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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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EDWARDS ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96–8732. Argued February 23, 1998– Decided April 28, 1998

At petitioners' trial under 21 U. S. C. §§841 and 846 for "conspir[ing]" to "possess with intent to . . . distribute [mixtures containing two] controlled substance[s]," namely, cocaine and cocaine base (*i.e.*, "crack"), the jury was instructed that the Government must prove that the conspiracy involved measurable amounts of "cocaine *or* cocaine base." (Emphasis added.) The jury returned a general verdict of guilty, and the District Judge imposed sentences based on his finding that each petitioner's illegal conduct involved *both* cocaine *and* crack. Petitioners argued (for the first time) in the Seventh Circuit that their sentences were unlawful insofar as they were based upon crack, because the word "or" in the jury instruction meant that the judge must assume that the conspiracy involved only cocaine, which is treated more leniently than crack by United States Sentencing Guidelines §2D1.1(c). However, the court held that the judge need not assume that only cocaine was involved, pointing out that, because the Guidelines require the sentencing judge, not the jury, to determine both the kind and the amount of the drugs at issue in a drug conspiracy, the jury's belief about which drugs were involved– cocaine, crack, or both– was beside the point.

Held: Because the Guidelines instruct *the judge* in a case like this to determine both the amount and kind of controlled substances for which a defendant should be held accountable, and then to impose a sentence that varies depending upon those determinations, see, *e.g.*, *Witte* v. *United States*, 515 U. S. 389, it is the judge who is required to determine whether the "controlled substances" at issue– and how much of them– consisted of cocaine, crack, or both. That is what the judge did in this case, and the jury's beliefs about the conspiracy are irrelevant. This Court need not, and does not, consider the merits of

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petitioners' claims that the drug statutes and the Constitution required the judge to assume that *the jury* convicted them of a conspiracy involving *only* cocaine. Even if that were so, it would make no difference here. The Guidelines instruct the judge to base a drug-conspiracy offender's sentence on his "relevant conduct," §1B1.3, which includes *both* conduct that constitutes the "offense of conviction," §1B1.3(a)(1), *and* conduct that is "part of the same course of conduct or common scheme or plan as the offense of conviction," 1B1.3(a)(2). Thus, the judge below would have had to determine the total amount of drugs, whether they consisted of cocaine, crack, or both, and the total amount of each– regardless of whether he believed that petitioners' crack-related conduct was part of the "offense of conviction" or "part of the same course of conduct, or common scheme or plan." The Guidelines sentencing range– on either belief– is identical. Petitioners' statutory and constitutional claims could make a difference if they could argue that their sentences exceeded the statutory maximum for a cocaine-only conspiracy, or that their crack-related activities did *not* constitute part of the "same course of conduct," etc., but the record indicates that such arguments could not succeed. Their argument, made for the first time on appeal, that the judge *might* have made different factual findings had he known that the law required him to assume the jury had found a cocaine-only conspiracy is unpersuasive. Pp. 2–5.

105 F. 3d 1179, affirmed.

BREYER, J., delivered the opinion for a unanimous Court.