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

CAPTION: UNITED STATES, Petitioner v. MIGUEL GONZALES,  
ORLENIS HERNANDEZ-DIAZ AND MARIO PEREZ  
CASE NO: No. 95-1605  
PLACE: Washington, D.C.  
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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
MIGUEL A. ESTRADA, ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF	
EDWARD O. BUSTAMANTE, ESQ.	
On behalf of the Respondents	27

1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 95-1605, United States v. Miguel Gonzalez.  
5 Mr. Estrada.

6 ORAL ARGUMENT OF MIGUEL A. ESTRADA

7 ON BEHALF OF THE PETITIONER

8 MR. ESTRADA: Thank you, Mr. Chief Justice, and  
9 may it please the Court:

10 Section 924(c)(1) of title 18 provides for  
11 mandatory jail sentences for persons who use or carry a  
12 firearm during the commission of certain offenses. The  
13 Tenth Circuit in this case held that a sentence imposed  
14 under section 924(c) by a Federal district court may be  
15 made to run concurrently with a State sentence that the  
16 defendant is already serving. In our view, that is wrong  
17 for three reasons.

18 First and foremost, the language of the statute  
19 expressly forbids the imposition of a concurrent sentence.  
20 Second, we think the court of appeals was wrong to imply a  
21 presumption that that prohibition refers solely to  
22 previously imposed Federal sentences, and finally, we  
23 think the Tenth Circuit was wrong to rely on a passage  
24 from the 1984 Senate committee report that accompanied the  
25 1984 amendments to section 924(c).

1 QUESTION: Mr. Estrada, do you take the position  
2 that section 924(c) requires the separate sentence given  
3 for that violation to run before any other sentence, or  
4 could it be required after any other sentence? Just, what  
5 the statute refers to is running sentences concurrently,  
6 so is it okay to order its service after the expiration of  
7 a State court penalty?

8 MR. ESTRADA: Yes, Justice O'Connor, but let me  
9 back up. Under the sentencing statutes that we have, how  
10 the sentence is administered is usually up to the Bureau  
11 of Prisons.

12 QUESTION: And you don't take the position that  
13 it has to always be first?

14 MR. ESTRADA: No, and in many circumstances it  
15 will not be able to be first.

16 QUESTION: Right. Okay.

17 MR. ESTRADA: In this case, for example, in  
18 order to give effect to both the statutory authority to  
19 make the drug sentences concurrent with the State terms  
20 and to the statutory mandate that the 924 sentence be  
21 consecutive, the Bureau of Prisons would have to run the  
22 Federal drug sentence first, concurrent with the State  
23 sentence, and to run the 924(c) sentence last, consecutive  
24 to both State and Federal sentences.

25 There was an assumption in the court of appeals'

1 view that that would not be so because it gave what we  
2 think was inordinate weight to its view of the Senate  
3 committee report, but that is, in fact, an error.

4 As a matter of the administration of the  
5 sentence, under section 3584(c), I believe, the Bureau of  
6 Prisons would treat the entire term imposed by the Federal  
7 court as a single administrative term that has several  
8 parts, and the part that would correspond to the Federal  
9 drug sentences in this case would be ordered -- would be  
10 served concurrently with the existing State sentences.

11 The part that corresponds to section 924(c), as  
12 required by the plain language of the statute, would be  
13 made consecutive both to Federal sentences and to the  
14 State sentences that are already being served.

15 QUESTION: Do the States have to go along with  
16 that? I suppose this can get very complicated as to which  
17 is first.

18 In the -- Number 1, can the Bureau of Prisons  
19 tell the States when their sentence is going to run in  
20 relation to the Federal sentence?

21 MR. ESTRADA: No.

22 QUESTION: Or is there some control on that  
23 discretion?

24 MR. ESTRADA: The State sentence is independent.  
25 Section 924(c), like all Federal sentencing statutes, in

1 our view speaks solely to a Federal question, how a  
2 Federal court imposing a Federal sentence for a Federal  
3 crime, may order the calculation of the Federal sentence.

4 QUESTION: My question was, does the Bureau of  
5 Prisons have discretion to say in a particular case to the  
6 State, we're going to allow all the Federal sentences to  
7 run first, and then you can do whatever you want, or,  
8 we're going to require that part of our sentence be  
9 served, then part of your sentence served, then the  
10 remaining part of ours, or can -- is there -- does -- is  
11 there some supremacy principle where the Federal  
12 Government can direct this if the States object?

13 MR. ESTRADA: Not in those terms, Justice  
14 Kennedy.

15 There is a case from this Court, Punsey v.  
16 Fessendon, which is at 258 U.S. 254, which encompasses a  
17 principle of primary jurisdiction, which is that each of  
18 the two sovereigns, State and Federal, may lend someone to  
19 the other Government so he may be tried, yet choose not to  
20 relinquish him for the service of the other sovereign  
21 sentence until they choose to, but under the statutes that  
22 we have, we would not take the view that we can break up a  
23 term of imprisonment and to tell the States how to do  
24 anything.

25 QUESTION: Mr. Estrada, I can agree with your --

1 with the Government's position that the statute as written  
2 does not compel the States to make their sentences  
3 nonconcurrent, but why is it not the case that, after  
4 you've had the Federal sentence imposed and then a State  
5 sentence is imposed and the State says, well, we're not  
6 bound by this Federal statute, we will have this run  
7 concurrently with the Federal sentence, why does not the  
8 Federal sentence at that point become in violation of the  
9 statute, because it is now a sentence that is being served  
10 concurrently with another sentence.

11 MR. ESTRADA: That view might have some weight,  
12 Justice Scalia, if all there were to this statute would be  
13 the single clause, nor shall any sentence be made.

14 In context, it seems clear to us that the  
15 statute speaks to the duty of the Federal sentencing court  
16 at the time it imposed the sentences to impose a sentence  
17 based on the facts then existing, as is true with Federal  
18 sentencing statutes generally. Therefore, given that the  
19 Federal court complied with that duty at the time it  
20 imposed sentence, any subsequent court that is not bound  
21 by that duty would be in no breach and, as a result, it  
22 would not be any violation of the statute.

23 Quite simply, if you take the language of the  
24 statute that says, notwithstanding any other provision of  
25 law the court shall not suspend the sentence or do any of

1 these other things that a sentencing court would do, or,  
2 nor shall the sentence be made concurrent, in that context  
3 the natural reading is that the statute speaks to the  
4 duties of the Federal sentencing court as sentencing  
5 statutes usually do at the time sentence is imposed.

6 QUESTION: Then everything's going to turn on  
7 whose sentence is first.

8 QUESTION: That's right.

9 MR. ESTRADA: Excuse me, Justice --

10 QUESTION: Then everything -- then the result is  
11 simply going to turn on whose sentence is first.

12 If they do a State sentence first, then, in  
13 effect, you get the policy carried out when the Federal  
14 sentencing follows it. If the Feds sentence first, in  
15 effect the State can negate the policy by saying  
16 everything we impose is going to run concurrent, including  
17 the premium, yes.

18 MR. ESTRADA: There are two answers to that  
19 question, Justice Souter. The first one is that the  
20 policy of the statute is that the sentence that is imposed  
21 under section 924(c) be made consecutive to any other  
22 sentence that the defendant might be serving. It is  
23 always the case, where a sentence is made consecutive to  
24 another sentence, that any number of circumstances, for  
25 example, might change the first sentence.

1 All that Congress can do is to say this is what  
2 the Federal court may make the sentence at the time of  
3 sentencing, and until and unless Congress chooses to go  
4 forward and to say that this is a national policy, not of  
5 instruction to the Federal courts about how to do their  
6 business, but of instruction also to the State courts  
7 about how to do theirs, the statute simply doesn't speak  
8 to the question.

9 QUESTION: So I guess you would say that the  
10 State could -- let's -- it imposes its sentence first.  
11 The Federal sentence comes up second, and the sentencing  
12 judge says, well, this cannot run concurrent, so it will  
13 be consecutive, and then he goes back to the State court  
14 and says, in light of, you know, what the Feds have done,  
15 please make my State sentence run concurrent with the  
16 Federal sentence, and the State says, that's fine.

17 MR. ESTRADA: If that is --

18 QUESTION: So the State could in effect  
19 frustrate this by --

20 MR. ESTRADA: If that is a course that is  
21 allowed by State law --

22 QUESTION: By State law it would be all right.

23 MR. ESTRADA: -- that is absolutely true,  
24 Justice Scalia, and the same would be true if he went back  
25 to the Governor of the State and told them, I have

1 received an unduly long sentence, would you please  
2 exercise your discretion under State law to make my State  
3 sentence go away, and to thereby remove the predicate for  
4 the consecutive sentence in the Federal court.

5 I'm not saying that that would effectuate the  
6 Federal policy to the fullest possible extent that one  
7 might take such a policy, but under the terms of this  
8 statute as written, it would, because the policy, as we  
9 have explained, is one that speaks to the actions of the  
10 Federal sentencing court when imposing sentence, and it is  
11 that court --

12 QUESTION: Mr. Estrada, that's certainly a  
13 reasonable interpretation, but it's not what the statute  
14 says. Do you think -- you say that's a literal reading,  
15 or are you just making a very sensible construction of the  
16 statute?

17 MR. ESTRADA: Oh, I think both, Justice Stevens.

18 QUESTION: Because it says -- it's a flat  
19 prohibition, as Justice Scalia pointed out.

20 MR. ESTRADA: Well, as I indicated to Justice  
21 Scalia, Justice Stevens, it is our view, and we think it's  
22 right --

23 QUESTION: That it should be read that way.

24 MR. ESTRADA: No. It is our view that, as the  
25 Court has always stated, the clarity of the language turns

1 on context, and if all we had to go to -- through were a  
2 Federal statute that says, anyone who has been sentenced  
3 for a firearms charge shall never have a concurrent  
4 sentence, and there was nothing else to the statute, that  
5 might give rise to the issue of whether that binds the  
6 State courts as well.

7 In the context of a statute that first defines a  
8 crime and then makes a direction to the court not to  
9 suspend the sentence or to impose a concurrent sentence --

10 QUESTION: It doesn't say that. It doesn't say  
11 that. If it said, nor shall a concurrent sentence be  
12 imposed -- it uses -- almost goes out of its way to use  
13 different language.

14 It says, nor shall the term of imprisonment  
15 imposed under this subsection run concurrently with any  
16 other term of imprisonment, and so as soon as the State  
17 decides later to have a concurrent State sentence, this  
18 term, the term imposed under this section, will begin to  
19 run concurrently with the State sentence. I mean,  
20 literally, it --

21 MR. ESTRADA: I have two answers to your  
22 question, Justice Scalia. The first one is that I agree  
23 with your reading in isolation. As I pointed out, that  
24 reading would ignore what comes earlier in the statute,  
25 which gives context to what the subject for who may not

1 impose may be.

2 The second answer is that, as we --

3 QUESTION: Before you go to the second, and I  
4 want you to get there, what is it earlier in the statute  
5 that's inconsistent with that sentence? That's what I  
6 didn't quite follow.

7 MR. ESTRADA: Well, there are two things,  
8 Justice Stevens. In the first place, it is a definition  
9 of a Federal offense, which is something that normally  
10 gives rise to Federal sentencings, and second is --

11 QUESTION: Yes, but that doesn't cut any ice,  
12 because this last sentence clearly contemplates, not  
13 concurrent with State or Federal sentences.

14 MR. ESTRADA: Well, that's right as an  
15 instructions to the Federal court as to what they may  
16 order.

17 QUESTION: Right.

18 MR. ESTRADA: It doesn't really speak to the  
19 State courts as to what --

20 QUESTION: Well, and then the first part of the  
21 sentence it says, we're just talking about a sentence for  
22 Federal crimes. That doesn't undermine the literal  
23 reading of the last sentence.

24 MR. ESTRADA: No, but the -- let me make two  
25 further points.

1 QUESTION: You have another point, I know, yes.  
2 MR. ESTRADA: Well, there was a second part to  
3 my first point --  
4 QUESTION: He keeps thinking of more as we --  
5 (Laughter.)  
6 QUESTION: Yes.  
7 MR. ESTRADA: Excuse me, Justice Scalia. I'm  
8 sorry.  
9 QUESTION: Well, you --  
10 QUESTION: I say, you keep thinking of more  
11 points as --  
12 QUESTION: No, he had a second point based on  
13 the language of the statute --  
14 MR. ESTRADA: Yes.  
15 QUESTION: -- that preceded it.  
16 MR. ESTRADA: And I was getting to that --  
17 QUESTION: Yes.  
18 MR. ESTRADA: -- which is that the language that  
19 Justice Scalia read in isolation, which we concede would  
20 bear that reading, doesn't really have a subject, and it  
21 is part of a sentence that starts with, the court shall  
22 not, and in our view in that context it is most reasonable  
23 to read the court as the Federal court, as the subject  
24 that --  
25 QUESTION: I mean, and --

1 MR. ESTRADA: -- is implicit in the clause that  
2 uses the passive voice.

3 QUESTION: I mean, anyway, most sentencing  
4 statutes are phrased in the passive voice or refer to the  
5 defendant. They don't say, the judge shall do this.

6 MR. ESTRADA: Well, that's right, and most  
7 sentence --

8 QUESTION: And so I take it your point is, like  
9 all other sentencing statutes this is meant to talk about  
10 the obligation of the judge.

11 MR. ESTRADA: Of the general court, that is  
12 correct.

13 QUESTION: But this one is phrased that way.

14 QUESTION: But that cuts the other way because  
15 the first part of the sentence talks about what the court  
16 may do --

17 QUESTION: In the active voice.

18 QUESTION: -- and then the second part is  
19 broader.

20 QUESTION: Just one at a time.

21 QUESTION: Yes -- right.

22 QUESTION: Give him a chance.

23 MR. ESTRADA: Thank you, Mr. Chief Justice.

24 (Laughter.)

25 MR. ESTRADA: I think I've made my first point,

1 which is in essence that you have to infer a subject for  
2 the clause in the passive voice and that, given that the  
3 very same sentence starts with a clause in the active  
4 voice the more reasonable reading, even if it would bear  
5 another, is that the subject is that of the Federal court.

6 I would like to have a --

7 QUESTION: What principle says that you must  
8 infer a subject for a sentence in the passive voice?

9 MR. ESTRADA: Well --

10 QUESTION: Is that a principle of grammar, or  
11 something? If it's in the passive voice it simply means  
12 the term of imprisonment imposed shall not run  
13 concurrently.

14 MR. ESTRADA: Well --

15 QUESTION: You don't need a subject for it.

16 MR. ESTRADA: This case -- excuse me. This  
17 Court has had cases in which similar grammatical  
18 difficulties have been present, Justice Scalia.

19 In the Wilson case, I think, which is cited in  
20 our brief and which also deals with how Federal sentences  
21 are administered, the Court had before it a statute that  
22 also was written in the passive voice and the question  
23 then was, does this give a right or a duty to the  
24 sentencing court or to the BOP, and the Court went into  
25 the context of the statute and to some extent into the

1 history to conclude that it did not give any rights or  
2 duties to the sentencing courts, but it confided the  
3 duties to be carried out under the statute to the Bureau  
4 of Prisons alone, and I think that that's not an unusual  
5 act of statutory interpretation.

6 I don't want to let go of the second point --

7 QUESTION: You still have the second point. The  
8 first point, you're assuming that the words, the term of  
9 imprisonment, are not the subject, aren't you?

10 MR. ESTRADA: Yes. Well, yes.

11 QUESTION: Yes.

12 MR. ESTRADA: I mean, you can put it that way,  
13 but I think --

14 QUESTION: Some grammarians might disagree.

15 MR. ESTRADA: Well, and I think -- and I really  
16 will concede, Justice Stevens, that if all I had were an  
17 independent freestanding sentence that began with the term  
18 of imprisonment, this might raise a different question.

19 To just touch upon our -- or, our second point  
20 is that to the extent the language would bear another  
21 reading, and to the extent that you might read the  
22 language in isolation as speaking to the duties of State  
23 courts imposing sentences under State law, there is a  
24 section that is also part of the Gun Control Act, section  
25 927, which is quoted in our brief, in our reply brief in

1 one of the footnotes, which indicates that it was not --  
2 in footnote 7 at page 10 -- which indicates that it was  
3 not, in fact, Congress' intention to occupy the field of  
4 sentencing for these offenses, and that they did not  
5 intend to divest the State courts of the authority that  
6 they would ordinarily have.

7 QUESTION: It seems to me that your argument  
8 here is really being generous to the defendant. Even if  
9 you conceded the point that Justice Stevens and I have  
10 been pressing, you would not have to concede the point  
11 that therefore the statute does -- therefore the statute  
12 does not take into account State sentences.

13 All you would have to concede is that the  
14 Federal -- or that the statute controls State courts. All  
15 you would have to concede is that the statute continues to  
16 control only Federal sentencing, but when the Federal  
17 sentencing has been made by a State courts action to run  
18 concurrently with the State sentence, the Federal sentence  
19 must be altered to be -- you know, to run sequentially,  
20 or, in other words, the sentence that's imposed has to be  
21 conditional.

22 MR. ESTRADA: I agree that it is not a necessary  
23 component of our case that we show the premise of the  
24 question to be wrong, Justice Scalia. I think in a spirit  
25 of candor we can tell you that we have never read the

1 statute in that way, and we have no intention of applying  
2 it that way.

3 QUESTION: Mr. Estrada, do you know of any  
4 Federal criminal sentencing statute that controls State  
5 courts without saying so? To affect the State's criminal  
6 process one would expect Congress at least to speak with a  
7 clear voice that it is attempting to control what the  
8 State does.

9 MR. ESTRADA: I think that you are right,  
10 Justice Ginsburg, in that to the extent Congress ever  
11 tries to control the processes of State courts applying  
12 State law and tell them what to do, that fairly  
13 interesting and maybe difficult federalism issues would  
14 come up that may call that as one of the principles.

15 One of the interesting facets of this case is  
16 that there is a general statute that governs whether  
17 Federal courts may impose sentences that are concurrent or  
18 consecutive, section 3584, which is quoted both in our  
19 opening brief and in our reply brief.

20 In our reply brief I believe the pertinent part  
21 is quoted at page 4, footnote 2. That is the general  
22 residual Federal statute that deals with the question  
23 whether a Federal court may impose a concurrent sentence  
24 or a consecutive sentence, and the statute that  
25 respondents urge should be applied to them here.

1            Now, the interesting thing about that statute is  
2 that even though it authorizes a concurrent term of  
3 imprisonment, it doesn't speak to State terms of  
4 imprisonment at all, so that if one were to take the rule  
5 of construction being urged for here, the logical  
6 consequence would be that there is no statutory authority  
7 for the imposition of a concurrent term of imprisonment.

8            QUESTION: Mr. Estrada, can I clarify one thing  
9 about this case? What was the State prosecution for? It  
10 wasn't brought under 18 U.S. Code 924(c).

11            MR. ESTRADA: No, it was not. It was a State  
12 offense, I believe, of assault.

13            QUESTION: And the State had already imposed a  
14 sentence for that crime?

15            MR. ESTRADA: Yes, they had.

16            QUESTION: Before the Federal court --

17            MR. ESTRADA: That's correct.

18            QUESTION: -- tried the defendant for this.

19            MR. ESTRADA: That's correct.

20            QUESTION: It had already occurred --

21            MR. ESTRADA: By the time --

22            QUESTION: -- and in fact all the Federal Court  
23 of Appeals decisions dealing with this situation as I  
24 understand it have involved sentences by State courts that  
25 had already been imposed before the succeeding Federal

1 prosecution under 924(c).

2 MR. ESTRADA: I think that is right, and that  
3 would be the usual area in which our reading of --

4 QUESTION: Yes, and so you're saying, in that  
5 circumstance, which was also the circumstance here, that  
6 the Federal court is governed in its sentencing and must  
7 make it run at least consecutively --

8 MR. ESTRADA: That is right.

9 QUESTION: -- to the State sentence.

10 MR. ESTRADA: Our view is that the statute tells  
11 a Federal district court imposing sentence for a Federal  
12 offense --

13 QUESTION: Yes.

14 MR. ESTRADA: -- that it should make this  
15 sentence consecutive to --

16 QUESTION: Yes.

17 MR. ESTRADA: -- whatever else there is.

18 QUESTION: Yes.

19 QUESTION: I guess on that the hardest point is  
20 that the State sentence involved an additional year  
21 actually served as a mandatory additional year under State  
22 law for the very possession of the firearm that is also  
23 the subject of the extra 5 years under Federal law, and I  
24 suppose that, if you apply the extra 5 years under Federal  
25 law into Federal cases, that will never arise.

1 It would never happen that the extra 5 years  
2 would be imposed consecutively to an additional sentence  
3 that had as its base solely the possession of that very  
4 gun --

5 MR. ESTRADA: It would not --

6 QUESTION: -- but it could happen in this case  
7 under State law.

8 MR. ESTRADA: It would not happen under the  
9 guidelines.

10 QUESTION: Oh, I know -- under a statute, how  
11 could it happen, because the only provision that poses an  
12 extra 5 years mandatory for possession of a gun during a  
13 crime of violence is this very statute, isn't it?

14 MR. ESTRADA: Well, no. Let me give you an  
15 example. For example, the armed bank robbery statute, 18  
16 U.S.C. 2113, 2113(a), if I recall, defines the crime of  
17 bank robbery. 2513(d) imposes an additional authorized  
18 sentence of 5 years under the bank robbery statute for a  
19 bank robbery that is carried out with a weapon.

20 QUESTION: So you think that this statute means  
21 when a person is accused of that crime through violence --  
22 let's say it's an armed bank robbery with a gun -- he gets  
23 10 extra years for the gun?

24 MR. ESTRADA: Justice Breyer, the issue that you  
25 just posed was one of the questions that the Court had

1 before it in the Busic case. The Court in that case took  
2 the view that I gather you would instinctively take of how  
3 that case should turn out.

4 In 1984 Congress turned around and said no, we  
5 didn't mean that, and overruled in effect for future cases  
6 the outcome in Busic and as a result of that change the  
7 statute now reads that the mandatory 5-year sentence may  
8 apply to any offense, including one that has an  
9 enhancement for a firearm.

10 QUESTION: Including the firearm. Not may, but  
11 must, you mean?

12 MR. ESTRADA: Mm-hmm. That is right, and it's  
13 very plain from the legislative history that accompanied  
14 the 1984 amendments that Congress was unhappy with the  
15 outcome in Busic and changed the statute just to make that  
16 possible.

17 QUESTION: Thank you.

18 MR. ESTRADA: And the relevant language that  
19 does that is at the top of page 2 in our brief, where  
20 Congress added a parenthetical that reads, including a  
21 crime of violence or drug trafficking crimes which  
22 provides for an enhanced punishment if committed by the  
23 use of a deadly or dangerous weapon or device.

24 QUESTION: I didn't understand that that  
25 included the extra gun enhancement part, but it does. I

1 see what you're saying.

2 MR. ESTRADA: It does, and that was one of the  
3 issues that the Court had before it in the Basic and  
4 Simpson cases.

5 QUESTION: Mr. Estrada, you answered some of the  
6 questions from Justice Scalia or Justice Stevens about the  
7 scope of the nor shall clause by saying it occurs in a  
8 sentence which is addressed to Federal sentences, and that  
9 provides the context.

10 Why should we confine our contextual reference  
11 to sentences? Why don't we approach this case with a --  
12 sort of a section-based contextualism, and the principle  
13 address of the section, I suppose, is to Federal  
14 sentencing and the relationships of Federal sentences, so  
15 if we're going to look at context, why don't we look at it  
16 more broadly than you would and find that a reason not to  
17 apply the any sentence reference to State sentences?

18 MR. ESTRADA: You see, I think, Justice Souter,  
19 that I do not disagree with your statement up to the very  
20 last clause, which is that it is true that this is a  
21 statute that applies only to Federal sentencings, but one  
22 of the things it does is to instruct a Federal court as to  
23 how the sentence should be imposed and, by extension, the  
24 Federal Bureau of Prisons as to how the sentence should be  
25 administered, and it is to them that the instruction goes,

1 this sentence shall not start before that other sentence  
2 has been concluded.

3 It doesn't act on a State court, and it doesn't  
4 act on a State sentence. It merely takes --

5 QUESTION: No, but your --

6 MR. ESTRADA: -- takes that as a point of  
7 reference for Federal officials discharging their duties  
8 under Federal law.

9 QUESTION: Oh, I grant you that, but I thought  
10 your answer to the question about the nor shall clause was  
11 not that it could not be addressed or effectively be  
12 enforced against a State court. That's a separate issue.  
13 We'll leave that aside.

14 Your answer was in the context we can infer that  
15 it's not being addressed, and don't we have sort of no  
16 more or less ambiguity when we get to the reference to any  
17 sentence being served?

18 MR. ESTRADA: Oh, I see. No, for two reasons.  
19 The first one is that the first sentence of this very  
20 statute uses the expansive language, any crime, and goes  
21 on expressly to qualify it by reference to only crimes  
22 that are Federal crimes and when the same expansive  
23 language, any crime or offense or sentence is used in the  
24 first sentence of the statute and does not so --

25 QUESTION: Yes, that gives that --

1 MR. ESTRADA: -- restrict it, there is a fair  
2 inference that Congress did not mean the qualifications  
3 then.

4 The second answer to that is the answer that I  
5 started to give to Justice Ginsburg concerning section  
6 3584, which is a residual statute that governs concurrency  
7 and consecutivity, and it does not itself make reference  
8 to State sentences either.

9 As a historical matter, before the statute was  
10 passed in section 19 -- in 1984, the rule in the Federal  
11 courts was that a Federal sentence could not be concurrent  
12 with a State sentence, and the legislative history of  
13 section 3584 makes clear that one of the things that  
14 section -- that the residual statute meant to do with  
15 unqualified reference to terms of imprisonment that don't  
16 mention State law was to allow Federal courts, when  
17 otherwise appropriate, to impose a sentence that would be  
18 concurrent to a State term.

19 QUESTION: Well, I think your answer is a fair  
20 answer, but I guess I have one follow-up question to it,  
21 and that is, if there is any question about whether your  
22 answer is sort of dispositive, isn't it fair to look to  
23 the point that was brought out earlier, and that is that  
24 on your theory there's sort of a game of chance going on,  
25 because if the -- in this case, for example, if the State

1 sentence had not been imposed first, the result would be  
2 different here, and rather than allow this statute to be  
3 administered in a way that is going to turn it into a game  
4 of chance, which sentence -- depending on which sentencer  
5 gets there first, why isn't it more reasonable to  
6 interpret it the way the respondents claim?

7 MR. ESTRADA: Because I think as an empirical  
8 matter it will be the case in most of the cases that  
9 Congress may have contemplated that the sentences imposed  
10 later will correspond to later-occurring crimes, and it's  
11 not necessary to think that they crafted the entire  
12 sentencing structure of the Federal courts to fit the  
13 facts of a dual successive prosecution.

14 But even apart from that, I think that the  
15 implicit assumption in the premise is that a statute that  
16 requires a consecutive sentence purports to speak to what  
17 may happen in the future, and I think that is not  
18 empirically founded.

19 QUESTION: Mr. Estrada, is -- before you -- is  
20 consecutivity a word?

21 MR. ESTRADA: I have seen it -- I don't know,  
22 Justice Scalia, and as a nonnative speaker of the  
23 language, I feel hesitant --

24 (Laughter.)

25 MR. ESTRADA: -- to give the Court advice on

1 these sorts of matters.

2 I can tell you that I have seen it in the  
3 reported cases dealing with the issue, and I will leave it  
4 at that, and if I could save the remainder of my time for  
5 rebuttal, Mr. Chief Justice.

6 QUESTION: Very well, Mr. Estrada.

7 Mr. Bustamante. Am I pronouncing your last name  
8 correctly?

9 MR. BUSTAMANTE: Bustamante.

10 QUESTION: Bustamante. Thank you.

11 ORAL ARGUMENT OF EDWARD O. BUSTAMANTE

12 ON BEHALF OF THE RESPONDENTS

13 MR. BUSTAMANTE: Mr. Chief Justice, and may it  
14 please the Court:

15 This Court should affirm the Tenth Circuit,  
16 because the Government ignores proper methods of statutory  
17 construction in this case, and they base their entire  
18 argument in this case on the false premise that the any  
19 used in 924(c)(1) is capable of only one meaning.

20 That term actually has multiple definitional  
21 possibilities, and where there are multiple definitional  
22 possibilities, this Court -- any practitioner should  
23 examine the entire text of the statute and place the word  
24 in context with this entire statutory scheme.

25 QUESTION: Mr. Bustamante, the Tenth Circuit in

1 its opinion relied on the case of the Church of Holy  
2 Trinity v. The United States, which to me has always meant  
3 we're going to legislate a little. It means that you  
4 can't really get the meaning you want out of the statute.

5 Do you think the court of appeals went that far  
6 here, or do you think its interpretation is absolutely  
7 defensible just as the statute is written?

8 MR. BUSTAMANTE: Your Honor, I believe -- Mr.  
9 Chief Justice, I believe that if the Court examines  
10 924(c)(1) and the language of 924(c)(1) and then looks at  
11 the history of 924(c)(1), I think it becomes clear that  
12 924(c)(1) only applies to Federal sentences.

13 QUESTION: Mr. Bustamante, what is your response  
14 to Mr. Estrada's point about 3584(a)? I mean, I  
15 understand that your only concern is your client, but if  
16 we agree with you in this case with regard to defendants  
17 in general we would be doing them more harm than good,  
18 because if this provision doesn't apply to State  
19 sentences, I don't see how you can distinguish 3584(a),  
20 which also would not apply to State sentences, which would  
21 mean that a Federal court could not make a Federal  
22 sentence concurrent with a State sentence.

23 MR. BUSTAMANTE: Justice Scalia, I believe the  
24 difference, and I think it's a consistent interpretation,  
25 is that if the Court looks at the legislative history of

1 3584 --

2 QUESTION: Oh, you just lost me. Do you have  
3 anything about the text that would distinguish the two?

4 MR. BUSTAMANTE: Not about the text, Your Honor,  
5 but I believe that if the Court -- I think it's clear from  
6 3584 that a court has discretion under that statute to run  
7 sentences concurrently or consecutively, and I think the  
8 difference between 3584, other than the legislative  
9 history, Your Honor, is that 924(c)(1) does something very  
10 different, which is, it takes absolute discretion away  
11 from a court, which is a major change, Your Honor, in the  
12 history of sentencing.

13 Throughout history, Federal courts, State courts  
14 have been given great discretion in running -- deciding  
15 whether sentences shall run concurrently or consecutively.

16 QUESTION: But the Government would not take  
17 that discretion away from State courts.

18 MR. BUSTAMANTE: That's true, Your Honor, but it  
19 did take it away from a Federal court, which is a  
20 significant matter.

21 QUESTION: What's the odd result? The court of  
22 appeals said that if you took concurrently to mean  
23 concurrently, it would produce an odd result. What's the  
24 odd result?

25 MR. BUSTAMANTE: Justice Breyer, I believe the

1 odd result in this specific case, and again this case does  
2 have unusual facts, because it was a consecutive  
3 prosecution, is that because the State sentence occurred  
4 first and the Federal sentence occurred second, what in  
5 fact occurred in this case is that the -- what the  
6 Government seeks is a doubling of the sentence based on  
7 the same conduct.

8 QUESTION: It's true of the Federal, too. If --  
9 I mean, you could split the Federal trial, too.

10 MR. BUSTAMANTE: Your Honor, I believe it's  
11 true --

12 QUESTION: I mean, I thought the odd result was  
13 what I said before, and he explained no, that's not an odd  
14 result, the same thing's true federally, and so I'm sort  
15 of stuck now. So I asked you, what's the odd result?

16 MR. BUSTAMANTE: Your Honor, I believe -- it's  
17 not that it's an odd result, Your Honor. It's that the  
18 Government is saying that it's a compelled result, and  
19 what the problem is, Your Honor, is that the Government is  
20 encouraging practitioners to basically play table tennis  
21 between Federal court and State courts.

22 They give -- and I don't believe the Government  
23 can have it both ways, Your Honor. They state in their  
24 opening briefs -- brief fairly boastfully that this does  
25 not run concurrently to any sentence. In their reply

1 brief, they state --

2 QUESTION: Excuse me, that this does not -- I  
3 didn't under --

4 MR. BUSTAMANTE: They state in their opening  
5 briefs, Your Honor, that this shall not run concurrent to  
6 any sentence.

7 QUESTION: Shall not run concurrent to any  
8 sentence.

9 MR. BUSTAMANTE: That's correct, and they do not  
10 specify whether it's Federal or State.

11 In their reply brief they make a concession that  
12 it was -- it would be okay for a State court to run their  
13 sentence concurrent to the Federal sentence, so I think  
14 they're --

15 QUESTION: But that really is quite consistent  
16 with the Government's oral presentation here, that the  
17 section speaks to Federal sentencing judges and Federal  
18 proceedings. It doesn't purport to speak to State court  
19 judges.

20 MR. BUSTAMANTE: That's correct, Your Honor. I  
21 believe the Government concedes this applies to Federal  
22 courts, concedes it applies to Federal sentences, concedes  
23 it applies to Federal offenses, but they're very --

24 QUESTION: That doesn't -- isn't odd  
25 particularly, because all kinds of things can depend on

1 that, whether -- if you're -- you know, if the State court  
2 convicts somebody first, then they have a conviction on  
3 the record. When they have a conviction on the record  
4 their sentence is bumped up because of the guidelines, and  
5 if that trial hasn't take place yet, it isn't. I mean,  
6 lots of things turn on timing. Now, is that --

7 MR. BUSTAMANTE: That's true, Your Honor, a lot  
8 of things do turn on time, but with the Government's  
9 concessions, and if you place their example in reality,  
10 Your Honor, is that what could occur is you have the State  
11 prosecution first, then a Federal prosecution, then it's  
12 fairly easy for the lawyer in the State's court then to go  
13 back, after the Federal prosecution to then ask for a  
14 reduced sentence or a --

15 QUESTION: Fine.

16 MR. BUSTAMANTE: -- sentence concurrent.

17 QUESTION: Fine. So what's wrong? I mean --

18 MR. BUSTAMANTE: Well, Your Honor, I don't  
19 believe that --

20 QUESTION: Isn't that what you could do here?  
21 Isn't that your remedy, then? As you say, Mr. Estrada has  
22 said this is a rule of sentencing for Federal judges only,  
23 and he recognized that if the order had come up with the  
24 State court second the State court could do what it will.

25 MR. BUSTAMANTE: Your Honor, that is a possible

1 remedy. However, I don't think that criminal culpability  
2 or sentencing statutes were set out to allow a game of  
3 chance, which is --

4 QUESTION: Well, another way to eliminate all  
5 the chance, and the Government generously has not asserted  
6 this, but it would be quite possible to interpret this to  
7 speak only of the Federal courts, but to allow the  
8 Federal -- to require the Federal sentences to be made  
9 consecutive whenever a State court says that the State  
10 sentence shall run concurrently,

11 And I guess you could have games being played  
12 back and forth, and the State court revises its sentence  
13 and the Federal court revises its sentence, but you could  
14 eliminate all of that inconsistency by simply saying if a  
15 State court after the Federal sentence imposes a  
16 concurrent State sentence, the Federal sentence, pursuant  
17 to the precise language of this, the term of imprisonment  
18 imposed shall not run concurrently with that State  
19 sentence, so it thereupon becomes consecutive.

20 MR. BUSTAMANTE: Justice Scalia, I --

21 QUESTION: You wouldn't want that.

22 MR. BUSTAMANTE: I wouldn't want that. But  
23 Justice Scalia, I think the problem is, is that if the  
24 court were to read that into the legislation, then I think  
25 in effect it would be allowing this statute, which is not

1 very clear, just have no clear statement to preempt state  
2 law.

3 In the case of a Federal prosecution that  
4 occurred first and a State prosecution occurring second,  
5 clearly the State sovereign should have the authority if  
6 it seems proper to run their sentence concurrent to the  
7 Federal sentencing --

8 QUESTION: But it doesn't preempt State law,  
9 because you just, I think, recognized that you could go  
10 back to State court and say, based on something that  
11 happened after, and based on the way the Government, U.S.  
12 Government reads this statute, the ball ends up in your  
13 court, State, and your law isn't being preempted. You  
14 favor concurrency, so reduce the sentence.

15 MR. BUSTAMANTE: I believe Justice Scalia's  
16 premise was that if the statute was read at the Federal  
17 court, that no sentence would run concurrent to the  
18 Federal sentence if it occurred first, and I think that  
19 would be a preemption, because the State court would not  
20 be allowed to run their sentence --

21 QUESTION: But that's not the position that  
22 Mr. Estrada says that the Government -- that's not how the  
23 Government is reading this Federal statute, so maybe  
24 you're -- you've come to the wrong court for the remedy  
25 you're seeking.

1 MR. BUSTAMANTE: Your Honor, we've come to this  
2 Court for the remedy we're seeking because it's the  
3 Government's goal in this case to ensure that -- one of  
4 several things. To ensure that the 924(c) gun count runs  
5 consecutive to the State sentence, but also I believe,  
6 Your Honor, they seek to also violate 3584(a), Your Honor,  
7 which states that a sentence, when someone goes in and  
8 starts serving a Federal sentence, that sentence shall be  
9 considered one aggregate sentence.

10 Your Honor, what could occur in this case and in  
11 cases in the future is that -- in this case, Your Honor,  
12 the sentencing judge did run the underlying offense  
13 concurrent to the State sentence.

14 What could occur in this case and other cases,  
15 Your Honor, is that you would in fact have the Federal  
16 sentence beginning, then the sentence would stop while the  
17 State sentence would continue, and then at some point,  
18 indeterminate point in the future the Federal 924(c)(1)  
19 gun count would begin, and I think that's one of the major  
20 problems with the Government's interpretation of --

21 QUESTION: Where do we find 3584(a), which  
22 you -- that's the one you just referred to, I believe.

23 MR. BUSTAMANTE: Yes, Justice --

24 QUESTION: Where is that set out?

25 MR. BUSTAMANTE: Excuse me -- Chief Justice.

1 QUESTION: Where is that set out?

2 MR. BUSTAMANTE: And I believe that is in the --

3 QUESTION: Page 4 of the Government's reply  
4 brief, footnote 2.

5 QUESTION: Thank you.

6 MR. BUSTAMANTE: I believe the last sentence to  
7 that statute states that when a prisoner begins to serve a  
8 Federal sentence it shall be considered one aggregate  
9 sentence, and what could result in this case and future  
10 cases is that there would be a gap, a Federal gap in  
11 sentences, and I do not believe that is what Congress  
12 intended in 3584 or 924(c)(1), especially when you  
13 consider the committee report of 924(c)(1), which states,  
14 members of the Court, that in their opinion they are -- it  
15 is their intent that the 924(c)(1) gun count begin first,  
16 and I think if the Court looks at that, that's the only  
17 practical way to apply 924(c)(1).

18 924(c)(1) clearly was enacted to take all  
19 discretion away from a court. A court -- a person  
20 convicted of a 924(c)(1) sentence must do prison time.  
21 That does not affect the court's discretion at all as to  
22 the underlying offense, so it's really impractical --

23 QUESTION: 38 -- 3584(a), which you're -- says a  
24 sentence may be made to run either concurrently or  
25 consecutively, and then 924(c) says that in certain

1 circumstances it shall not be made to run concurrently, so  
2 you can construe those sections consistently, can you not?

3 MR. BUSTAMANTE: You can consider them  
4 consistently, Your Honor, if a Federal sentencing judge is  
5 given discretion to run a -- this sentence concurrent to a  
6 State sentence.

7 QUESTION: But one rule says -- and I take it  
8 3854, whatever the 30 one is, is a general principle of  
9 sentencing. It can run either concurrently or  
10 consecutively. Then you have a far more specific one in  
11 section 924. It says, shall not run concurrently. I  
12 don't see how there's necessarily any inconsistency  
13 between those.

14 MR. BUSTAMANTE: There's no inconsistency if it  
15 is only applied to Federal sentences. Clearly, if someone  
16 is in Federal court --

17 QUESTION: May I just be sure I understand one  
18 of your points? Do you think 3584(a) applies only to  
19 Federal sentences also?

20 MR. BUSTAMANTE: No, Your Honor. I believe  
21 3584, from its legislative history and from the text of  
22 the statute, allows a Federal judge to run his sentence  
23 either concurrently or consecutively to a State sentence.

24 But I would premise that, Your Honor, by stating  
25 that in order for the judge to do that he must first apply

1 a guideline analysis, and if the guidelines state that  
2 this sentence shall run concurrent, then the court may  
3 consider doing that, and either do an upward or downward  
4 departure, depending on what he feels appropriate. If the  
5 guideline states that it shall be consecutive, then again  
6 the court can do an upward or downward departure depending  
7 on what he feels is appropriate.

8 In this case, Your Honor, the problem is, is  
9 that there was no guideline analysis that could be done as  
10 to this particular sentence.

11 QUESTION: How does that differ from 3146(b)(2),  
12 in -- the bail-jumping statute says shall be consecutive.

13 MR. BUSTAMANTE: Your Honor, I believe in that  
14 instance the person -- I believe probably the guideline  
15 would be consistent with that, and the guideline would say  
16 that if you commit an offense while -- a pending offense  
17 while you are awaiting sentencing occurs, then it shall be  
18 consecutive, so I think the guideline analysis and the --

19 QUESTION: But if the guideline didn't take that  
20 position it wouldn't matter, because the statute says  
21 shall be consecutive. The guideline couldn't take a  
22 position inconsistent with the statute.

23 MR. BUSTAMANTE: The two could not be  
24 inconsistent, Your Honor. However, it would be up to the  
25 court to always and first try to harmonize the guideline

1 with the statute, and I think in that instance the  
2 guideline and the statute would probably be synonymous.

3 QUESTION: Could you go back, please, to the  
4 Chief Justice's question, because I didn't understand  
5 either what the inconsistency is supposed to be if we  
6 assume that both statutes apply to the State.

7 I mean, assume that 9 -- that -- I thought the  
8 question was, if 3584(a) applies both to State and Federal  
9 sentences, which I agree with you, I think it does, and  
10 then if the section before us also applies to both State  
11 and Federal, as the Government but not you argues, I  
12 thought you were saying that that would produce an  
13 inconsistency, but I didn't understand the inconsistency  
14 so I thought I'd ask you so you could explain.

15 MR. BUSTAMANTE: I believe what I'm saying,  
16 what -- I hope what I'm saying is that 3584 clearly from  
17 its legislative history can allow the court under a  
18 guideline analysis to run a sentence either consecutive or  
19 concurrent to a State sentence. 924(c)(1) is a much more  
20 specific statute, and that analysis, if there's a  
21 guideline analysis at all, only requires a Federal  
22 sentencing judge to run that sentence consecutive to a  
23 Federal sentence.

24 QUESTION: Well, the fact that it's much more  
25 specific is what is hurting you here, because I think you

1 may be right that there is an incompatibility between  
2 3584(a) and the section at issue here. 3584(a) says that  
3 the terms may run concurrently or consecutively, and  
4 924(c) says that they may not run concurrently, that they  
5 must run consecutively.

6 MR. BUSTAMANTE: Your Honor --

7 QUESTION: So there is an inconsistency but, as  
8 you say, the more specific statute is 924(c) --

9 MR. BUSTAMANTE: Your Honor, I --

10 QUESTION: -- and the rule is you apply the more  
11 specific one, don't you?

12 MR. BUSTAMANTE: Justice Scalia, I believe that  
13 the way the two statutes are distinguished is that  
14 924(c)(1), when it says shall not run concurrent, I  
15 believe is only applied to the Federal sentence, the  
16 underlying Federal sentence for which the gun enhancement  
17 is imposed.

18 QUESTION: No, I understand that, but it doesn't  
19 seem to me that you can argue that this must apply only to  
20 Federal sentences and not to State sentences somehow on  
21 the basis that there would otherwise be inconsistency  
22 between those two. There's -- and in fact, there's going  
23 to be inconsistency whether you apply it to Federal or  
24 State, isn't there? I mean, that's a wash.

25 MR. BUSTAMANTE: Yes, I believe, Justice Scalia,

1 19 -- 924(c)(1) and 1994 -- 84 was amended. I think it  
2 was amended in direct response, Your Honor, to The United  
3 States v. Busic and United States v. Simpson, and in  
4 truth, Your Honor, there was a time when I feared the  
5 language of 924(c)(1).

6 I don't any more, because if you look at the  
7 legislative history and if you look at the Congress'  
8 direct response to the Busic and Simpson cases, I think  
9 it's clear that statute was amended only to correct what  
10 they felt were improper decisions by the Court in Busic  
11 and in Simpson.

12 Your Honor, section 1 of 924(c)(1) deals with  
13 what kind of cases shall be prosecuted under this section.  
14 Section 2 deals -- states they be crimes that are  
15 prosecuted in Federal court. Section 3 states how the  
16 crime is committed. Section 4 states that notwithstanding  
17 any other provision of law, the court may not prorate the  
18 sentence, which really states that you have no discretion  
19 to suspend this enhanced sentence, and section 5, Your  
20 Honor, I think is the section that nails the coffin into  
21 Busic and Simpson and says that nor shall this run  
22 concurrent with any other sentence, and I think what  
23 they're referring to is that they do not want the court to  
24 run the gun enhancement concurrent to the underlying  
25 offense at that time.

1 QUESTION: Section 5 -- I -- what's the section  
2 5 you're referring to?

3 MR. BUSTAMANTE: I'm referring, Your Honor, to  
4 the last part of 924(c)(1).

5 QUESTION: Okay. Sentence 5. I thought you  
6 said section 5.

7 MR. BUSTAMANTE: Yes. It's -- sentence 5, which  
8 states, nor shall --

9 QUESTION: Gotcha.

10 MR. BUSTAMANTE: -- this run concurrent with any  
11 other sentence, Your Honor.

12 I think what they're saying in nailing the  
13 coffin in Busic and Simpson is that a Federal judge may  
14 not run that sentence concurrent even though he has to  
15 impose a prison sentence, nor shall he impose that  
16 concurrent to the underlying Federal offense. I think  
17 that, Your Honor, clearly lays out why this only applies  
18 to Federal sentences.

19 Your Honor, I think other sections of the  
20 Comprehensive Control -- Comprehensive Crime Control Act  
21 confirm that 924(c)(1) only applies to Federal sentences.

22 The Congress also referred to State and Federal  
23 laws in 3564(b) and 3624(e). In both those sections, Your  
24 Honor, they were contemplating that Federal probation and  
25 Federal supervised release could run concurrent to a State

1 sentence, so they are contemplating that State and Federal  
2 sentences shall run concurrently, and they are  
3 contemplating that these sections are possible they run  
4 concurrently, Your Honor. I think that is highly  
5 significant, because it goes to Congress' overall  
6 sentencing scheme.

7 Your Honor, I believe that the problem with the  
8 Government's argument is that they attach a layman's  
9 definition to the term, any. They ask for an expansive  
10 interpretation of the term, any other. In fact, they have  
11 argued the exact opposite in the past.

12 In the Government's reply brief they refer to  
13 United States v. Alvarez -- the United States v. Alvarez-  
14 Sanchez, and in that case the defendant-respondent was  
15 seeking a more expansive term of the term, any. The  
16 Government -- the court, at the Government's urging, asked  
17 the court to apply proper methods of statutory  
18 construction and to not allow the term, any to have an  
19 all-expansive interpretation, and the court in fact did  
20 imply -- apply proper methods of construction and stated  
21 that the term, any in 18 U.S.C. 3501 only applied to  
22 Federal law authorities.

23 Your Honor, I think there's other compelling  
24 reasons for the Court to reject the Government's argument  
25 in this case as erroneous, and the States, Your Honor, in

1 enforcing criminal conduct clearly have primary authority.  
2 I think they should also have primary responsibility in  
3 prosecuting persons in their State in enforcing local  
4 criminal conduct.

5 I think the Government's interpretation in this  
6 case directly affects the delicate balance between Federal  
7 and States, and absent a clear statement from the  
8 Congress, I've asked the Court to reject the Government's  
9 argument and not allow the 924(c)(1) or Federal  
10 authorities to interfere with the State's authority to  
11 enforce local criminal conduct.

12 I think there's two ways, Your Honor --

13 QUESTION: Well, I don't really see how it does  
14 affect State law under the Government's argument. Indeed,  
15 I suppose there are many situations where there's a  
16 Federal offense, not 924 involved, but some Federal  
17 offense, and some State court -- some State law will  
18 mandate that any State sentence for a State offense based  
19 on similar conduct has to run consecutively, or not  
20 concurrently.

21 I mean, you could have it in reverse, and I  
22 don't see that these schemes prohibit that, these Federal  
23 laws. We face that often, don't we?

24 MR. BUSTAMANTE: Your Honor, I --

25 QUESTION: So that a State itself might be in

1 the position of, look, your Federal requirements are what  
2 they are, but we're going to make our sentence anyway not  
3 serve concurrently with the Federal.

4 MR. BUSTAMANTE: That's correct, Your Honor.  
5 The State would have the authority, if they so chose, to  
6 run their sentence consecutive to the Federal prosecution.

7 QUESTION: And the Federal Government says, and  
8 vice versa, the Federal Government, the Congress can pass  
9 a law making some particular sentence for a particular  
10 Federal crime not serve concurrently, and their argument  
11 is that Congress has done here, so it seems to me just the  
12 opposite side of the same coin.

13 MR. BUSTAMANTE: Your Honor, I believe Congress  
14 clearly has the authority and power to tell a State your  
15 sentence shall not run concurrent --

16 QUESTION: No, no. Maybe you misunderstood my  
17 question. I wasn't proposing that the Federal Government  
18 was here telling the State what to do. They're not, and  
19 that's not the Government's position.

20 MR. BUSTAMANTE: Your Honor, I believe that was  
21 their position in their opening brief. They have changed  
22 that position in their reply brief.

23 QUESTION: Well, it certainly isn't their  
24 position as I've heard it explained today.

25 MR. BUSTAMANTE: That's correct, Your Honor.

1       However, I believe that clearly the State has the  
2       authority to run their sentence consecutive, but they  
3       should also have the authority to run their sentence  
4       concurrent, whatever the order --

5               QUESTION: I heard Mr. Estrada say the State  
6       could do that.

7               MR. BUSTAMANTE: Your Honor, he has stated that,  
8       Your Honor, but I think that does point to the  
9       ambiguousness of the statute, and I think it points out to  
10      the problems in the application of the statute.

11              QUESTION: It's not ambiguous if you say it only  
12      applies -- 924(c) applies to sentences imposed by Federal  
13      courts. That's not ambiguous, is it?

14              MR. BUSTAMANTE: I think it's ambiguous, Your  
15      Honor, first in how you apply first 924(c)(1), in which  
16      order it should go in, Your Honor, and how it affects the  
17      State sentence.

18              Your Honor, there is a guideline in this case  
19      that does possibly affect the State sentence and possibly  
20      affect the Federal sentence, Your Honor, and that is  
21      5G1.3.

22              QUESTION: The Government isn't here saying that  
23      these statutes affect the State sentence. It's saying it  
24      affects the Federal court sentence.

25              MR. BUSTAMANTE: That's correct, Your Honor.

1 They are stating that the Federal Government does not  
2 affect the State sentence in any way.

3 However, I think, Your Honor, that in the  
4 application of the Federal sentence it must by necessity  
5 affect the State sentence, Your Honor, and I state that  
6 because if you go with the committee report that the  
7 924(c)(1) must be applied first, Your Honor, then --

8 QUESTION: You mean that one sentence in some  
9 committee report?

10 MR. BUSTAMANTE: Well, Your Honor, it's not only  
11 the one sentence --

12 QUESTION: I -- this Court has never felt that  
13 it was bound by that kind of a --

14 MR. BUSTAMANTE: That's correct, Your Honor.

15 QUESTION: -- little snippet from a legislative  
16 committee report.

17 MR. BUSTAMANTE: Your Honor, I believe it's not  
18 just that one snippet. I think there are -- the Eleventh  
19 and Sixth Circuit have followed that order, and I think  
20 that's the only practical way to apply 924(c)(1), and the  
21 problem, Your Honor, is that if 924(c)(1) is applied to  
22 run consecutively to a State sentence, then, Your Honor,  
23 then the underlying offense must also run consecutive, and  
24 you're back to the point where you've doubled this  
25 person's custodial time.

1 QUESTION: Why? I didn't think 924(c) applied  
2 to anything but the offense described in 924.

3 MR. BUSTAMANTE: Your Honor, it applies -- if a  
4 person has committed an underlying offense and then has a  
5 924(c)(1) sentence, those sentences must both be mandated  
6 to that defendant.

7 QUESTION: So in this circumstance we'd simply  
8 have to say, look, that committee report doesn't govern  
9 this circumstance, that the judge is perfectly free to let  
10 the rest of the sentence run concurrently with the State,  
11 but he isn't free to let this part run with the State  
12 because this part says it's supposed to run consecutively  
13 with any preceding sentence. Would that work?

14 MR. BUSTAMANTE: That's true, Your Honor, if the  
15 court -- but if 924(c)(1) is to be applied practically,  
16 then I think that what would happen, you'd have to have a  
17 prison time for 924(c)(1), and then for the remaining  
18 underlying offense the court still would have discretion  
19 to grant a downward departure to probation. It would be  
20 impossible --

21 QUESTION: Well, just run it -- if he doesn't  
22 want to, say run the 920 -- run the substantive Federal  
23 crime other than the 924(c) consecutively with the State  
24 crime. Do that, and then when they're finished that, run  
25 this 5 years. That would seem -- I mean, I'm looking for

1 a flaw in that. That would seem to solve the problem that  
2 you raised.

3 MR. BUSTAMANTE: Your Honor, I think the flaw  
4 is, Your Honor, is that clearly 924(c)(1) does require a  
5 prison sentence. Any other underlying offense may or may  
6 not require a prison sentence. It would be impossible, or  
7 at least impractical for a court to grant someone  
8 supervised release and they serve that sentence and then 4  
9 years later they begin a 924(c)(1) sentence. The court  
10 would not do that. What the court --

11 QUESTION: The supervised release would have to  
12 take -- they'd have to split the supervised release from  
13 the first part, that's true.

14 MR. BUSTAMANTE: That's correct. That's  
15 correct.

16 QUESTION: But I guess you could do that. Why  
17 couldn't you -- would that require a departure? I'm not  
18 sure.

19 MR. BUSTAMANTE: I think it would require some  
20 kind of downward departure for the underlying offense,  
21 Your Honor, but I can't imagine a court giving someone  
22 supervised release, they serve a supervised release for 4  
23 years --

24 QUESTION: No, no, I agree with that,  
25 absolutely. What you'd have to do is the other stuff

1 comes first, consecutively, then the 5 years, then  
2 supervised release insofar as it's appropriate.

3 MR. BUSTAMANTE: That's correct.

4 QUESTION: But I think that would work. I can't  
5 think of anything that stands in the way of that, off-  
6 hand.

7 MR. BUSTAMANTE: I guess, Your Honor, I guess  
8 the concern is -- my time is up.

9 QUESTION: Thank you, Mr. Bustamante.  
10 Mr. Estrada, you have a minute remaining.

11 MR. ESTRADA: Thank you, Mr. Chief Justice.  
12 Unless the Court has questions, we have nothing further.

13 CHIEF JUSTICE REHNQUIST: The case is submitted.

14 (Whereupon, at 12:05 p.m., the case in the  
15 above-entitled matter was submitted.)  
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## CERTIFICATION

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

UNITED STATES, Petitioner v. MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ AND MARIO PEREZ :

CASE NO. 95-1605

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

BY Ann Mari Federico  
(REPORTER)