ORIGINAL

In the

Supreme Court of the United States

MICHAEL M. BUSIC,

PETITIONER,

V.

UNITED STATES,

RESPONDENT,

No. 78-6020

ANTHONY LaROCCA., JR.,

PETITIONER,

V.

UNITED STATES,

RESPONDENT.

No. 78-6029

Washington, D. C.
February 27, 1980

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MICHAEL M. BUSIC, Petitioner, v. UNITED STATES, Respondent.	No. 78-6020
ANTHONY LaROCCA., JR., Petitioner, v. UNITED STATES, Respondent.	No. 78-6029

Washington, D. C.,

Wednesday, February 27, 1980.

The above-entitled matters came on for oral argument at 11:41 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:

GERALD GOLDMAN, ESQ., Hughes, Hubbard & Reed, 1660 L Street, N. W., Washington, D. C. 20036; on behalf of Petitioner LaRocca

SAMUEL J. REICH, ESQ., Gefsky, Reich and Reich, 1321 Frick Building, Pittsburgh, Pennsylvania 15219; on behalf of Petitioner Busic

MARK I. LEVY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-6020, Busic v. United States, and 78-6029, LaRocca v. United States, consolidated.

Mr. Goldmany, you may proceed whenever you are ready.

ORAL ARGUMENT OF GERALD GOLDMAN, ESQ.,

ON BEHALF OF THE PETITIONER, LaROCCA

MR. GOLDMAN: Thank you, Mr. Chief Justice, and may it please the Court:

Petitioner Anthony LaRocca was convicted and sentenced consecutively under the enhanced penalty provisions of two federal statutes for the identical use of a firearm. Two counts allege that he had assaulted federal officers with a pistol in violation of section 111 of Title 18, while another count charged that he used this same pistol to commit these same felonies in violation of section 924(c)(1). Petitioner challenges the section 924(c) conviction and sentence.

In punishing assaults on federal officers, section 111 has long provided an augmented penalty if a firearm is used to accomplish the assault. The issue presented here is this: When Congress adopted section 924(c) in 1968 to provide an enhanced penalty generally for the use of a firearm in the commission of a federal felony,

did it intend to duplicate the coverage of section 111.

Frankly, it is surprising that it is necessary to bring this issue to this Court. Indeed, adopting petitioner's construction of the statute, the Justice Department in 1971 advised all U.S. Attorneys not to prosecute defendants under section 924(c) where one of the preexisting enhanced penalty statutes already applied.

QUESTION: Is that a matter of policy on the part of the department?

MR. GOLDMAN: I believe the department was acting on the basis of the very principles of interpretation that guided this Court to come to the same exact conclusion in Simpson v. United States, in particular the rule on specificity that calls for a more specific criminal statute to govern to the exclusion of a more general statute. And in addition in the following year, 1972, in a letter to the U.S. Attorney for Baltimore, the department again reiterated the same position and also said we adopt the statement of Rep. Poff as government policy.

Now, Rep. Poff's statement was precisely on point. He said -- his proposal was not intended to apply to the preexisting statutes inasmuch as they already serve to deter the use of firearms.

Now, the government, of course, could change its views on a question like this, but not in this case.

QUESTION: Mr. Goldman, would you also contend that if LaRocca had not used the gun but had merely carried it and therefore there could not have been enhancement under 111, that there could have been enhancement under 924(c)(2)?

MR. GOLDMAN: Well, Mr. Justice Stevens, that is the question that is presented in the companion case, Mr. Busic's case. Mr. Busic was charged under section 924(c)(2).

QUESTION: I understand. But you said, if I understand you correctly, and I want to understand if this is your position, that if there is an alleged violation of a statute which carries an enhancement provision, as 111 does, then 924(c) in its entirety is simply inapplicable.

MR. GOLDMAN: Well, our position -- it suffices for our case merely to call attention to the overlap between the preexisting statutes and section 924(c)(1). Our position is that Simpson in the tools of construction relied on there vitiate a conviction under 924(c)(1) quite clearly. There is then a separate question of whether Simpson and the principles on which it relies also vitiate a conviction under section 924(c)(2). The Court could conclude in the negative with respect to that question, but that would in no way diminish the force of Mr. LaRocca's petition.

QUESTION: Why do you suppose Congress would

deliberately select a lesser enhancement for the felony described in 111 than in other felonies? That is your position, isn't it?

MR. GOLDMAN: Well, our position is that the pre-existing enhanced penalty statutes established an array of punishments, some more, some less than section 924(c) in that in enacting 924(c) Congress chose not to deal with how to reconcile these provisions. Congress chose rather to extend coverage to felonies that were not already subject to an augmented penalty if a firearm was used. This is precisely what Rep. Poff stated. Furthermore --

QUESTION: If you take his statement literally, then even if there is a gun being used, you couldn't even use 924(c)(2) -- I mean a gun is being carried but not used.

MR. GOLDMAN: Yes, I think his statement is subject to that interpretation. But at a minimum he must have meant that if for instance section 111 applies, then his proposal was not intended to duplicate that coverage.

QUESTION: Well, the minimum, of course, would be that if the enhancement provision of 111 applies, there shall be no other enhancement. That would be the real minimum. Now, you say that is not right, I know, but that is also a permissible reading.

MR. GOLDMAN: Our minimum position is that if

section 111 applies --

QUESTION: I understand.

MR. GOLDMAN: -- 924(c) does not apply.

QUESTION: I'm saying the minimum permissible reading of what Congressman Poff said was that if the enhancement provision of 111 applies, there shall be no other enhancement. One could also read his statement that way.

MR. GOLDMAN: One could read his statement -- the precise words he used were as follows: "My proposal is not intended to apply to sections 111, 112, 113 of Title 18, which already define the penalties for the use of a firearm. In our case, precisely involves the use of a firearm, not the carrying but the use.

Furthermore, this statement is entitled I believe to great weight. It was expressly made for the sake of legislative history at the time the amendment was introduced. Furthermore, it went uncontradicted except for Senator Dominick whose own amendment fails of enactment. No one suggested a different interaction to govern among these provisions.

QUESTION: That is not surprising on the floor debates, is it?

MR. GOLDMAN: This was the only source, Mr. Chief Justice, of legislative history. Any Congressman who wished to determine the scope of this provision had to

look only to Rep. Poff's statement.

QUESTION: He would look first, I would think, to the statute itself, wouldn't he?

MR. GOLDMAN: Yes, he would but he would also I presume look at the discussion when the amendment was introduced.

QUESTION: If there were ambiguity or uncertainty as to what it meant --

MR. GOLDMAN: Well, there is no question that there is ambiguity in this statute. That has to be the necessary conclusion from this Court's decision in Simpson. At the very least, the parties agree that Simpson holds that 924(c) does not apply to a violation of an enhancement provision as in the bank robbery statute or as in section 111. To that extent, it is agreed that 924(c) has exceptions. That is established by Simpson.

Now, what seems very convincing to us is that the Justice Department itself, when it first analyzed this statute, focused exactly on Rep. Poff's statement and said we adopt this as official policy. At the very, very least that must indicate an ambiguity in this situation, that under the rule of lenity must be resolved in the defendant's favor.

That is not all that we have here. We also have the principle that calls for a more specific criminal

statute to govern where two statutes address the same concern.

The Court has already analyzed these various considerations and weighed them carefully and come to a conclusion. It did that in Simpson v. United States. In Simpson, the petitioner attacks sentences under the enhancement provisions of both the bank robbery statute and section 924(c). But contrary to the suggestion that the government is trying to make, that Simpson merely forbids double enhancement, the petitioners there weren't arguing simply against double enhancement. They maintained instead that 924(c) does not apply at all where its purpose is already served by a preexisting statute that is designed to deter the use of firearms. Accordingly, those petitioners asked to have this section 924(c) convictions vacated, even though the heaviest sentences they received had been imposed under the enhancement paragraph of the bank robbery statute. And the court responded by concluding -- and here I would like to quote -- "Congress cannot be said to have authorized the imposition of the additional penalty of section 924(c) for commission of bank robbery with firearms already subject to enhanced punishment." In fact, the court went beyond that. The court specifically endorsed the Justice Department's original interpretation of this provision.

Furthermore, the reasoning of this Court in Simpson leaves no room for doubt about the true import of that decision. The Court there found the legislative history instructive not merely because it indicated a congressional aversion to cumulative punishment, but because it underlined the limited scope of the provision. The --

QUESTION: Was the 924 conviction vacated in Simpson?

MR. GOLDMAN: Yes, it was, on remand. The Court remanded the case --

QUESTION: How about here, did we order it?

MR. GOLDMAN: No, the Court ordered that case be remanded for further proceedings in accordance with the opinion. The opinion specifically concluded that 924(c) should not apply, and that relief was awarded by the lower courts on remand.

QUESTION: Well, you say we held that there can be no conviction under 924(c) and also 111?

MR. GOLDMAN: Yes, and the reason for that -- the way I would put it is the Court held that there could not be sentences under both provisions because 924(c) did not apply, where the statutes overlapped.

QUESTION: So you think that means that we held that he could not be convicted under -- a defendant could not be convicted under both?

MR. GOLDMAN: Exactly.

QUESTION: Then shouldn't our disposition have been to vacate the sentence under 924(c) instead of sending it back and letting the lower courts take their choice?

MR. GOLDMAN: Well, I don't believe the lower courts really had a choice because the Court instructed that there be further proceedings in accordance with the opinion, and the opinion specifically endorsed the Justice Department's position that 924(c) doesn't apply because of the rule of specificity.

QUESTION: The mandate did not direct that 924(c) be --

MR. GOLDMAN: That is literally so, yes.

QUESTION: But you say Simpson held that the government could not have convicted under 924(c) alone?

MR. GOLDMAN: Yes, that is our position.

QUESTION: You think Simpson held that --

MR. GOLDMAN: Yes.

QUESTION: -- that if you are going to attempt to get enhancement at all in a bank robbery case, you must proceed under 111?

MR. GOLDMAN: That's correct. I'm sorry, in an assault case.

QUESTION: In an assault case, yes.

MR. GOLDMAN: But the same principle would be

also true for the --

QUESTION: So you have no choice, the government has no choice to proceed under 924 alone?

MR. GOLDMAN: That's correct.

QUESTION: Do you think that position is essential to you to win here?

MR. GOLDMAN: Yes, and we also maintain that the rationale of Simpson permits no other conclusion. The adoption of the Poff amendment said by its author not to apply to preexisting enhancement statutes, and the rejection of the Dominick amendment said by its author to apply to these statutes persuaded the Court that Congress meant to confine 924(c) to felonies that were not already subject to an enhanced penalty if a firearm was used in their commission.

Even more pointedly, the Court's invitation of the rule that dictates that the more specific criminal statute govern leaves no choice about this matter. That principle could only have been invoked to dictate that 924(c) gave way to the bank robbery statute. Logically, there was no other way of invoking that principle.

Now, considerations of stare decisus ought to weigh very heavily in this area. Not only is this a question purely of statutory interpretation, but Congress at this very moment has under active consideration

legislation directly on point.

In proposing bills to recodify Title 18, both the House and the Senate have suggested provisions that would unify and rationalize the entire field of enhanced penalties to deter the use of firearms. Both proposed statutes would bring together in one section all preexisting provisions and furthermore would propose penalties much more in line with section 111 than with section 924(c).

QUESTION: Are these part of the Criminal Code revision or independent of the Criminal Code revision?

MR. GOLDMAN: These are the pending bills to recodify, yes.

QUESTION: The package?

MR. GOLDMAN: Yes.

QUESTION: Do you make anything of Congressman Poff's vote against the conference report in your interpretation of the legislative history?

MR. GOLDMAN: I don't believe that that vote undercuts his initial explanation in any way, no.

QUESTION: And his explanation of why he voted against it?

MR. GOLDMAN: That's correct. I don't believe there is any ambiguity in his introductory explanation that makes it necessary to look at later events to decipher what he meant. The interesting thing is that the action

actually taken by the conference committee cuts just the other way. It shows that Congress was prepared to have litigation in these circumstances, so there would be no inconsistency in concluding that Congress intended section 111 to govern to the exclusion of 924(c). It is very difficult to make anything of an action taken by the conference committee against us on this point, notwithstanding that Rep. Poff voted against the bill. The fact is that Congress adopted it.

QUESTION: But it seems to me you have to take the bitter with the sweet to a certain extent, don't you? You use Congressman Poff when he is available to help you, but you reject him when he is not on your side.

MR. GOLDMAN: Well, I guess our position is that we don't really see any tension between his introductory statement and his ultimate vote. What Congressman Poff was concerned about was establishing a deterrent to the use of firearms where no deterrent already existed. Where one already existed, he wasn't concerned with the problem. Congress simply didn't choose to duplicate coverage that already existed.

As I say, at the very least, given the fact that the Justice Department agreed with us only less than ten years ago, one has to conclude that there is ambiguity about this matter and if that is true we have to win under

the rule of lenity.

QUESTION: Could I ask you, I suppose they therefore really couldn't in any event proceed under 924 alone, it doesn't describe an offense, does it?

MR. GOLDMAN: I believe the Court held in Simpson that 924(c) does constitute a separate crime.

QUESTION: So that if the government, with respect to some other felony that isn't covered by an enhancement, a non-111 felony, you can just say you violated 924?

MR. GOLDMAN: Yes, I think you could, although 924(c) by its terms contemplates that it will be --

QUESTION: Then you have to go some other felony statute.

MR. GOLDMAN: Yes.

QUESTION: And have to prove a felony under another statute.

QUESTION: You have to prove the commission of that felony before 924 becomes operative.

MR. GOLDMAN: That's correct, yes.

QUESTION: Yes.

MR. GOLDMAN: It is unclear -- I'm not sure the government would have to actually charge the other felony, but, yes, it would most certainly have to prove it.

QUESTION: But it is an element of the offense

anyway.

MR. GOLDMAN: That's correct.

QUESTION: Yes. So 924 itself doesn't describe separate effects.

MR. GOLDMAN: Well, I believe the --

QUESTION: There is an underlying offense that is described by another statute.

MR. GOLDMAN: That's true. There is a lesser included offense which is the other felony.

MR. CHIEF JUSTICE BURGER: Mr. Goldman, we will resume there at 1:00 o'clock, and I will have a question for you then.

MR. GOLDMAN: Thank you, Mr. Chief Justice.

(Whereupon, at 12:00 o'clock meridian, the Court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION -- 1:00 O'CLOCK P.M.

MR. CHIEF JUSTICE BURGER: Mr. Reich, you may proceed whenever you are ready.

ORAL ARGUMENT OF SAMUEL J. REICH, ESQ.,

ON BEHALF OF PETITIONER BUSIC

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

I represent Michael Busic. Under the evidence while the assaults were taking place, Mr. Busic carried a gun in his belt. This weapon was never drawn, never pointed or fired. By his conduct, he didn't endanger any lives. The evidence shows that while most of these incidents were taking place, Mr. Busic had stopped in a drug store to buy a pack of cigarettes. When he came out and he was confronted by the authorities, he surrendered without resistance.

As to the assault charges, the actual assaults were --

QUESTION: I take it that was in the fase of greater fire power?

MR. REICH: That was disputed, Your Honor. He certainly surrendered himself and the evidence is clear that he never rendered any active assistance during the assaults.

QUESTION: And he made some sort of a statement

to that effect?

MR. REICH: Yes. He said remember, I never drew my weapon or never fired my weapon. He wasn't familiar with the Pinkerton doctrine, but that is what he said.

QUESTION: Mr. Reich, you don't contest the sufficiency of the evidence to prove that he aided and abetted in the other offense, do you?

MR. REICH: We did in the lower court, yes, Your Honor.

QUESTION: But that is not before us?

MR. REICH: That is not before you.

QUESTION: So we must assume that he did aid and abet.

MR. REICH: Yes. Yes. As to the assault charges, Busic was indicted for aiding and abetting LaRocca's use of the firearm which LaRocca was using during the assaults. As to the count under 924(c), Busic was charged with carrying the weapon he had in his gunbelt, although he could have been charged under the indictment with using LaRocca's firearm under part one of section 924(c).

QUESTION: But he was also properly on the evidence convicted of carrying a firearm unlawfully, wasn't he? Didn't he have a felony record?

MR. REICH: Yes, he did have a felony record and he was convicted -- he was indicted with every charge

conceivable for possession of every weapon in sight. Under the 924(c) count, there is no question that he carried a gun in his belt.

QUESTION: And it was carried unlawfully?

MR. REICH: And it was carried unlawfully. That is also correct, Your Honor.

Under section 924(c), one can violate the statute in one of two ways: Alternatively by using or by carrying the firearm during the commission of the underlying federal felony. A reading of the statutes indicates that the unit of prosecution is the underlying federal felony and not the number of weapons involved, and as we see it this becomes very critical in showing the similarity between Busic's case and that of his co-defendant LaRocca.

QUESTION: Do you think it makes no difference that one of these fellows sprayed the parking lot with a machine gun and the other one didn't use his gun? It has nothing to do with this case, I suppose.

MR. REICH: No, it does not have anything to do with this case, although under the evidence and under the law that was applicable, which is not disputed in this Court, both could be convicted for their participation in the assault, and that is --

QUESTION: Even thoug one carried and the other used his firearm?

MR. REICH: The point that I am making about section 924(c), Your Honor, is that the possibilities of prosecution are not multiplied because of the number of weapons involved. One is liable under 924(c) either for using or for carrying a firearm, and the important distinction here is that Busic could have been convicted either for using vicariously LaRocca's firearm or carrying his own.

Now, what the Third Circuit has said in this case is that LaRocca, who is the one spraying the parking lot with the bullets, to use the Chief Justice's observation, can be sentenced only once, whereas Busic, who watched and stood by and is only responsible vicariously can be punished twice.

As we read the Simpson case, we read Simpson to establish that a Simpson or a LaRocca-type defendant can be convicted and punished only once, that is for the underlying federal offense, when that offense contains its own enhancement provision, and it is our position that Busic is entitled to identical treatment as LaRocca.

Now, the government assumes in its brief that the Blockburger issues vanish because Busic was charged and sentenced for carrying his own weapon. Even (c)(2) is superimposed on an underlying or on the underlying assault felonies, and different elements are not required as to each. There is an additional element for the 924(c)(2)

violation and that is the carrying of the firearm.

I point out to the Court that under section 111 the basic charge is forcible assault or resistance or impeding a federal officer. There is an enhanced provision if one uses a dangerous or deadly weapon such as a firearm in doing that. But the underlying charge is fully included in the 924(c) violation and therefore if this Court were to hold that our statutory contentions are invalid, the Court would still be required to move on to the Blockburger issues and the double jeopardy issues.

I also point out that these assault incidents involved the same transactions. The unit of prosecution, as I understand it, is the assaults charged in the indictments so there are two transactions, the 924(c) seems to apply to both of them.

QUESTION: Is the term "unit of psesecution" a word of art?

MR. REICH: I believe so, yes, Your Honor. I am using it that way.

QUESTION: I know, but do you derive it from any higher authority than your own use?

MR. REICH: I believe that this is based on my analysis of the cases, although --

QUESTION: How many cases treat it as a term of art?

MR. REICH: No. No. The most recent cases in this Court talk of the Blockburger test, but I believe in Simpson this Court did acknowledge in passing that we were talking about -- the Court was talking about the one transaction which was the bank robbery.

If Busic and LaRocca are to be treated differently, obviously this will result in creating a very easy way to evade the protections which Simpson sought to create against double jeopardy. We point out that using always includes carrying, and using can never be less serious misconduct than carrying, and usually it involves more serious misconduct.

Simpson itself involved two or more weapons. As I understand the facts of Simpson, both of the defendants in that bank brandished their firearms and possessed their firearms.

QUESTION: Does 924(c) involve just firearms?

MR. REICH: 924(c) involves firearms but firearms is broader than guns.

QUESTION: Yes, but deadly weapons, which is a term I believe used in 111, is broader than firearms.

MR. REICH: That is true. And as this Court noted in the Simpson case, the primary purpose of 2113 in that case, and we believe the assault case, was to deal with the use of firearms, handguns and the like.

QUESTION: Well, 111 would include a hatchet or a knife --

MR. REICH: It would include any deadly weapon.

QUESTION: -- and 924 would not.

MR. REICH: Yes, Your Honor. But I believe that the legislative history on that point is similar to the bank robbery statute. Those provisions were included primarily to cover handguns, but to cover anything else. As a matter of fact, there are some cases I believe that hold that you can have a violation of that provision using a shoe and possibly a fist, but primarily it is directed toward the gun.

QUESTION: Well, I suppose both in 924(c) with respect to a firearm or in 111 with respect to the aggravation use of a deadly or dangerous weapon, the use has to be of the firearm or of the weapon as a firearm or as a weapon, I suppose.

MR. REICH: In 924(c), yes.

QUESTION: In other words, a bank robber who used his gun to bang down the door of the bank wouldn't be using -- while he would be using a firearm, he wouldn't be using it as a firearm.

MR. RIECH: I don't believe that the --

QUESTION: Conversely, the cases you have just cited where a person's fist if used as a weapon is a weapon.

MR. REICH: Yes.

QUESTION: But it normally isn't.

MR. REICH: Well, whether it would constitute a deadly weapon or a dangerous weapon would depend on who the person is, but I think your observation is correct, Your Honor.

QUESTION: Luckily, that is one of the few questions that is not involved in this case.

MR. REICH: Yes. There is to be disparate treatment as to Busic and LaRocca because LaRocca used one gun and Busic carried another, the Simpson division can be evaded by selective theories of prosecution. Even in this case there --

QUESTION: There is nothing new or improper about using selective theories, as you put it, of prosecution, is there?

MR. REICH: There is nothing new or novel except when the theories arise under the same statute or under the entirely same set of facts.

QUESTION: Or the same transaction.

MR. REICH: Well, there are a number of transactions where the government could indict the person for tax evasion and bribery and everything that seems to relate without contraverting any constitutional provision. Here we are talking about a situation where the government has

the choice of charging simple assaults and either charging or not charging the enhanced violation by using the dangerous or deadly weapon. They can charge the defendants with using their own weapons or each defendant with using the weapon of the co-defendant, and then when you come to 924(c) you can charge a defendant with use either of his own weapon or his co-defendant's weapon or carry it, one or the other weapon.

If there is a distinction based on the fact that one defendant uses and one defendant carries a firearm or a distinction based on the number of firearms involved, Simpson itself means nothing under the facts of the Simpson case.

QUESTION: I would think you would reas Simpson to say the holding is you cannot have consecutive sentences. You are asking for a much broader reading that says you can't choose which statute to prosecute under even though you impose only one sentence.

MR. REICH: I believe that Simpson held that you cannot have multiple sentences where the two types of statutes are involved. But I also believe that the language of the Simpson case establishes the underlying reasoning that you can't have consecutive sentences because the statute, 924(c) is inapplicable to a felony which already has its own enhancement provision.

QUESTION: You can't even under Simpson argue, you can't be convicted under 924(c) if the underlying felony already has an enhancement provision.

MR. REICH: That is the way I read Simpson, yes, Your Honor.

QUESTION: Which would mean that that is 924, period, all of its sections, none of its sections is applicable.

MR. REICH: 924(c), I don't address myself to the rest of the statute because Rep. Poff was only speaking of 924(c). As I read the Gun Control Act, even though there are different -- well, different statutes were put in there because of different considerations, but as far as 924(c) is concerned --

QUESTION: Well, 924(c), that reasoning would cover both (c)(1) and (c)(2)?

MR. REICH: I believe it must. You see, (1) is not even a separate sentence. (c)(1) is a phrase which is joined by an "or" and the sentence is completed in (c)(2) and I find it difficult to conclude that when Rep. Poff made that statement for legislative history, he was stopping in mid-sentence as to his views regarding the applicability of the statute. He said the statute is not applicable where the underlying felony contains its own enhancement provision. Now, obviously I am not quoting him, I am

paraphrasing him.

QUESTION: But if a person at the time he made out a fraudulent income tax return unlawfully had a gun in his pocket, could he or could he not in your submission be prosecuted both under 924(c0(2) and under the income tax evasion criminal statute?

MR. REICH: In the lower court, we made precisely that observation to the court.

QUESTION: Well, what is the answer?

MR. REICH: My answer is, as I understand the opion, he could if --

QUESTION: Under both?

MR. REICH: Yes. I find that result to be illogical and absurd, but under 924(c) -- we were making the point in the lower court that you have to have more than a conspiracy involved. And if someone is carrying a firearm during a tax conspiracy, an income tax conspiracy, the logic of the government's position in the lower court was that he could be convicted of the tax conspiracy and also the 924(c) violation.

QUESTION: Doesn't the legislative history show pretty clearly that what Congress was concerned about was the use of firearms or weapons as an implement of the particular crime, and it would hardly be an implement if he sat at his desk making a false income tax return.

MR. REICH: That is the argument --

QUESTION: And he had a gun on his desk.

MR. REICH: That is the argument I would make if confronted with the issue.

QUESTION: Isn't that clear from the legislative history?

MR. REICH: In terms of the use of this statute to apply to conspiracies, the legislative history seems to speak very broadly in terms of covering all kinds of federal felonies and we had the same argument come up -- if the person is involved in a continuing drug conspiracy --

QUESTION: Well, aren't you really arguing something that would come from Senator Dominick's amendment had it been adopted? He wanted a broad-scale --

MR. REICH: I think they both did. I think Rep. Poff did. I think where Rep. Poff drew the line is that he did not want to have broad coverage under the act and create double jeopardy problems and that is the way I read the legislative history. I don't think Rep. Poff --

QUESTION: At least he didn't want to have double enhancement.

MR. REICH: He did not want to have double enhancement and I believe that that is clear from his statement. Now, the question that has come up that I feel requires a response is exactly what kind of relief are we

asking for on behalf of the carrier of a different firearm. The ultimate position that this Court might reach, and I think properly so, is that consistent with the Simpson language and Rep. Poff's statement, no carrier can be convicted where there is an underlying felony with an enhancement provision. But that is not necessary to give Busic relief in this case.

All that is necessary to give Busic relief in this case is that the Court conclude that he cannot -- that 924(c) consistent with Simpson is not applicable where the defendant carried a firearm but could have been -- but was subject to enhancement because of use of a firearm, not necessarily the same firearm.

I go back to the language of 924(c) which is alternative and not based on the number of firearms involved, but merely the existence of the underlying federal felony. The crux of the case that I think makes Busic's case identical to LaRocca's case is that Busic was subject to sentence enhancement because of his use of a firearm.

QUESTION: Mr. Reich, supposing LaRocca had not used his firearm, suppose they both just carried them. In your judgment -- but nevertheless the principla part of 111 was violated. Would you say that Busic would be subject to enhancement under (c)(2) or not?

MR. REICH: I would say he would not be, and

that would require the Court to accept the ultimate position which we are arguing that 924(c) has no application whatever where the underlying felony already contains an enhancement --

QUESTION: Even though the reason for enhancement in (c)(2) is not a reason for enhancement of the underlying felony?

MR. REICH: In view of the legislative history, I believe that there is a gap there, but I hasten to point out that in this case, as to Busic and LaRocca, it is not necessary to get to that issue since Busic --

QUESTION: Because you do rely on the fact of enhancement by reason of aiding and abetting a felony where a gun was used?

MR. REICH: Right.

QUESTION: Are you saying that the prosecutor must charge a person either under (c)(1) or (c)(2) and make up his mind, and if he charged them uner (c)(1) you can't be charged under (c)(1)?

MR. REICH: I am saying that he cannot, the prosecutor cannot use 924(c) at all where the underlying felony is one which already subjects that defendant to enhancement.

QUESTION: Well, that is LaRocca's basic argument, isn't it? Isn't that LaRocca's basic argument?

MR. REICH: Yes, but there is a difference between the using and the carrying and I am showing the relationship between the two. The difference is that Busic's sentence could be enhanced because he used LaRocca's firearm, and the statute wouldn't permit multiple punishments if there were ten guns used.

QUESTION: Yes. I see.

MR. REICH: Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Levy.

ORAL ARGUMENT OF MARK I. LEVY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

In June of 1968, the Congress, alarmed by recent publis tragedies and the rising incidence of firearm related crimes, passed the Gun Control Act. Among the principal provisions of that act is section 924(c) which focuses directly on the crime problem by punishing the use and unlawful carrying of firearms in the commission of federal felonies.

By its terms, section 924(c) is applicable to the commission of any federal felony. Nevertheless, the petitioners argue that they fall outside the scope of section 924(c) because the underlying of predicate felony of which they were convicted, assault on federal officers,

provides an enhanced penalty for using a deadly or dangerous weapon to commit the assault.

They contend that the enhancement provision of the predicate felony operates to the absolute exclusion of section 924(c) and that the government is not authorized to prosecute under or the District Court to sentence under section 924(c) whenever the underlying offense contains its own enhancement provision for the use of a dangerous weapon.

In support of their contention, petitioners rely on this Court's decision in Simpson v. United States. They assert first that the holding in Simpson governs the instant case; and, second, that the Court's analysis in Simpson compels the result they urge here.

We submit, however, that the issue in Simpson and the issue in this case are quite different and that neither the holding nor the reasoning of Simpson is controlling here.

The defendants in Simpson had been convicted of armed bank robbery and had been given both an enhanced punishment under the bank robbery statute and the consecutive punishment under section 924(c); thus, the issue in Simpson was whether cumulative sentences for the use of a firearm could be imposed under the enhancement provision of the bank robbery statute and under section 924(c). In

other words, whether the defendant's sentence could be doubly enhanced.

After noting several places in the opinion that this was the issue for decision, the Court held that Congress had not intended to authorize such double enhancement and therefore that the defendant's use of a firearm could not be consecutively punished for the section 924(c) offense and for the aggravated bank robbery.

This holding, the cumulative enhanced punishments for use of a firearm are not permitted by section 924(c), does not dispose of the distinct issue presented in this case, whether section 924(c) is applicable at all where the predicate felony contains an enhancement provision but that provision is not invoked and thus the defendant's sentences is not doubly enhanced.

It is one thing to hold that Congress did not intend that the aggravating circumstances of using a gun be twice punished. It is a far different matter to hold, as petitioners seek here, that Congress intended the penalties provided in section 924(c) to be wholly irrelevant.

QUESTION: I suppose if Simpson had just in so many words said that 924(c) just isn't applicable at all when you are dealing with an underlying felony that has an enhancefent provision, that that sort of language wouldn't be very relevant in this case.

MR. LEVY: It would be relevant. I think that sort of language would exceed the scope of the issue presented in Simpson.

QUESTION: Well, that may be but it would at least reflect the then opinion that --

MR. LEVY: Yes, it would.

QUESTION: And it would have been deciding that case on a very broad ground. It wouldn't have been dicta, it would have been the grounds of decision, had the Court said that.

MR. LEVY: Had the Court said that.

QUESTION: Which I think it didn't.

MR. LEVY: I think that is right, but I don't read Simpson to have said that.

QUESTION: What do you think its reasoning was? How did it arrive at its result? It said Congress didn't intend these consecutive punishments because they understood Mr. Poff in a certain way or not?

MR. LEVY: Well, I think starting a step further back that the Court was confronted with a somewhat unusual issue in Simpson of doubly enhancing the use of a firearm. That is quite uncommon under the federal code, and I think the Court was simply not satisfied that Congress had intended that unusually severe result given the language and legislative history and other factors that were cited by

the Court in Simpson. I don't think the Court in Simpson held that the defendants there couldn't be twice punished because they couldn't be punished at all under 924(c). I do not read the opinion to say that.

QUESTION: You certainly don't agree with your colleague on the other side in that the government couldn't proceed under 924(c) alone where the underlying felony already has an enhancement provision?

MR. LEVY: That's right, I do disagree with that.

QUESTION: You have to.

MR. LEVY: Absolutely. That is this case.

Beyond the holding, the analysis employed in Simpson also does not require the conclusion that section 924(c) is inapplicable simply because the underlying felony provides an enhancement penalty for use of a dangerous weapon. The Court in Simpson relied on three general considerations: First, that the double enhancement of punishments was not necessary to promote the purpose or the deterrence rationale of section 924(c); second, that the legislative history, and particularly a statement by Congressman Poff on the floor of the House, pointed in the direction of a congressional intent not to allow sentences to be doubly enhanced; and, third, that several canons of statutory construction supported the view that double enhancement was not authorized by section 924(c).

Looking to each of these factors in turn, it can be seen that none of them supports the result urged by the petitioners.

First, the statutory structure and purpose: The penalty provisions of section 924(c) are unique and, having been specifically designed to punish and deter firearms violations, they are fundamentally different both quantitatively and qualitatively from the penalties provided in section 111.

With respect to the length of sentences, section 924(c) specifies an increased punishment for using a firearm of up to ten years for a first offense and up to twenty-five years for a second or subsequent offense. In contrast, section 111 increases the penalty where a dangerous weapon is used by only seven years.

In addition, section 924(c) provides a mandatory minimum sentence of one year for first offenders and two years for second and subsequent offenders. Section 111 provides no mandatory minimum penalty.

Section 924(c) also establishes more severe penalties for recidivists than for first offenders. Section 111, on the other hand, makes no provision for the imposition of increased sentences on recidivists.

Finally, section 924(c) restricts the availability of probation, suspended sentences and concurrent sentences.

In contrast, section 111 provides no such limitations on the discretion of the sentencing judge to exercise leniency.

Petitioners have offered no reason why Congress would have meant section 924(c) to be inapplicable here. In our view, given the differences in penalty structures and given that the Gun Control Act was specifically designed to address the problem of firearms, it seems inconceivable that Congress intended that a defendant who uses a firearm to assault a federal officer would be completely exempt from sentence under section 924(c) and would instead be subject only to the lesser punishment provided in section 111; thus, unlike in Simpson, where the Court concluded that double enhancement was unnecessary to achieve the deterrence rationale of section 924(c), a decision that section 924(c) is wholly inapplicable in the instant case would disregard the special penalties provided in that statute and would frustrate the purposes of the Gun Control Act.

Moreover, again in contrast to Simpson, to hold here that section 924(c) does not apply whenever the predicate felony contains an enhancement provision for the use of a dangerous weapon would leave to several illogical results that are inconsistent with the purposes of the act and that Congress surely did not intend.

The first consequence of such a holding would be

that a defendant who uses a firearm to assault a federal officer would be subject to different and less onerous penalties than one who uses a firearm to commit virtually any other federal offense. Indeed, this result would have the particularly perverse effect of rendering the stiff penalty provisions of section 924(c) inapplicable to the very felonies that Congress had previously singled out for greater, rather than lesser deterrence and punishment. Congress could not rationally have intended section 924(c) to produce such a result.

QUESTION: Mr. Levy, your opposing counsel points to irrational results; you point to irrational results. Do you think it is fair to say that the kind of anomalies and bizarre cases under both constructions more or less balance out?

MR. LEVY: I do not. I don't think our position does produce any anomalous results. First, section 2114, upon which petitioners rely to produce such results, I understand does not have the same sorts of limitations on probations, suspended sentences and concurrent sentences that section 924(c) does. But beyond that, it seems to me that the correct answer to the asserted anomalies is to vest in the prosecutor the discretion in this area, as virtually in all other areas, to select the proper charge in any given case commensurate with the conduct that is

alleged. I think that prosecutorial discretion would eliminate any conceivable anomalies that might otherwise arise.

QUESTION: But you've got some wholly uncontrolled and uninstructed discretion and we all know as a matter of fact that in some areas prosecutors just have the tradition in that prosecutor's office just to overcharge in every case.

MR. LEVY: There are differences in prosecutors but --

QUESTION: Or in different types of cases, and in other areas the tradition is otherwise, and it is wholly unreviewable and uncontrolled, that discretion.

MR. LEVY: That is correct. It is unreviewable and uncontrolled and it is also quite common. There is nothing different about this area.

QUESTION: They are not instructed. I mean there are no agreed upon criteria.

MR. LEVY: Well, within the executive branch in terms of an administrative criteria, there are guidelines that are used in some areas to control prosecutors in U.S. Attorneys offices. I agree that those are not subject to review by a court.

QUESTION: Certainly the executive branch is not alone if there are anomalies because there certainly are wide variances in exercise of sentencing power by federal

judges as well.

MR. LEVY: That is correct. That's correct.

QUESTION: But perhaps nothing that we should be invited to promote or encourage.

MR. LEVY: Well, I think the -- well, first I don't think again that this area is any different than any other, and it seems to me the prosecutorial discretion is at the very least unavoidable and is in fact desirable in order to fit the charge to the particular case. But beyond that I think that the consequences of not allowing such discretion here and imposing the rigid and very narrow view urged by petitioners would be far worse.

Another illogical result of petitioners' construction would be that a defendant who uses a gun to assault a federal officer and one who uses some other dangerous weapon, such as a knife, would both be sentenced under exactly the same penalty provisions of section 111. Such a result would be contrary to the purposes of section 924 to punish with special severity the criminal use of firearms.

Moreover, since the recidivist provisions of section 924 extend only to a second or subsequent conviction under that section, petitioners' interpretation would mean that a defendant who on several occasions uses a firearm to assault federal officers would not be covered by those repeat offender provisions and indeed he would remain

outside those provisions even if he later uses a firearm to commit some other federal offense.

On the other hand, a defendant who twice uses a firearm to commit virtually any other federal felony would be subject to those harsher penalties. The recidivist provisions were designed to punish with heightened severity those people who have shown themselves to be recurrent abusers of firearms, and no reason suggests itself where Congress would have wanted the applicability of the recidivist provisions to depend upon whether the prior armed offense consisted of an assault instead of almost any other federal felony.

Finally, if we are correct, as we contend in our brief and we rely on the argument there, that section 924(c) at all events prohibits the unlawful carrying of a firearm during the commission of an assault on a federal officer, petitioners' construction would mean that the defendant who actually uses the firearm would be subject solely to section 111, while the defendant who only carries but does not use a firearm would be sentenced under the more stringent provisions of section 924(c).

While Congress wanted to punish and deter both the use and the unlawful carrying of firearms, it is impossible to believe that Congress intended to authorize more severe sanctions for unlawfully carrying a firearm

than for its actual use.

In sum, the first consideration relied on in Simpson, the purpose of the statute demonstrates here that section 924(c) is not inapplicable where the predicate felony contains its own enhancement provision. The legislative history of section 924(c), the second factor relied on in Simpson, also demonstrates that an armed assault on a federal officer is punishable under section 924(c). This history makes it plain that Congress wanted to punish and to deter by means of stern measures the criminal use of firearms. Congress recognized that this objective turned on the certainty as well as the severity of punishment. Congressman Poff, in introducing the amendment that ultimately formed the basis for section 924(c), expressly stated that his proposal was stronger than the then pending Casey amendment because it restricted the imposition of concurrent sentences, suspended sentences and probation.

The importance of these --

QUESTION: Do you think your position is consistent with the passage quoted by the Court in Simpson of the statement of Rep. Poff?

MR. LEVY: Yes, I do.

QUESTION: How is that?

MR. LEVY: Well, I think it is consistent if you look at Congressman Poff's statements in their entirety.

We do not believe that the statement relied on by the Court in Simpson, which was an isolated statement, which elicited no discussion and which was not directed to the issue presented in this case, can be given dispositive weight here.

QUESTION: Well, what else did Congressman Poff say that you -- at least for my part, I am waiting to hear what else he said that you think we have overlooked.

MR. LEVY: In introducing his amendment, Congressman Poff emphasized that his proposal was stronger than the Casey amendment which was then pending before the Congress because it had the limitation on the exercise of the trial judge's leniency discretion. Congressman Poff later reiterated the importance of these features of his amendment and they were likewise stressed by other Congressmen who stressed the need to confine sentencing discretion in order to provide a significantly greater deterrent than was generally found in existing law. And in the end, after this discussion, the House adopted the Poff amendment by a vote of 412-to-11.

QUESTION: Well, the Court in Simpson said they wouldn't give dispositive weight to the statement Mr. Poff made but then it went on to the other parts of the legislative history and held or at least it was the Court's opinion there that the other parts of the legislative

history supported that statement of Mr. Poff.

MR. LEVY: Yes. Well, I --

QUESTION: Which is contrary to your submission here.

MR. LEVY: No. If I could finish reciting the general legislative history and Congressman Poff's statements, as I said, Congressman Poff had emphasized several times the importance of the unique provisions of his proposal, and indeed he felt so strongly about these provisions that when the conference committee weakened to some extent his amendment, he eventually voted against the conference report. The conference committee had weakened his proposal by eliminating the restriction on concurrent sentences and limiting to repeat offenders the restrictions on suspended sentences and probation. Congressman Poff found this so significant that he voted against the report. At that time, he said it is not the severity of punishment that deters, it is the certainty of punishment that deters; in the posture that the conference report leaves it, the amendment will not promote certainty of punishment; rather, with respect to the first offense, actual time in jail will be no more certain than it is today.

Given his clear views on the need for certainty of punishment to deter armed felons, it is impossible we think to conclude that Congressman Poff intended that

defendants who use firearms to assault federal officers would be excluded altogether from section 924(c) and instead would be punished solely under the existing enhancement provision of section 111, a provision --

QUESTION: His literal language didn't say that 924(c) was simply inapplicable to offenses under those statutes, didn't he?

MR. LEVY: He said did not apply where the provisions provided a penalty for the use of the dangerous weapon.

QUESTION: "My substitute is not intended to apply to Title 18, section" -- and so on, or two other sections, 2113 and 2114, 2231 or with Chapter 44. "My substitute is simply not intended to apply to felonies under those sections," that is what he said.

MR. LEVY: Well, it is --

QUESTION: Maybe he was speaking carelessly, but that is what he said.

MR. LEVY: That is what he said. We think the construction of those words is best used what the Court held in Simpson, that Congressman Poff was concerned about the double enhancement of penalties where the underlying --

QUESTION: That isn't what the Court said.

MR. LEVY: Excuse me?

QUESTION: That isn't what the Court said.

MR. LEVY: I think that is what --

QUESTION: Maybe you think that is what it held, but that isn't what it said with respect to Mr. Poff's statement and the other parts of the legislative history that supported that statement that my brother Stewart just referred to.

MR. LEVY: What the Court said about the Poff statement after quoting it was that his view was consistent with the deterrent rationale of section 924(c). I read that to mean that it was consistent because there was no need for double enhancement in order to promote the deterrent rationale of the statute.

With respect to the other portion of the legislative history --

QUESTION: You read Mr. Poff's statement, if I understand your argument, as though he had said my substitute is not intended to apply to those portions of sections 111 and 112 which already define the penalties for use of firearms, that portion, which would be the enhancement portion.

MR. LEVY: No, I think even more accurately we would say that 924(c) does not apply when the enhancement provision of those predicate felonies has been invoked.

QUESTION: And the sentence is imposed under them.

MR. LEVY: Exactly.

QUESTION: That is the way you read it, isn't it?

MR. LEVY: Exactly, yes, sir, and we read it in light of the other statements and actions by Congressman Poff in the House.

QUESTION: I submit that that is the same reading as the one I suggested.

MR. LEVY: If it is, then I agree with you.

QUESTION: Because it is the second paragraph that defines the penalty for the use of a firearm in assaulting an officer. You recall, 111 is two paragraphs

MR. LEVY: Yes, sir.

QUESTION: And it is the second paragraph that talks about the use of a deadly weapon in assaulting an officer.

MR. LEVY: That's correct, Mr. Justice Stevens.

QUESTION: Here is what the Court said in Simpson. It said, subsequent events in the Senate and conference committee pertaining to the statute buttress our conclusion that Congress' view of the proper scope of 924(c) was that expressed by Rep. Poff.

MR. LEVY: I think the subsequent even that you have just referred to is the conference committee's rejection of the Dominick amendment which had been passed by the Senate --

QUESTION: Well, I am just suggesting to you that

the Court found other evidence in the legislative history that supported this statement of Mr. Poff.

MR. LEVY: I believe that the other evidence the Court found was the committee's rejection of the Dominick amendment.

QUESTION: But that evidence the Court thought -- maybe erroneously -- the Court thought supported this statement of Mr. Poff.

MR. LEVY: It supported the statement of Congressman Poff in the context of double enhancement. The Dominick amendment had been limited to certain enumerated predicate felonies and we read the committee's rejection of that amendment in favor of the broader Poff proposal to mean that Congress intended that 924(c) would be broadly rather than narrowly applicable. But with particular respect to Simpson, the Dominick amendment had also allowed the double enhancement of penalties in exactly the way that the defendants in Simpson had been punished and --

QUESTION: Well, how, Mr. Levy, do you think the Simpson Court limits the sentencing judge, only that he may if there is an armed bank robbery, that he may sentence the convicted defendant either under the enhancement provision of the bank robbery statute or under 924(c), and he has to choose and that is you think the extent of the Simpson holding?

MR. LEVY: For the aggravated offense.

QUESTION: That is what I mean.

MR. LEVY: Simpson holds that he has to choose between them and that he cannot sentence under both.

QUESTION: But you think it doesn't limit the prosecution in what it can charge?

MR. LEVY: I do not think it limits the prosecution.

QUESTION: It simply imposes that limitation upon a sentencing judge?

MR. LEVY: That's correct. I believe that the Court thought Congress had not authorized the double enhancement punishments, the consecutive sentences under both statutes.

QUESTION: And you think that is the extent of the holding of Simpson or the extent of the limitation it imposes upon a criminal prosecution?

MR. LEVY: I do. I think that is the full extent of the Simpson holding.

QUESTION: Thank you.

MR. LEVY: The Dominick amendment had allowed the double enhancement punishments in the way that the Court in Simpson held Congress had not intended, and the Court in reaching that result had relied on the rejection of the Dominick amendment. That in the Court's view

corroborated their reading of the Poff statement. I don't think that the rejection of the Dominick amendment bears on the issue before the Court in this case, whether the prosecutor has discretion to prosecute under 924(c) in lieu of prosecution under the enhancement provision of section 111.

In addition to the legislative history, the Court in Simpson also relied on several maxims of statutory construction. In this case, those maxims do not lead to the conclusion that section 924(c) is inapplicable whenever the predicate felony provides for an enhanced penalty.

The Court in Simpson first invoked the usual rule of avoiding constitutional decisions where possible. In Simpson, the government had relied on identical evidence to provd violations of sections 924(c) and 2113(d), the aggravated provision of the bank robbery statute, and the defendants had received consecutive sentences under those statutes. In such circumstances, the Court observed that there was the prospect of double jeopardy and following settled practice it thus looked to see whether an interpretation of the statute was fairly possible to avoid the potential constitutional issue. Here, in contrast, no analogous constitutional question is involved because under the Court of Appeals decision, petitioners' sentence cannot be doubly enhanced for the use of a firearm and

hence this canon of construction is not pertinent here.

The Court in Simpson also relied on the rule of lenity. However, this rule is simply an auxiliary aid in discerning the congressional intent and it applies only when the Court has looked to all other available sources for guidance on the meaning of a statute and is still left with the serious ambiguity or uncertainty.

Moreover, the Court has recognized on other occasions that even a criminal statute is not to be so strictly construed that the legislative purpose is defeated. Given the structure, purpose and legislative history of section 924(c), and given the untenable results that would occur under petitioners' construction, the rule of lenity does not bear on the present issue.

Finally, the Court in Simpson referred to the principle that precedence be given to the more specific of the two statutes. However, this principle cannot be determinative, whereas here the language, purpose and history of the act consistently point in the opposite direction. Moreover, we do not understand the Court in Simpson to have held as a general matter that only one criminal statute can apply to a given situation simply because that statute may be considered to be the most specific. Such a proposition would be of dubious soundness and would contradict many long-standing decisions of this

Court and of the courts of appeals that have consistently held to the contrary and have allowed the prosecutor discretion to choose among two or more statutes that apply to a given set of facts.

QUESTION: And what happened on remand in Simpson?

MR. LEVY: In Simpson, on remand the Court of Appeals vacated the 924(c) sentences.

QUESTION: How about the conviction?

MR. LEVY: I do not believe it vacated the conviction.

QUESTION: Did the government take the position there that it could choose which to vacate or not?

MR. LEVY: In Simpson, the more severe penalty had been imposed on a 2113(d) count --

QUESTION: I see.

MR. LEVY: -- and so the issue didn't really arise where the government wanted to proceed with the 924 count.

We think the Court in Simpson relied on the doctrine of specificity only to illustrate that there are instances other than the particular one in Simpson in which two statutes are not simultaneously applicable to a given situation, despite their literal language. In this way, the notion of specificity served to corroborate the

enhancement provision and you want to proceed under 924 -- I suppose you have to, don't you, in order to impose the penalty and you have to impose the penalty, the statute says "shall."

MR. LEVY: That's correct, the statute says "shall."

QUESTION: So if you have a non-enhanced underlying felony, you must proceed under 924?

MR. LEVY: In order to have an enhanced sentence.

QUESTION: Well, you have to have the enhanced sentence.

MR. LEVY: I would think the prosecutor would have discretion not to --

QUESTION: Well, that isn't what the statute says. The statute says that --

MR. LEVY: The statute --

QUESTION: -- the statute says he shall be punished.

MR. LEVY: He shall be punished when he has been convicted. I don't think the statute directs that the prosecutor in every case bring all conceivable --

QUESTION: So you think that it would be quite proper to charge both 924 and the underlying felony in separate counts?

MR. LEVY: Yes, I do, and also I think it would

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MR. LEVY: He shall be punished when he has been convicted. I don't think the statute directs that the prosecutor in every case bring all conceivable --

QUESTION: So you think that it would be quite proper to charge both 924 and the underlying felony in separate counts?

MR. LEVY: Yes, I do, and also I think it would

be quite proper in an appropriate case to charge just the underlying felony and not charge 924(c). There is no requirement that the prosecutor in all cases where it is available to prosecute a defendant to the fullest maximum extent.

QUESTION: But if the charge was enhancement of bank robbery by use of a firearm -- whatever that is, 2113(d), I think -- and also violation of 18 U.S.C. 924(c) and he is convicted of both, you told me a moment ago -- in fact I invited you to tell me -- that you thought Simpson gave the judge an option of sentencing either under the enhancement provision or under 924(c). But in light of the language that my brother White has just called our attention to, I suppose the judge doesn't have an option, he has to sentence him under 924(c), and under Simpson he cannot sentence him then under the enhancement provision, because he says "shall" -- because of that word "shall." Wouldn't that follow?

MR. LEVY: If I understand --

QUESTION: "Shall" is directory language, it takes away any discretion that the judge might otherwise have.

MR. LEVY: Yes, if the defendant were convicted under both.

QUESTION: He was.

MR. LEVY: But the petitioners' argument in this case was not that he was mandatorily sentence on a 924(c) but only that he shouldn't have been prosecuted at all.

QUESTION: In your theory of the case, you would amend it to say the judge has no discretion, he has to do it under 924(c), and when he does he cannot under Simpson do it under 2113(d), isn't that correct?

MR. LEVY: In this case, the issue doesn't arise because the more severe sentence was given under 924(c).

QUESTION: Well, this case wasn't a bank robbery.

QUESTION: And providing that he was charged under 924(c).

QUESTION: That's right, in my hypothetical case he was charged and convicted under both.

QUESTION: Well, he would have to be charged under 924 to even have the 924(c) enhancement.

MR. LEVY: That's right.

QUESTION: So the judge under Simpson must now, in view of the word "shall," give him a sentence under 924(c) --

MR. LEVY: Well, I think the word --

QUESTION: -- and may not under Simpson give him a sentence, any sentence at all under 2113(d), isn't that correct?

MR. LEVY: I'm not sure. I think the word "shall"

in the portion of 924(c) you just quoted says "shall, in addition to the penalty for the predicate offense," and I think the purpose of the word "shall be" --

QUESTION: "Shall be sentenced."

MR. LEVY: -- I think the purpose of the word there "shall" is to make it clear that the penalty for 924(c) was in addition to the penalty for the underlying predicate felony.

QUESTION: It says "shall be sentenced," that is the way the --

MR. LEVY: Yes, it does, Mr. Justice Stewart.

QUESTION: So you are saying that where the underlying felony has an enhancement provision and you are charged in a 924, you would add the 924 enhancement to the unenhanced penalty of the underlying penalty?

MR. LEVY: We think that is a correct interpretation.

QUESTION: Nevertheless, you have to sentence under 924(c).

MR. LEVY: That's correct.

QUESTION: I'm not sure you have it simplified because the word "shall" I think is also in the bank robbery statute, 2113(d). You have held you can't use both, so neither "shall" it seems to me would take precedence over the other.

MR. LEVY: I think that is certainly the effect of the holding in Simpson.

QUESTION: You just have to choose one or the other.

QUESTION: About the only position you haven't suggested is that you couldn't sentence under either.

(Laughter)

MR. LEVY: In sum, we think the structure, purpose and legislative history all establish that section 924(c) is applicable, whereas in this case the predicate felony contains its own enhancement provision.

If the Court has no further questions, we respectfully request that the judgment of the Court of Appeals be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Goldman?

ORAL ARGUMENT OF GERALD GOLDMAN, ESQ.,

ON BEHALF OF PETITIONER LaROCCA--REBUTTAL

MR. GOLDMAN: Yes, Mr. Chief Justice. I will try to be brief.

I think the most recent colloquy very aptly demonstrates that this case cannot be resolved on the basis of an analysis of anomalies. There are anomalies all over the place and it won't do for the government to point to those to justify its position.

QUESTION: Does it suggest to you, Mr. Goldman, that those members of the House who were present when Mr. Poff made his statement -- well, as a question, how many of them do you think understood what he was saying and what its impact was and what the whole problem was?

MR. GOLDMAN: Well, I think he very accurately stated what he meant, we are not addressing the interplay of these provisions --

QUESTION: I was not pointing to what he meant. How many of them do you think understood what you understand his statement to be, let's put it that way?

MR. GOLDMAN: Well, because I think his words accurately conveyed his thoughts. I believe those who listened to him and read what he had to say agreed with that. The fact is that some of these preexisting statutes do read in terms of "shall." That is true of the provision in 211⅓. And under Simpson, it is clear that a prosecution can't lie under 211⅓ and under 924(c). The proper resolution is indeed the one that Rep. Poff said he intended.

QUESTION: Well, the government says you can convict under both and can sentence only under one.

MR. GOLDMAN: But that would be to contradict the "shall" mandatory language in one or the other of these two statutes, both of which provide for mandatory sentencing.

QUESTION: Well, Simpson did that.

MR. GOLDMAN: Well, Simpson was quite clearly correctly decided. At a minimum, Mr. Poff's statement is understood by everybody to forbid cumulative sentencing. In fact, I think it is helpful just to quote for a second from the Justice Department's own U.S. Attorneys Bulletin in 1971. They said then, "A number of federal statutes already include special provisions providing for increased penalties where a firearm is used in the commission of the offense," and they gave some examples, including section 111. "Since the specific provisions of these statutes may take precedence over the general provisions of section 924(c)(1), the specific provision should be used where applicable."

Now, it doesn't assist the government's case to emphasize the deterrent purpose of section 924(c). If it is necessary to accomplish Congress' purpose to apply 924(c), then it is necessary to do that in every single case. And yet even the government concedes that there has been no implied repeal of section 111.

QUESTION: It would be wrong to repeal section 111 anyway, because it covers weapons other than guns.

MR. GOLDMAN: But there isn't even an implied appeal pro tonto for the area of the overlap. The government concedes that.

QUESTION: That's right, they claim that the

alternatives are available, but we've held in Batchelder not long ago that you can have alternative prohibitsion in the same conduct.

MR. GOLDMAN: Yes, that's true, but in Batchelder there was affirmative evidence that Congress intended precisely that result. Moreover, neither statute in Batchelder could be said to be more specific than the other. The present cases are distinguishable on both counts.

QUESTION: Mr. Goldman, the thing is when you look through the whole argument, before this statute was passed Congress had said there shall be specially severe penalties for carrying a gun with certain limited number of offenses and you construe it as saying, well, when they wanted to deter the use of guns they decided to have the penalty for those offenses to be less rather than greater. It just doesn't seem to make much sense.

MR. GOLDMAN: But that is not true across the board. Some of the penalties in the preexisting statutes are more serious.

QUESTION: But where it is true, doesn't it seem a bit more squarely under the congressional purpose to say that Congress intended generally speaking to make more severe punishment applicable to using guns, and you have in effect have said that applies everywhere except where they have already taken care of the gun problem.

MR. GOLDMAN: Well, I can only repeat our position, that the person who sponsored this provision said in what we regard to be absolutely unequivocal language that he did not intend to address the problem of statutes where there is already a deterrent purpose being served. The normaly presumption I would think would be that Congress did not intend to duplicate itself in enacting criminal laws, and yet that is exactly what the government is suggesting here. Now, that happened in Batchelder but there was affirmative evidence to that effect. In this case, the evidence is just the other way.

In addition, there is an additional tool of statutory construction, the interpretive preference for specific criminal laws that applies here, and it did not apply in Batchelder.

One last word: It is our position that when a sentence is vacated, that also serves to vacate the conviction because a judgment of conviction requires a sentence under the federal rules. So that when the sentence was vacated on remand in Simpson, that also served to vacate the convication.

QUESTION: We have made a lot of errors then in our vacation of sentences after the Furman case, where we vacated sentences but left convictions stand.

MR. GOLDMAN: Well, I think the question --

QUESTION: We just didn't know the scope of our -- we didn't know the reach of our orders.

MR. GOLDMAN: Well, I think the question is whether --

QUESTION: Maybe what you say is true in federal cases and not in --

MR. GOLDMAN: And in addition the question is whether resentencing is permissible under any circumstances.

QUESTION: That's right, and it could be a matter of state law.

MR. GOLDMAN: In Simpson, there could be no new sentence.

QUESTION: But it does in a federal case.

MR. GOLDMAN:

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:02 o'clock p.m., the case in the above-entitled matters was submitted.)