
24	for instance, relevant in that context.
25	If I might just point out that there's a lot of

1	talk about dual object conspiracies here, and it's a
2	source of a lot of confusion in the briefs and I think,
3	with respect, in my colleague's argument.
4	The indictment here charged a dual object
5	conspiracy in the sense that it charged both possession
6	with intent and distribution, each of which is a separate
7	offense under 841. Now, they happen to be in this case
8	offenses that violate the same substantive statute.
9	It did not charge a dual object conspiracy by
L O	charging that there was both cocaine and crack cocaine
1	involved in this conspiracy. Those are means of
.2	satisfying the same element of either the distribution
13	offense or the possession offense. They are not objects
.4	of the conspiracy, and I think it's quite important,
.5	actually, conceptually to keep that in mind.
.6	The offense of conviction
.7	QUESTION: The object of the conspiracy was
.8	either to distribute or to possess with intent to
.9	distribute?
20	MR. DUMONT: That's correct, and we know from
21	Griffin that if there was sufficient evidence to convict
22	on either one of those, and there clearly was, they
23	conceded there was, the convictions are perfectly valid.
24	But it is false and misleading to say, oh, well,
25	this is dual objects because one object was crack and one

1	object was powder. That's just not the way it works.
2	The other thing is, the offense of conviction,
3	which we talk about both in terms of 841 as a statute
4	QUESTION: Excuse me. Just before you go on,
5	that's quite correct unless you accept your colleague's
6	view of what 846 requires. I mean, if you acknowledge
7	that 846 does require you to charge something other than
8	an intent to distribute some controlled substance, and if
9	you acknowledged his view that it requires you to specify
10	a controlled substance, then it would be a dual object,
11	under his view of the world.
12	MR. DUMONT: Under his view of the world I think
13	that's right, and there would be there would be more
14	serious problems than figuring out the sentence, frankly,
15	because I think there would be problems with convictions,
16	although they've never stood up to the plate on that one.
17	Again, in view of the offense of conviction,
18	which is important, is a conspiracy to distribute
19	controlled substances, and I think if we look, as my
20	colleague was suggesting, at the indictment and at the
21	statute, he said, well, if you didn't specify quantity,
22	the maximum statutory sentence would be 20 years, and we
23	would quite strongly disagree with that.
24	If you get an indictment that charges you with
25	participating in a drug conspiracy and no quantity is

1	specified, when you look at the statute you ought to be on
2	notice you are on notice that the maximum penalty is
3	life in prison. It depends on the quantity, which is
4	something that hasn't been specified.
5	Now, you may want to seek clarification of that
6	in one way or another, but it is not
7	QUESTION: Do they still have bills of
8	particulars?
9	MR. DUMONT: They absolutely do, Your Honor.
10	It is not true that you somehow know from that
11	indictment that your exposure is limited to 20 years.
12	So I might just return to the fact that there is
13	one real and straightforward issue in this case, and the
14	other and that is the guidelines issue that I was
15	dealing with earlier, and the circuits are in conflict on
16	that issue, and the Court ought to resolve it in the way
17	that we think is plainly correct under Watts and Witte.
18	The other questions we've been considering are
19	very interesting, and they may, in fact, be difficult in
20	some future case that presents them, but this case, when
21	we return to our sheet, is really a very simple one, and
22	the judgment below ought to be affirmed.
23	Thank you.
24	QUESTION: Thank you, Mr. DuMont.
25	Mr. Shobat, you have 2 minutes remaining.

1	REBUTTAL ARGUMENT OF STEVEN SHOBAT
2	ON BEHALF OF THE PETITIONERS
3	MR. SHOBAT: Mr. Chief Justice, the issue that
4	is not before the Court is the guideline issue. Quite
5	frankly, this case doesn't raise the concerns of the
6	guidelines. It raises the question of the statutory
7	maximum and the offense of conviction, and that's the
8	starting point.
9	Even before the district court could proceed to
10	the question of the Sentencing Guidelines, it had to know
11	what the offense of conviction was, and it had to know
12	what the statutory maximums
13	QUESTION: Well, were all these sentences within
14	the range of the powered cocaine range?
15	MR. SHOBAT: The answer to that question is no.
16	QUESTION: No?
17	MR. SHOBAT: It's really, we don't know, but
18	it's very likely that it is no.
19	QUESTION: The Government says it's calculated
20	them all and the answer is yes.
21	MR. SHOBAT: Well, what the Government has
22	relied upon, Your Honor, is the findings of the Court
23	after having considered the defendants of being of
24	having been convicted of a conspiracy that we don't know
25	that they were convicted of, and so now, after the fact,

1	we	have	a	determination	by	the	sentencing	court.
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If the judge were to look at this anew and say
the conspiracy of which they were convicted was powdered
cocaine distribution, then the Court might say, well, I
think the amount of powdered cocaine is less than I
previously attributed to this conspiracy because then I
thought the conspiracy embraced both crack cocaine and
powder cocaine.

After all, in this conspiracy there were quantities of powder cocaine that were converted into crack cocaine and, for example, with respect to petitioner Wintersmith, he was held accountable for 540 grams of powder cocaine. If just 40 grams of that substance were attributable to the crack conspiracy -- that is, that part of the conspiracy that had to do with converting the powder to crack and selling it out of a drug house -- just diminution of that 40 grams would mean that his maximum penalty was 20 years.

Now, he received a sentence of 21 years, less than the 40-year maximum that would have been applied at a 500-gram level, and so we think that the similar analysis applies to each of the petitioners in varying degrees.

Certainly with regard to some of the petitioners there was more evidence, there was a greater involvement in the conspiracy, and that is the central problem with

1	these dual object conspiracies. The Government could
2	potentially bring a case which has very strong evidence
3	CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shobat.
4	Your time has expired.
5	The case is submitted.
6	(Whereupon, at 1:57 p.m., the case in the above-
7	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:

VINCENT EDWARDS, REYNOLDS A. WINTERSMITH, HORACE JOINER, KARL V. FORT, AND JOSEPH TIDWELL Petitioners v. UNITED STATES CASE NO: 96-8732

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

BY _ Dom Novi FedinG__ (REPORTER)