In the

Supreme Court of the United States

ALPHONSE BIFULCO, PETITIONER,	)	
V.	)	No. 79-5010
UNITED STATES OF AMERICA, RESPONDENT.	)	

Washington, D. C.
February 27, 1980

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ALPHONSE BIFULCO,	:	
Petitioner,	:	
v.	:	No. 79-5010
UNITED STATES OF AMERICA,	:	
Respondent.	:	

Wednesday, February 27, 1980

Washington, D. C.

The above-entitled matter came on for oral argument at 10:05 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, Jr., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

STEVEN LLOYD BARRETT, ESQ., The Legal Aid Society, Federal Defender Services Unit, 531 United States Courthouse, Foley Square, New York, New York 10007; on behalf of the petitioner.

HARLON L. DALTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530 on behalf of the respondent.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
STEVEN LLOYD BARRETT, ESQ., on behalf of the petitioner	3
HARLON L. DALTON, ESQ., on behalf of the respondent	28

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Bifulco against the United States.

Mr. Barrett, you may proceed whenever you're ready.

ORAL ARGUMENT OF STEVEN LLOYD BARRETT, ESQ.,

ON BEHALF OF THE PETITIONER.

MR. BARRETT: Mr. Chief Justice, and may it please the Court:

This case comes to the Court upon writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner was convicted of violating the Federal drug conspiracy law, 21 USC, Section 846. He was sentenced to four years imprisonment, a $1,000 fine, and five years of special parole.

Petitioner subsequently filed, pro se, a collateral attack upon his sentence, alleging that the inclusion of special parole for the crime of conspiracy was not authorized. And the Second Circuit held that special parole was a lawful component of the sentence of conspiracy, and affirmed denial of petitioner's application.

The issue in this case, which is currently the subject of disagreement among the circuits, is whether, as the Second Circuit held, Section 846 includes special parole, or whether, as we assert, the statute's specifications

of imprisonment and fine precludes special parole.

The statutory language of Section 846 is set forth in our brief at page 3, and it states: Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both, which may not exceed the maximum of punishment prescribed for the offense the commission of which was the object of the attempt or conspiracy.

We submit that the penalties intended for conspiracy are stated plainly on the face of this statute: imprisonment and fine. And in our argument this morning, it will be shown that Congress used the precise specification of penalties for the very purpose of providing imprisonment without special parole for the crime of conspiracy.

I'll be looking at four issues bearing on this matter. First, I will examine the statutory scheme, and Section 846's place in that scheme, to show that throughout the statute, special parole may be imposed only when it is separately authorized from imprisonment and fine.

Second, I will look at the legislative history to elucidate Congress' intent that a specification of imprisonment or fine in a statutory section cannot alone authorize the inclusion of special parole.

Third, I will discuss the government's analysis of Congress' intent and show that that position cannot be

sustained.

And finally, I will consider the appropriate disposition of this case under the doctrine of lenity.

QUESTION: Mr. Barrett, I take it in your legislative history discussion you will also take up the time sequence at which the statute was drafted, and the time at which special parole was introduced as a concept into the statute?

MR. BARRETT: Yes, I will, Mr. Justice Rehnquist.

Turning first to the statutory scheme, special parole exists as a punishment quite distinct from the punishment of imprisonment. It's provided as an additional and separate penalty to be served after full service of a prison term.

Now, special parole is subject to no maximum limit, so that it can and often does exceed the prison term in length. This is important because of the revocation rule, which is that upon revocation of special parole, an additional prison term is substituted in the amount of the entire special parole term, without credit for time served.

Now, it is therefore a substantial penalty. And Congress authorized its inclusion selectively, by a separate provision, in each statutory paragraph defining a crime to which special parole would be applied.

Now, quite a number, and indeed, a majority of the

drug crimes provide for imprisonment without specification and without mention of any special parole. And significantly, the crime of continuing criminal enterprise, which is the most serious trafficking offense in the Federal drug law, does not specify special parole terms. And similarly, there is no specification of special parole in the offenses involving trafficking by persons who are registered under the drug law.

Generally, the special parole authorizations occur in the distribution and possession offenses defined in Section 841. But even here, there is selectivity. Two of the six--two of the six punishment sections in Section 841 do not provide for special parole.

Now, in practice, there has never been any question that a drug section which does not make any mention of special parole is not entitled to include, as a sentence, special parole, with one exception. And that, of course, is Section 846, which is the issue that's presently before the Court.

From the standpoint of the statutory scheme, we feel that this unique treatment accorded Section 846, which some circuits at least have given Section 846, makes no sense. Like the other sections throughout the drug law, which do not make mention of special parole, and in which special parole does not apply, Section 846 describes the punishments

in terms of imprisonment and fine exclusively. And like those other sections, Section 846 is a separate criminal section under which sentences are imposed.

The purported distinction for Section 846 which the government offers to justify the inclusion of special parole in Section 846, notwithstanding the absence of special parole authorization, is that the conspiracy section refers to the statutory section of the object offense to set the limits of punishment applicable to the particular conspiracy.

And the government contends that this reference results in the incorporation into Section 846 of any special parole that would be required in the object offense section, were sentence imposed under that section.

We feel this argument by the government misperceives the significance and the function of Section 846's specification of imprisonment and fine.

Section 846 refers to the object offense section to set the amount, but not the type, of the punishment authorized. Section 846 itself sets the type of punishment. The accuracy of this reading is supported by the House report which accompanied the bill which was ultimately enacted by Congress. And in that report, a description of the operation of the conspiracy section, and the penalty for conspiracy,

the House committee--I believe it was the Interstate and Foreign Commerce Committee--stated--described the punishment as imprisonment and/or fine which may not exceed the maximum amount set for the object offense.

And as this statement indicates, the imprisonment and fine clause of Section 846 defines the type of punishment which is to be imposed for that Section.

Proof that Section 846 is a referencing structure, which again, is the basis of the government's distinction--the proof that there's referencing structure does not justify any special treatment is clear from another section of the drug law. That's the section that numerically precedes Section 846, Section 845. It's set forth in footnote 25 of our brief, at page 20, and that's the distribution to minors section.

Now, Section 845, like Section 846, uses reference to another section or section's sentencing limits. But there's a very significant distinction on the face of the two statutes. Whereas Section 846, as I've indicated, specifies in one clause, imprisonment or fine or both, Section 845 has two clauses. The first clause specifies a reference for imprisonment and fine, and in that sense resembles Section 846. But there's a separate second clause which provides for the incorporation of special parole.

I'll have more to say about Section 845 [illegible]

legislative history discussion. But for the present, it bears noting that Section 845 shows that the characteristic that I've identified in the drug law--and that is, that before special parole is included in a section, there must be a specific special parole authorization in the individual section--that Section 845 shows that that characteristic or that rule applies to sections which use referencing. And that therefore, Section 846 should not be treated unusually. It should be treated like all the other sections throughout the drug law which do not make specific reference to special parole. It should be--in other words, no special parole should be authorized.

Looking now at the legislative history, the legislative history confirms that the specification of imprisonment and fine in Section 846 was intended to define a punishment which would not include special parole.

In particular, two points are established in the legislative history. First, as to sections which, like this conspiracy section, use referencing to another section to establish the amount of penalty available, Congress recognized the need for a separate, special parole authorization in a section employing the reference, if that section was to include special parole.

And the second thing that the legislative history demonstrates is that Congress added special parole clauses

to other sections which employed this referencing, but it did not so add a special parole clause to Section 846.

QUESTION: Well, is it fair to infer from your argument that before Congress introduced the concept of special parole into this re-writing of the drug law, 846 clearly manifested the intent that one who was--attempted or conspired to violate the law should be punished in the same manner as one who committed the substantive offense?

MR. BARRETT: I don't think so. I think that that is a happenstance of the way the initial bills were drafted. But I think that there are two important reasons why we should not find that the original formulations of the bills, before the inclusion of special parole, indicates an intent to have--if I could use the government's word in this--congruence between the two sections, the conspiracy section and the object section.

The first reason why has to do with the structure of the drug law. In the formal law, conspiracy was within the specific substantive sections. And in every bill considered in the new law, conspiracy was withdrawn from the substantive section and established in its own section.

Now, we feel that if you look through other penal sections throughout the United States code, you find that when conspiracy is separated from a substantive offense, generally, the sentences provided are disparate rather than

congruent; and that you find congruence in a sense in cases in which the conspiracy section is allowed to remain within the substantive offense section.

Now, I'm not suggesting that when Congress--the 91st Congress--removed conspiracy from the substantive offense section in this case it was intending to create disparate sentences, or it necessitates the finding of disparate sentences.

What I'm saying is that it was originally in a situation where congruence was necessitated. And it was thereafter placed in a situation where traditionally congruence was not found.

And I think that that sort of refutes the thought that Congress was thinking specifically in terms of establishing congruence.

QUESTION: Well, it could have just dropped 846 and punished under the general conspiracy statute if it wanted to do that, couldn't it?

MR. BARRETT: The general conspiracy statute would have required a specific term of five years. In other words, the generali conspiracy statute would not have allowed any flexibility or differentiation between the various conspiracy sections. So I don't think that that would have accomplished that purpose.

I think that there's--there was one other point

I wanted to make in response to your question, Mr. Justice Rehnquist. And that is, that as to this discretion of whether the initial bill intended to have the similar treatment, and that is, the use of the language in every bill which the 91st Congress considered in Section 846--in the predecessor to Section 846.

In no bill did Congress specify that punishment for conspiracy was subject to punishment equal to that of the substantive section. It always used the term, "which may not exceed."

Now to be sure, using the term "which may not exceed" allows for the possibility that the sentences will be the same. But Congress was free also to use the term, "equal to." And "equal to" connotes something quite different than "which may not exceed."

And my point again in this is that I think it reflects that Congress was not thinking specifically of setting up this equality. Equalization was not on their mind when they drew this section.

QUESTION: But of course you have to prove more than just that Congress didn't mandate equality. You have to prove that it didn't authorize equality.

MR. BARRETT: Well, let me say this. The suggestion that you've made is that in initial bills, before special parole was added, there happened to be this

relationship, so that the same kinds of crime were specified. The basis of a conclusion from that fact that Congress intended this to be the case was, specifically the language and the structure of these two sections.

Why not, if you use that same standard of analysis, say that after special parole was added, and after the one section had special parole and the other one didn't, since your analysis is based on the construction of the statutes as they exist, while after special parole existed, taking the statutes on their face, there was not this congruence any longer.

QUESTION: Well, why couldn't you equally well say that Congress had thought in 846 it had made attempt—or conspiracy punishable in the same—up to the same manner as it had the substantive offenses, and there was simply no need to tinker with it?

MR. BARRETT: I'm not sure I'm following the thrust of your question.

QUESTION: Well, 846 was already in existence saying that an attempt or a conspiracy could be punished in a manner not to exceed that which the substantive offense could be punished for.

And after the—then came the special parole terms. And wouldn't it be a permissible inference if Congress simply thought, "Well, we've already said in 846 that

attempt and conspiracy are punishable the same way 846 is. Why fool around with it?"

MR. BARRETT: Okay.

I think that would not be a permissible inference in this case.

First of all, they did not only say in Section 846 that attempt and conspiracy are punishable the same way as the substantive offenses. They say two things: They said it's punishable--they said primarily that is punishable by imprisonment and fine. In other words, if you had taken a section--if you take Section 846 and cross out the provision that it's punishable by imprisonment and fine and just have what's left being that a person who violates the conspiracy section is punishable, not to exceed--is subject to punishment not to exceed the, et cetera, you'd have your result. And you'd be perfectly correct in making the inference that this section would trace the substantive section.

But that's not what Section 846 did; 846 specified imprisonment and fine. Now, the key reason--the reason why that's of such key significance is because of the way Congress dealt with Section 845.

Now, Section 845 in the initial bill, Section 845 and 846 resembled each other, but no special parole, that is, in that both of them specified imprisonment and fine; both of them had referencing, and both of them specified

that the reference applied to imprisonment and fine.

In that sense, then, both of them were subject to a very similar consequence, and that is, that they did not specify special parole, but the sections to which both of them could refer might specify special parole. Because special parole had been entered into the bills at a time when both Section 845, the distribution to minors, and 846, the conspiracy section, still did not have these sections.

Now, what Congress did in H.R. 18583 was that it added a separate clause to the distribution to minors section. Whereas originally it had specified only that Section 845 was punishable by a term of imprisonment or fine or both, up to the--twice that authorized in the substantive event section, now it had a separate section that said at least twice any special parole term authorized by the substantive section.

This indicates that Congress felt that the imprisonment and fine specification was not adequate to bring in special parole.

QUESTION: But 845 is a substantive offense, wasn't it?

MR. BARRETT: Yes, but I'm not certain that that really makes much distinction--difference in that the key similarity between 845 and 846 is, they both use reference. That, I think, is what's key to the analysis that we've

offered, and I think that the question of substantive and conspiratorial distinction is not as important as the fact that both of these crimes are structured--both these sections are structured identically. They both use reference and--

QUESTION: Isn't there this difference, that in 845 they were not merely incorporating by reference, but they were changing what was incorporated, namely, they're authorizing twice the special parole terms that the statute would authorize?

MR. BARRETT: I don't think--

QUESTION: So they had to refer to it specifically.

Do I not correctly understand that, that 845--I said that when you sell to a young person, why, you get twice as long a special parole term. So how could they have done it without putting--

MR. BARRETT: Well, the statute has provided, Section 845 has provided--would very well have--easily have been interpreted as twice the special parole because of the fact that it originally provided for a term of imprisonment or fine or both up to twice that authorized. As that provided, if they were going to double the special parole term, if you're going to assume that the imprisonment clause of Section--I'm sorry.

QUESTION: I'm a little puzzled by it anyway,

because I didn't think there was a maximum limit on the special parole term anyway.

MR. BARRETT: That's right.

QUESTION: So one sort of--I wonder what they really--what that really means is that the minimum special parole term should be twice as long?

MR. BARRETT: There is a mandatory minimum.

QUESTION: Otherwise that doesn't make any sense.

MR. BARRETT: No, there is a mandatory minimum of special parole.

QUESTION: So it doesn't--isn't the effect of this to double the mandatory minimum?

MR. BARRETT: Yes. But--the effect of that would automatically occur if you doubled the punishment. In other words--

QUESTION: I'm trying to remember, is there--in the substantive offenses, is there a mandatory minimum term of imprisonment?

MR. BARRETT: Yes. A mandatory minimum term of imprisonment, no.

QUESTION: Well, then--then you did have to deal separately with the special parole term.

MR. BARRETT: Not really, if you said that a person who is subject--who had violated the distribution to minors section was subject to twice the punishment applicable

in the object offense.

QUESTION: But in the object offense, there's no ceiling anyway, was there? Was there a maximum--is there a maximum--

MR. BARRETT: But twice the punishment--in other words, when you say twice the punishment--when you simply say twice the punishment of imprisonment, what you mean in the context of this statute is that the person is subject to ten years, twice means he's subject to twenty years. But there's no requirement as far as the minimum. He may still get the same minimum.

When you say twice as far as special parole, however, because there's a mandatory minimum and no maximum, what you mean is twice the mandatory minimum, and still no maximum.

QUESTION: It would seem to me in drafting, there would be more occasion to spell it out in 845 than there is in 846. I'm not saying you're necessarily wrong, but--

MR. BARRETT: Yes, I understand the point. I think that the same point--

QUESTION: Let me ask you another related question, because the text--the entire text of the statute isn't in front of me. At least, I can't find it.

In the term of imprisonment under the substantive offense, there is a mandatory--is there a mandatory minimum?

MR. BARRETT: No.

QUESTION: There is not? I see, okay.

MR. BARRETT: Okay. I wanted to add just one other point to your earlier question. And that is, that if you look at the language of Section 846 which again is at page 3 of our brief, it speaks of a fine or imprisonment or both which may not exceed the maximum punishment prescribed for the offense.

Now, maximum punishment prescribed for the offense really doesn't mean anything when you're talking about special parole. It only means something when you're talking about fine or imprisonment, because those terms are established as maximum terms.

In other words, if Congress was going about--when it changed Section 845, if it was making the change that--for artistic reasons, let's say, so that it's clearer that what they're talking about is doubling--mandatorily doubling the special parole, and permissibly doubling the authorized term of imprisonment, they should have made a similar change in attempt and conspiracy because really, on its face, speaking of a maximum punishment, it does not make very much sense in Section 846 when you're referring to special parole, which of course has no maximum punishment.

QUESTION: Well, then--perhaps you explained it and I just didn't get it--what's the meaning of Section 845

which imposes on the sentencing judge the duty of imposing a special parole term of at least twice the term authorized by Section 841(b)? And if there is no maximum, what is twice that?

MR. BARRETT: Twice the mandatory minimum. In other words, special parole is always provided as a mandatory minimum term; always. In other words, the statute always says that you shall receive at least two years or three years or four years' special parole. It never specifies the maximum term.

In other words, any term from two years to life is always a legal--or in fact is a mandated special parole term.

QUESTION: Special parole?

MR. BARRETT: Right.

QUESTION: And so it's twice the minimum--

MR. BARRETT: Right.

QUESTION: --under 845?

MR. BARRETT: Right.

QUESTION: I see.

QUESTION: Let me ask another question--

MR. BARRETT: Sure.

QUESTION: --just to help me sort this thing out. In either the substantive offense or the conspiracy offense, in your view, could a judge put a first offender

on parole right away, on probation, right away?

MR. BARRETT: Yes, I believe so.

QUESTION: In other words, that authority would be encompassed under 846, then, in the words--that would be just generally included in the words--

MR. BARRETT: I would think--

QUESTION: --imprisonment or fine; that would include probation?

MR. BARRETT: Yes.

QUESTION: Why would it include probation but not parole, special parole?

MR. BARRETT: Because I think that in 18 USC 51, the probation statute, provides that a term of imprisonment may be probated. But parole is a different thing than probation.

And my--special--there are really three concepts here: There's probation, there's parole, and there's special parole. And they really are very, very different.

QUESTION: And special parole is peculiar to this legislation, is it not?

MR. BARRETT: Yes, and unique to this legislation. It's never been found--we didn't find it in any other state legislation, any other Federal legislation. And I think that perhaps you should be thinking in terms--even though it's called special parole, you could call it anything you

want. It really does not have that close a relationship to parole.

Parole served as part of the prison sentence. You have a fixed term of imprisonment; you serve part in jail and part on parole. Special parole waits until that parole term is finished.

Now, in fact, Mr. Bifulco right now is serving parole. He's been released from jail; he's on parole. Once he successfully completes his parole term--in other words, he max's out on the original prison term. Then he has to start the five years' special parole on top of it. There's no concurrence.

QUESTION: Could you call it imprisonment?

MR. BARRETT: You could call it potential imprisonment, in that if it's revoked, it's imprisonment. But you can't call it imprisonment; no, certainly not. I was being facetious. Certainly not.

It's certainly a very distinct punishment from imprisonment, because of the fact of the way it is served; because of the fact that, unlike imprisonment which, in only one case has a mandatory minimum, special parole always has a mandatory minimum; and because it's subject to a whole different kind of revocation. It's quite a distinct punishment.

QUESTION: What's the difference between special

parole and regular parole?

MR. BARRETT: Okay. There is a five-year term of imprisonment, and the Parole Board, initially they look at the parole guidelines and they say that--how much time you have to spend in jail of that five years, and when your consideration for parole is.

Let's say the Parole Board says, "You're going to have to serve three years in jail, and after that you're eligible for parole."

QUESTION: I know it's the length of the term. What I'm talking about, does he report to his parole officer differently, or something?

MR. BARRETT: Oh, I see what you mean. The statute isn't specific. My understanding is that, yes, you are under the control of the parole officers just as you would be--

QUESTION: Well, that's what I want to know: What's the difference? Do you report twice a week instead of once a week?

MR. BARRETT: I don't--well, it's not specified in the statute. My understanding is that that's subject to the way the parole officer wants to set it up. I don't think that in that sense there's a distinction in terms of what you have to do to serve. In other words, I think special--

QUESTION: So the word "special" means what?

MR. BARRETT: "Special" means different, or extra.

I was speaking about the legislative history. And I think I covered, really, most of the points that I wanted to.

The main point that I wanted to speak of, of course, was that section 845 made this change, and 846 did not make this change. And I think that that indicates Congress' intentions.

And I think that in fact if you look at H.R. 18583, which was the bill that was enacted by Congress, the intent of Congress with respect to these two sections is very very clear, in that that bill they amended the parole--in the parole revocation section, there is a reference--prior to H.R. 18583, there's a reference to special parole imposed under this Act.

Now in conjunction with changing 845 by adding the second special parole clause, Congress changed the term "imposed under this Act" to "special parole imposed under Section 841 or 845." No mention of Section 846 there.

So 845 is included, and 846 is excluded, in terms of this particular reference. Now that's in Section 841(c), which is at page 3 of our brief.

We feel that in light of Congress' activity as to other sections, it cannot be maintained that Congress' failure to add special parole is anything but intentional. It was

the very purpose of keeping special parole out of a Section 846 sentence.

If I could try to paraphrase Mr. Justice Frankfurter in the Youngstown Sheet & Tube v. Sawyer case, it's one thing to say that Congress intended special parole to apply to conspiracy, despite not having so specified, where Congress did not address itself to the need for separate special parole authorization; but it's quite impossible when Congress did specifically address itself to the need for specific and special--specific special parole authorization to find in Section 846 the grant of special parole authorization which Congress consciously withheld.

We feel, therefore, that the legislative history teaches the same lesson that the statutory scheme does, and that is that Congress retained Section 845's precise specification of penalties, imprisonment and fine, for the purpose of providing for imprisonment without a special parole term for the crime of conspiracy.

My time is almost up. I just didn't want to say--speak very briefly on the doctrine of lenity. Because we feel that--we feel in this case that the statutory language and legislative materials lead to an inescapable conclusion as to Congress' intent.

But should this Court remain unconvinced and find some merit in the government's position, we feel that

there are nonetheless sound reasons for disposing of this case by excluding special parole from this kind of sentence.

The absence of special parole in Section 846, and Congress' addition of special parole to other sections which were structured like Section 846 provokes, at the very least, some doubt in our favor.

The most that the government can prove, we feel, is that there's ambiguity in this case; that it--it cannot erase the express terms of the statute, or Congress' unwavering retention through all these bills of the expression of imprisonment or fine or both.

And therefore, in accordance with this Court's long preference for the resolution of ambiguity in criminal statutes in favor of lenity, and particularly in favor of--in light of this Court's determination that lenity applies in sentencing cases--

QUESTION: You think that the doctrine of lenity applies with monolithic, uniform sense to drug crimes and all other crimes, or do you think there's a difference?

MR. BARRETT: I don't think there's a difference, Mr. Chief Justice, on the basis of the crimes. But I--

QUESTION: You don't?

MR. BARRETT: No, I don't. I think it's within this Court's discretion. And I would submit that lenity should be used in this case, but in this Court's discretion.

I think, though, that the key to the operation of lenity is not the question of the crime committed, but the question of the ambiguity in the statute. And I think that this statute--I definitely think that the statute is clear. But I think at the very, very least, our points show that there's some ambiguity.

QUESTION: Mr. Barrett, before you sit down, could you tell me this.

It's your view that the special parole term is not authorized at all. Now, the contrary view could either be that it's authorized but not mandated, or that it's mandated. Under the substantive offense, it's mandated.

Now, do you know--in the cases that have gone against you, which view have they taken for that?

MR. BARRETT: I've never seen expressed the view that special parole is anything but mandatory. In other words--

QUESTION: If it applies, it's mandatory.

MR. BARRETT: If it applies, it applies only mandatorily, as with imprisonment; I've never seen any suggestion that it can be in the discretion of the Court.

Thank you very much, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Dalton.

ORAL ARGUMENT OF HARLON L. DALTON, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. DALTON: Mr. Chief Justice, and may it please the Court:

Like petitioner, we began by focusing on the statute itself, and particularly on the statute as a whole, and determined what guidance can be drawn from the structure of the statute.

Sections 841 through 845 of Title XXI define various drug-related substantive offenses, and fix penalties for committing them. Section 846, the attempt and conspiracy section, makes unlawful an attempt or conspiracy to commit one of those substantive offenses. And--however Section 846 does not itself define the conduct which if attempted or planned would constitute an offense; nor does it create its own penalty or sentencing scheme.

Instead, Section 846 looks to the substantive offenses, and takes from them, borrows from them, draws from them, the penalty schemes that are included in those substantive offenses.

Thus, whether one looks at Section 846 as active or passive, as a referencing statute or as a conduit, the language doesn't matter. The reality is that Section 846 derives its meaning, its very meaning, and derives its penalty structure from the substantive offenses; and imposes

the same penalties in the same combinations as would apply to a substantive offense that was the object of a particular conspiracy.

The facts of Section 846 refers to punishment, quote, not to exceed, the maximum punishment set in the substantive offenses, does not detract from this view. True, Congress could have--could have stated that conspiracy sentences must be equal to sentences imposed for substantive offenses. But as a practical matter, the difference between equal to and not to exceed the maximum, the difference doesn't exist.

Those phrases are, as a practical matter, synonymous. Because the Drug Abuse Act does not create fixed sentences, or determinate sentences; rather it fixes maximums, maximum terms of imprisonment, maximum fines, and in the case of special parole, minimum terms--minimum terms.

So that to talk in terms of equality really is to talk a strange language. Because there is no fixed sentence that must be imposed even for substantive offenses.

In other words, if Section 846 sets upper limits, that same statement can be said of the substantive offenses which create upper limits for the imprisonment and fine that can be imposed under them.

Now the legislative history of the Drug Abuse Act we believe underscores this congruence between sustaining

for conspiracy and sentencing for underlying object offenses. The--as mister--well, the predecessor statutes, the statutes that preceded the Drug Abuse Act, all provided for coterminative--for congruence between sentences imposed for conspiracy and sentences imposed for substantive offenses.

In 1969 the Administration introduced a comprehensive bill which was designed to make many changes in existing law, to consolidate existing laws, to change the penalty scheme. However--and indeed, that bill, in everyone of its incarnations, did create a separate section for conspiracy which had not been the case prior to 1970 or '69. But at no point did Congress change the basic congruity between sentencing for conspiracy and substantive offenses.

In fact, in response to your question, Mr. Justice Rehnquist, petitioner in a reply brief, I believe at page 7, concedes that the initial draft, the initial bill that was introduced in Congress in 1969, created punishments for conspiracy that were, quote, identical, quoting from their brief, to sentences that would be imposed for related substantive offenses.

Now, at no point during Congress' consideration of that bill was there any indication that Congress desired to alter that identity between the sentencing identity. Indeed, the spokesperson for the Administration who spoke to the bill both before the concept of [illegible] [illegible]--should

parole was introduced, and after, indicated that the concept of coterminous sentencing was to be retained.

Turning to Section 845--that's the distribution to minors provision of the statute--it's quite correct, as Mr. Justice Rehnquist pointed out, I believe, that Section 845 is a substantive provision. And to that extent it's different in kind than Section 846.

It's also correct, as Mr. Justice Stevens pointed out, that Section 845 is not a simple referencing statute. It changes the nature of what it is that's referenced. It provides for up to twice the imprisonment and fine, and at least twice the special parole. And for that reason, there's some sense that there's greater need for specificity in drafting.

But beyond that, the history of Section 845 is radically different from the history of Section 846. During the course of the passage of the comprehensive bill on route to becoming the Drug Abuse Act, Congress rewrote virtually every word of Section 845. Congress altered its language, and indeed its substance, and during the course of those alterations took the opportunity to effect the conforming changes to which petitioner refers.

Specifically, the first draft of Section 845 specified that the purchaser must be under the age of 18. It specified that the sentence must be a three-year [illegible]

between the ages of the purchaser and seller. In other words, the seller must be at least three years older than the purchaser. That initial draft, they tried to distinguish between narcotics distribution, and other kind--distribution of other kinds of controlled substances.

Most importantly, that initial draft provided for enhanced imprisonment, that is, twice the imprisonment, but did not provide for an enhanced fine.

Now, the second draft of the section, what became Section 845, occurred after the concept of special parole was introduced, after a series of hearings were held in both houses of Congress. That second draft, however, did not plug in the concept of special parole. It tinkered a little bit with that distinction that I mentioned between narcotics and other kinds of drug distribution offenses.

In the third and final draft of the statute, the narcotics/other controlled substances distinction was dropped. The age--of the purchasers must be to come within the statute was raised to 21. The disparity between purchaser and seller was removed. Fines--the fine that could be imposed if distribution were to an adult was enhanced, along with imprisonment. And at that time, Congress effected a conforming change with respect to special parole.

Similarly, the history of the second-offender provisions which petitioner comments on in his brief are

radically different from--is radically different from the history of Section 845.

The second-offender provisions underwent major rewrites by Congress. They were revised not only in terms of their language and contents, but their structure as well. And during the course of those revisions, the conforming change was made in the repeat-offender sections as well.

In contrast, Section 846, as it appears in Title XXI today, reads the same, line for line, word for word, comma for comma, as the Section that was introduced in the initial government bill back in 1969.

There was an abortive effort at some point to change the word "attempt" to endeavor. But that was the single, the sole, effort to change even one jot or tittle of that section.

As a result Congress--the conspiracy and attempt section became law without Congress ever really focusing on its precise language.

Nevertheless, there can be no question of the intent of Congress to maintain the traditional congruence, coterminality, between sentences for conspiracy and underlying substantive offenses.

I've already discussed the structure, the very structure of the statute, and the legislative history. In addition, simple logic dictates that conclusion. It's inconceivable Congress considered special parole a needed and appropriate

penalty or response to substantive offenses, which can in fact involve isolated transactions by single individuals, and yet discarded that same remedy for those who act in concert to achieve the same end.

Congress fashioned the remedy of special parole in order to impose post-incarceration--in order to maintain control over the post-incarceration conduct of persons who engage in drug distribution, in order to serve as a deterrent to repetition of criminal misconduct.

And it defies commonsense to assume or to believe or to conclude, absent some evidence, that Congress sought to achieve those objectives only with reference to completed drug distribution offenses.

Indeed, petitioner has cited no reason in policy, no reason in logic, why Congress would have wanted to, would have purposed to propose to treat conspiracy differently than substantive offenses.

Now petitioner suggested, and I'm not sure that I understand the argument, but if one looks at the pattern of substantive offenses to which Congress has assigned the penalty of special parole, one can conclude that the Congress could not have intended to assign that same penalty to conspiracy. And I think this is a non sequitur, first off.

The question isn't whether, given the fact that Congress has assigned special parole to one substantive offense,

it should, or logically, would have assigned it to another substantive offense. The question is whether, given the fact that Congress has assigned special parole to a particular substantive offense, it intended for conspiracy to engage in that precise offense to be similarly punished.

But in any event there is a clear, logical, sensible pattern to the manner in which Congress assigned special parole, even among the substantive offenses. Of the nine offenses defined in Section 841 through 844, the four most serious--most serious, that is, in terms--in the sense that they involve trafficking in narcotics and other easily abusable drugs--those four most serious offenses mandate the imposition of a special parole term.

Now, it's true that the continuing criminal enterprise section, which is Section 848, does not impose a special parole term. But that section has a ten-year mandatory minimum term of imprisonment. It authorizes a maximum of life imprisonment. It authorizes fines up to a $100,000. And it provides for forfeiture of profits from any continuing criminal enterprise, and of any property that is somehow associated with the enterprise.

And so in view of that clearly severe set of penalties, the fact that special parole is not among them is of very little moment.

Petitioner points to two other sections, alluded to them in his argument today, that petitioner deems equally serious to the ones for which Congress imposed special parole and yet which don't. One of those Sections, Section 841(d), I believe, was not even part of the Drug Abuse Act as passed in 1970. It was added less than two years ago--less than 15 months ago. And it--by the way, it penalizes possession of piperdine with intent to manufacture phencyclidine, which is, I guess, more commonly known as "angel dust," that Section, 841(d), was part of an experimental statute, as I say passed less than two years ago, that was designed to experiment with ways to deter abuses of piperdine. And the statute includes both criminal and non-criminal ways of trying to deal with this problem.

And that statute, including 841(d) on which petitioner relies, will expire in 1981 by its own terms, absent further implementing legislation.

The other section on which petitioner relies to suggest that there's little rhyme or reason to the pattern in which Congress imposed special parole, is Section 843, which again is different in kind than the sections to which special parole applies. It's a reporting statute. It has to do with parties who are licensed, or authorized, to dispense narcotic--drugs, rather, and do so in a fraudulent

fashion.

And Congress could quite logically choose to treat kinds of offense differently than the kind of offenses with which the Court is concerned.

QUESTION: Mr. Dalton?

MR. DALTON: Yes?

QUESTION: Do you agree that the--in a conspiracy case, the special parole term must be imposed?

MR. DALTON: Yes. Yes. I am not sure that that's the way that we framed our question would necessarily--the question presented in our petition would necessarily indicate that.

QUESTION: That's right.

MR. DALTON: But yes, we do.

QUESTION: And do you agree with your brother that that's been the view of every court that has agreed with your position?

MR. DALTON: Yes, it has; all five of the six circuits that have agreed with our position.

QUESTION: And your position has been unanimously endorsed in the circuits, hasn't it?

MR. DALTON: With the exception of the--

QUESTION: Of the districts?

MR. DALTON: No, with the exception--the Third

Circuit, in fact, in that case.

QUESTION: And there's a district court decision--

MR. DALTON: In California.

QUESTION: --in California.

MR. DALTON: Exactly, which did not go to the Ninth Circuit.

QUESTION: And the Ninth Circuit has not ruled on it?

MR. DALTON: That's correct.

In sum, logic and commonsense combine with the structure and the history of the Drug Abuse Act to dictate that special parole must be imposed as part of the sentence for conspiracy whenever that penalty would be imposed for the substantive offense which is the object of the conspiracy.

That's clearly Congress' intent. And this Court can give effect to that intent by concluding that the phrase, "imprisonment and fine or both," is merely illustrative, and does not limit the penalties incorporated by Section 846.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:50 o'clock, a.m., the case in the above-entitled matter was submitted.)