

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

CAPTION: FRANK J. MUSCARELLO, Petitioner v. UNITED  
STATES and DONALD E. CLEVELAND AND ENRIQUE  
GRAY-SANTANA, Petitioners v. UNITED STATES  
CASE NO: 96-1654 & 96-8837  
PLACE: Washington, D.C.  
DATE: Monday, March 23, 1998  
PAGES: 1-58

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**Supreme Court U.S.**

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FRANK J. MUSCARELLO, :

4 Petitioner :

5 v. : No. 96-1654

6 UNITED STATES :

7 and :

8 DONALD E. CLEVELAND AND :

9 ENRIQUE GRAY-SANTANA, :

10 Petitioners :

11 v. : No. 96-8837

12 UNITED STATES :

13 - - - - -X

14 Washington, D.C.  
15 Monday, March 23, 1998

16 The above-entitled matter came on for oral  
17 argument before the Supreme Court of the United States at  
18 10:02 a.m.

19 APPEARANCES:

20 ROBERT H. KLONOFF, ESQ., Washington, D.C.; on behalf of  
21 Petitioner Muscarello.

22 NORMAN S. ZALKIND, ESQ., Boston, Massachusetts; on behalf  
23 of Petitioners Cleveland and Gray-Santana.

24 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor  
25 General, Department of Justice, Washington, D.C.; on

1               behalf of the Respondent.

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1 multiple definitions, this Court has made clear in Deal v.  
2 United States and elsewhere that when a dictionary offers  
3 multiple definitions, all but one of those meanings is  
4 ordinarily eliminated by context. Here, the context is  
5 carries a firearm.

6 Third, the Government's view would make carries  
7 a firearm the same as transporting a firearm, but section  
8 924(b) and numerous other gun provisions use the word  
9 transport, showing that Congress knew how to get across  
10 the concept of transport when it wanted to.

11 QUESTION: Do any of those other provisions  
12 speak of transport in relation to a crime of violence, or  
13 a drug crime, or is it just transport in the abstract?

14 MR. KLONOFF: Well, there are a whole variety of  
15 provisions, Justice Souter. I guess one that comes to  
16 mind is 18 U.S.C. 926(a), which talks about transporting,  
17 shipping or receiving a firearm or transporting a firearm  
18 for any lawful purpose from any place where he may  
19 lawfully possess and carry such a firearm. That is the  
20 closest analogy.

21 QUESTION: For an unlawful purpose, you say?

22 MR. KLONOFF: No, it does not use that --

23 QUESTION: For a lawful purpose.

24 QUESTION: For a lawful purpose? It's a crime  
25 to transport it for a lawful purpose?

1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 96-1654, Frank Muscarello v.  
5 United States, and Number 96-8837, Donald E. Cleveland and  
6 Enrique Gray-Santana v. United States.

7 Mr. Klonoff.

8 ORAL ARGUMENT OF ROBERT H. KLONOFF

9 ON BEHALF OF PETITIONER MUSCARELLO

10 MR. KLONOFF: Mr. Chief Justice, and may it  
11 please the Court:

12 This case raises the issue left open in Bailey  
13 v. United States, what it means to carry a firearm under  
14 18 U.S.C. 924(c)(1). Petitioner submits that for four  
15 principal reasons carries a firearm means, bears a firearm  
16 on one's person. First, the plain meaning of the phrase,  
17 carries a firearm, directly supports petitioner's  
18 position. Dictionaries repeatedly and consistently equate  
19 carries a firearm with having a firearm on the person.

20 Second, the Government has not cited a single  
21 dictionary that defines the phrase, carries a firearm, to  
22 mean transporting or possessing a firearm in a vehicle.  
23 Instead, the Government improperly isolates the word  
24 carry, rather than looking at the specific context,  
25 carries a firearm, but although the term carry has

1 MR. KLONOFF: Not -- transporting, shipping or  
2 receiving for any lawful purpose from where he may legally  
3 possess.

4 QUESTION: But it --

5 QUESTION: That's a crime?

6 MR. KLONOFF: Yes, Your Honor.

7 QUESTION: I didn't realize we'd gone that far  
8 yet.

9 (Laughter.)

10 QUESTION: In any case, I take it the other  
11 references to transport as a prohibition did not make the  
12 limitation that this prohibition has on carries.

13 MR. KLONOFF: Not in that precise terminology,  
14 that's correct.

15 QUESTION: So that to read it as the Government  
16 would read it I think probably would not, therefore, just  
17 duplicate, in effect, all of the other prohibitions on  
18 transportation, correct?

19 MR. KLONOFF: Well, we think that it would. In  
20 fact, the Government itself in its --

21 QUESTION: Maybe I'm not getting my point  
22 across. I thought the reason that it wouldn't was that  
23 there's a limitation. There's a restriction here, in  
24 relation to a drug crime or crime of violence, and that  
25 restriction does not occur in the instances in which

1 transportation is specifically prohibited in other parts  
2 of the statute. That's the only point that I'm trying  
3 to --

4 MR. KLONOFF: No, I understand, but the during  
5 and in relation to is a separate component, but in terms  
6 of the meaning of the word carry we think that it is  
7 instructive to look at the other statutes.

8 QUESTION: I still don't think you're  
9 understanding Justice Souter's point. He's saying that  
10 just as you say the word firearm must be taken into  
11 account in determining the meaning of the word carry  
12 because that's part of its context, so also the phrase, in  
13 relation to a crime of violence or a drug offense must be  
14 taken into account in gathering the meaning of carry,  
15 because that is part of its context.

16 MR. KLONOFF: Oh, I agree with that point, Your  
17 Honor.

18 QUESTION: Okay. Now, the second question is,  
19 are there any other statutes that have similar language?

20 MR. KLONOFF: No, there are not.

21 QUESTION: I can't imagine that there's none  
22 that says it's a crime to transport a firearm for an  
23 unlawful purpose --

24 MR. KLONOFF: There's no --

25 QUESTION: -- from a statute that makes it a



1 crime to carry it for a lawful purpose.

2 MR. KLONOFF: There's no statute precisely like  
3 that, Your Honor. That is the answer.

4 QUESTION: With reference to carry, the  
5 definition of firearm includes a missile, a rocket  
6 launcher --

7 MR. KLONOFF: Yes. There is a broad --

8 QUESTION: Do you have to carry the rocket  
9 launcher in your vest pocket?

10 MR. KLONOFF: No, and that is correct, Your  
11 Honor. There are some types of firearms as defined in 921  
12 that you couldn't physically have on your person, of  
13 course.

14 QUESTION: Or a land mine.

15 MR. KLONOFF: That's correct. Of course, the  
16 definition of firearm in 921 is for the entire Chapter 44,  
17 and it's not surprising that there may be situations that  
18 don't fit every circumstance, and that would --

19 QUESTION: So then if you had a land mine in  
20 your -- in the trunk of your car or in the back of the  
21 utility vehicle, that would be carrying it?

22 MR. KLONOFF: It would not be. Our definition  
23 of carrying is limited to on the person. There are some  
24 kinds of firearms --

25 QUESTION: So there are some kinds of firearms

1 that cannot be carried and therefore there's no violation  
2 of the statute, in your view?

3 MR. KLONOFF: Well, there could be a violation  
4 for using in those circumstances, or --

5 QUESTION: Transporting.

6 MR. KLONOFF: Exactly, under other provisions,  
7 so there are a number of ways you could get at the same  
8 conduct. If Congress wanted to --

9 QUESTION: But are there any statutes in which  
10 Congress has defined something like firearm, punishing its  
11 carrying, but then the firearm is so defined that it  
12 cannot be carried? I don't understand how that works.

13 MR. KLONOFF: Well, it only -- as I said, it  
14 only applies to a small number of the firearms contained  
15 with the definition of 921(a)(3), and again we don't think  
16 it at all surprising that when you have a statute that's  
17 applied to the entire firearms chapter, that there may be  
18 one or two types of firearms as defined that you could not  
19 physically carry on your person.

20 That is a problem for Congress to fix under the  
21 proposed legislation, which would expand to include  
22 possession. That would be encompassed, and I would submit  
23 that's a problem that Congress has to fix. There are some  
24 oddities of the statute under any possible interpretation,  
25 but we don't think that the mere fact that some

1 conceivable type of firearm could not be carried on the  
2 person should inform this Court's interpretation of the  
3 words, carries a firearm.

4 QUESTION: What about Judge Trott's view that  
5 whatever line is drawn here it would make no sense to say  
6 to the savvy criminal, hide the gun and you're home free.  
7 Just don't keep it on your person. Keep it where you can  
8 get at it when you need it. Would that be a sensible line  
9 to attribute to Congress?

10 MR. KLONOFF: Judge Trott's analysis is entirely  
11 flawed. If the Court looks at his opinion, he talks about  
12 the absurdity of a situation where somebody has a gun on  
13 his person and then puts it on the car seat and all of a  
14 sudden he's scott free.

15 That's not at all the position we're arguing.  
16 We're not focusing entirely on the point of arrest, and if  
17 the Government can prove to the jury that the individual  
18 had the firearm on his person at some point during and in  
19 relation to the crime at issue, he would be prosecuted.

20 So in Judge Trott's example, there is adequate  
21 evidence under petitioner's definition of carries a  
22 firearm to convict that person.

23 Now, let me just respond, though, to Your  
24 Honor's question. I submit that Judge Kozinski has it  
25 right in terms of what the every-day criminal thinks, and

1 he thinks of carrying a firearm as packing heat, and I  
2 would give the Court an example that illustrates the  
3 point.

4 Two individuals are in a car. They're on the  
5 way to engage in a bank robbery and they're very close to  
6 the scene. The gun is under the back seat, or in the  
7 trunk, or wherever. One individual says to the other as  
8 they're getting ready to pull up, hey, are you carrying  
9 the gun?

10 Where the gun is in the trunk or in some other  
11 place, no one would say, yes, I'm carrying the gun. He'd  
12 say, no, it's in the trunk.

13 QUESTION: Well, let me ask you this. Suppose  
14 the person with the gun physically had it in his hands and  
15 put it in the car in order to go and have a drug  
16 transaction and in order to have a weapon available to  
17 facilitate carrying out the drug transaction. You say the  
18 person would have carried the gun when he was putting it  
19 in the car.

20 MR. KLONOFF: Depending on the crime. For a  
21 crime of possession with intent to distribute, that's  
22 correct. He had the gun on his person. He would be  
23 carrying it. He could have --

24 QUESTION: Well, I mean, carried it for use at  
25 the time the drug sale is made, for example.

1 MR. KLONOFF: Yes, during and in relation to.

2 QUESTION: So can he be charged with carrying  
3 the gun because he carried it to the car, where he then  
4 put it where it was not immediately available?

5 MR. KLONOFF: Under our view yes if -- as long  
6 as the Government can also show the during and in relation  
7 to, and for example, a possession with intent to  
8 distribute situation, where you're putting drugs in the  
9 car, you're putting your gun in the car, seems to me  
10 there's more than sufficient evidence there, and again,  
11 that's why I think Judge Trott's analysis is faulty,  
12 because in many of those situations you will have  
13 sufficient evidence of carries a firearm on the person.

14 QUESTION: In every case, Mr. Klonoff, where you  
15 have a drug in the trunk -- a gun in the trunk, a gun in  
16 the glove -- someone carried it and put it there, so under  
17 your analysis, much would depend on how we define in  
18 relation to. I mean, how far back can you go.

19 MR. KLONOFF: That's correct, Your Honor. That  
20 is true. In our case, though, there was a gun in the  
21 locked glove compartment. There's no evidence of when it  
22 was put there, and the Government couldn't conceivably  
23 make the argument that that gun was carried to the --

24 QUESTION: So it follows from your analysis that  
25 the informed drug dealer will have a drug -- will have a

1 gun in his car at all times, when he goes shopping, when  
2 he goes to church, and when he distributes the drugs.

3 MR. KLONOFF: If he's reading up on the statute  
4 that might be correct, but again, that's a problem --

5 (Laughter.)

6 MR. KLONOFF: And that goes back to what Judge  
7 Trott said.

8 But the point is, is that those oddities, we  
9 submit, are for Congress to fix.

10 QUESTION: What are the oddities? That's -- I  
11 mean, I carry plants in the back of my car in the trunk, I  
12 think, haven't I, when I go to the nursery, pick up the  
13 plants, put them in the trunk, carry them to my house. I  
14 always thought I was carrying the plants.

15 MR. KLONOFF: Again, that's contextual --

16 QUESTION: All right.

17 MR. KLONOFF: -- and I our point is, is when  
18 you're talking about the phrase --

19 QUESTION: But what I really want to know is,  
20 I'm pointing out I don't find that odd. I do find it odd,  
21 as you do, that if there really are things like you see in  
22 the movies, you know, big gangsters with huge guns  
23 guarding the place, that that wouldn't fall within the  
24 statute. We both find that odd.

25 What are the oddities on the Government's

1 interpretation? You said that was odd, and I'm not  
2 certain -- I want to know --

3 MR. KLONOFF: Well, there are --

4 QUESTION: I want you to focus on what those  
5 are.

6 MR. KLONOFF: There are several. First of all,  
7 under the Government's own theory, since movement is  
8 required, if an individual was sitting on a couch and the  
9 gun's next to him, he's not carrying it, so there's  
10 immediate access but the Government says it's not carried.

11 Secondly, it's not clear whether the  
12 Government's position --

13 QUESTION: Or, indeed, even if it's on his  
14 person, so long as he hasn't moved it, I suppose.

15 MR. KLONOFF: Exactly, that's right.

16 QUESTION: If he gets one of his confederates to  
17 come and hand him the gun and he puts it --

18 QUESTION: So there are oddities of omission,  
19 but is there any oddity of -- is there any oddity that is  
20 produced -- if we accept the Government's interpretation,  
21 does that produce anything odd?

22 MR. KLONOFF: I think it does. For example --

23 QUESTION: What is that?

24 MR. KLONOFF: -- I don't think the Government's  
25 position applies to a passenger. I think it only applies

1 to the person in control, so you'd have an odd situation  
2 of the gun sitting next to the passenger who's  
3 orchestrating the entire drug transaction. He's not  
4 carrying it, but the driver would be.

5 If I could save the balance of my time for  
6 rebuttal.

7 QUESTION: Very well, Mr. Klonoff.

8 Mr. Zalkind, we'll hear from you.

9 ORAL ARGUMENT OF NORMAN S. ZALKIND

10 ON BEHALF OF PETITIONERS CLEVELAND AND GRAY-SANTANA

11 MR. ZALKIND: Mr. Chief Justice, may it please  
12 the Court:

13 In deciding Bailey, you have given those of us  
14 who labor in the fields of criminal law a clear line  
15 definition, and we're asking for the same with the word  
16 carry.

17 We're asking for really the ordinary and plain  
18 meaning of the word carry in context of firearms, and of  
19 all the cases that I've read I haven't heard about rocket  
20 launchers used in drug transactions in any of the circuit  
21 cases. We're really talking about firearms, portable  
22 firearms, and that's bearing on the person.

23 QUESTION: Well, in days gone by if some rider  
24 had a gun in the scabbard on his saddle, as used to be the  
25 day when I lived on a ranch, is that person carrying a



1     weapon?

2                   MR. ZALKIND:  If it's right on his --

3                   QUESTION:  Right there on the saddle.  You know  
4     where they put the scabbard on a saddle.

5                   MR. ZALKIND:  I understand that, Justice  
6     O'Connor.

7                   I would say, under our definition, that that  
8     would not be carried, because it's not on --

9                   QUESTION:  Nor would it be if you had it in a  
10    wheelbarrow and were moving it from place to place.

11                   MR. ZALKIND:  No, that would not be carried.

12                   If you had -- and if you had a locked briefcase,  
13    and in the locked briefcase there was cocaine and there  
14    was a Mack 20, one of these fierce firearms that was  
15    mentioned in Smith, that would be carried.

16                   QUESTION:  Why do -- why when I put the -- I  
17    mean, this is what -- because I so often use the words, I  
18    put a flower plant or something for my wife in the trunk,  
19    and I feel I'm carrying that to my house, and why, in the  
20    plain meaning of the words, if instead of a -- I hope I  
21    wouldn't do it -- instead of a flower plant, it happens to  
22    be a case of rifles that we're using to -- for the big  
23    drug transaction.

24                   (Laughter.)

25                   QUESTION:  Why am I not carrying that?  I mean,

1 interpretation and work with those words, in relation to,  
2 does it produce any odd result?

3 MR. ZALKIND: Yes, because the Government's --  
4 Justice Breyer, the Government's interpretation is  
5 basically a transportation interpretation, and you're  
6 talking about the trunk of a vehicle. What about the  
7 ocean liner? What about the double truck, where you have  
8 the double caboose? What about the caboose at the end of  
9 the railroad line?

10 What about the power boat that is 20 feet, and  
11 then it's 40 feet, and then it's 75 feet? What about  
12 the -- I sail on racing boats. What about the 50-foot  
13 racing boat, and it's a trimaran, and you're out on the  
14 furthest end of the trimaran, and that's where you could  
15 carry firearms.

16 QUESTION: But under your view you say that  
17 putting it in a wheelbarrow and pushing it isn't carrying.  
18 How about one of these luggage containers that's on a  
19 little strap and wheels? Not carrying, I guess, huh?

20 MR. ZALKIND: That's becoming closer, Your  
21 Honor, because we're talking about on the person, and once  
22 you have that luggage that you're carrying right with you,  
23 that's not really a separate -- that's right on the --  
24 that's very on the person.

25 QUESTION: A purse would clearly qualify,

1 if I'm carrying the plant, why wouldn't I be carrying the  
2 case of rifles?

3 MR. ZALKIND: Because we're talking about  
4 statutory interpretation and we're --

5 QUESTION: That's true, so that's --

6 MR. ZALKIND: -- talking about a narrow meaning  
7 of the word carry, which is bear on the person, and  
8 we're --

9 QUESTION: I guess you can carry a grudge, you  
10 can carry a tune, you can carry a whole lot of things and  
11 it has different meanings, depending on --

12 (Laughter.)

13 QUESTION: -- what you're carrying, right?  
14 That's your point.

15 MR. ZALKIND: Justice Scalia, I totally agree  
16 with you.

17 QUESTION: But I'm -- my problem, to be  
18 specific, and I'm trying to get an answer to this, is  
19 whenever I would think of an anomaly, and I've been trying  
20 to think of them, is it seems to me the anomalies tend to  
21 be taken care of on the Government's interpretation by the  
22 words, in relation to a drug transaction, so I really  
23 haven't, once I play with those words, found anything odd  
24 about the Government's interpretation, and that's why I'm  
25 asking you to tell me if I -- if I adopt the Government's

1 wouldn't it? If a woman carried a gun in her purse, that  
2 would qualify?

3 MR. ZALKIND: Justice Scalia, that would  
4 qualify.

5 QUESTION: You make the purse a little bigger  
6 and it's a suitcase, and would that qualify?

7 MR. ZALKIND: If the person is carrying that  
8 suitcase?

9 QUESTION: Yes.

10 MR. ZALKIND: Justice Scalia, that would  
11 qualify, but if the wheelbarrow -- we would say there's a  
12 line draw -- that's a --

13 QUESTION: The line is between the suitcase and  
14 the wheelbarrow?

15 MR. ZALKIND: No, between the body.

16 (Laughter.)

17 MR. ZALKIND: Between the body. We would  
18 include, for instance, if you had 10 layers of clothes,  
19 and there would be a firearm that you -- that was in --  
20 under the 10 layers, that would be carried, even though  
21 you would not have immediate access.

22 QUESTION: There are going to be fine lines we  
23 have to draw no matter whose version of the statute we  
24 interpret.

25 MR. ZALKIND: Chief Justice, that's correct, but

1 the version that we're suggesting is the easiest and it  
2 has the easiest line to draw. Congress, if they want to  
3 make possession a crime, then they -- and they're trying  
4 to right now. They can add the word possession if they  
5 want to, or they can add the word transport, but the line  
6 that we're drawing is the easiest, and you did it for us  
7 in Bailey. We know --

8 QUESTION: But what about the Government's  
9 argument that your client loses in any case, because your  
10 client went to a shop. purchased a gun for the specific  
11 purpose of having it with him in this drug deal, carried  
12 the gun in his hand to the car, so your client, whatever  
13 it might be in another case where the gun was just in the  
14 car, your client carried the gun to the car.

15 MR. ZALKIND: Justice Ginsburg, I most  
16 respectfully disagree with you, because he did carry some  
17 firearms to the car, but it wasn't in relation to a drug  
18 crime at that time. It hadn't -- he -- that issue was  
19 never raised.

20 QUESTION: So you say that doesn't present a  
21 carry problem. It is carried, but not in relation to.

22 MR. ZALKIND: Not in my case. I -- if a drug  
23 connection was really evolving, it -- let's say the drug  
24 transaction started down in Symphony Hall, and he had some  
25 guns hidden in a building near Symphony Hall, and once he

1 made the conversation with the drug dealers they really  
2 knew they were going to a motel, and he went over to a  
3 building, grabbed his guns, and brought them and through  
4 them in the trunk at that -- while the drug transaction  
5 was moving, that would be different.

6 But in my case, sometime earl -- much earlier in  
7 the afternoon, when he didn't know that where there was  
8 going to be a meeting, what the quantity was of -- what  
9 the negotiations were, was he going to get the drugs  
10 fronted or was he going to rip the drugs off, there was no  
11 specific plan, he was charged with an attempt to commit  
12 possession with intent to distribute cocaine. He  
13 wasn't -- the other charges were dismissed. That's the  
14 charge that he made a conditional plea to, so in our case  
15 he would be not guilty.

16 There are cases that if it's all within an  
17 immediate activity, during the drug transaction, yes, I  
18 would agree with you, Justice Ginsburg.

19 QUESTION: You seem to be taking the view that  
20 the in-relation-to has to be specific to the transaction  
21 as it finally turned out. Why should that be? Why can't  
22 in relation to simply refer to the general subject matter?

23 If he put the guns in the trunk for whatever use  
24 they would turn out to be to him in whatever drug  
25 transaction he succeeded in engaging in, why isn't that

1 enough for in relation to?

2 MR. ZALKIND: It isn't because there's no -- he  
3 could have been arrested at the -- when he carried the  
4 guns to the car and charged with the specific crime of  
5 attempting to possess with intent to distribute cocaine at  
6 that time. He could have been arrested by the State of  
7 Massachusetts for possession of firearms, but he couldn't  
8 have been arrested for during a drug crime, because the  
9 drug crime wasn't --

10 QUESTION: I didn't say anything about during.  
11 I said -- I was asking you why it is not sufficient for  
12 the in-relation-to prong to prove that he put them in the  
13 car for whatever use they might turn out to be in whatever  
14 drug transaction he succeeded in engaging in.

15 He didn't know, on my hypothesis, what that  
16 transaction would be exactly, but he did know that he  
17 intended to engage in a drug transaction. Why, under  
18 those circumstances, is not the in-relation-to prong  
19 satisfied?

20 MR. ZALKIND: Well, every single drug  
21 transaction where there are firearms at some point, and I  
22 think it was mentioned by one of the justices before,  
23 somebody would be bringing the guns to the car, and  
24 they're just not committing a crime at that time. Just  
25 because --

1 QUESTION: Well, what's --  
2 QUESTION: Well, that's -- that's --  
3 QUESTION: -- the language of the statute? At  
4 924(c) it says whoever during and --  
5 QUESTION: And.  
6 MR. ZALKIND: In relation --  
7 QUESTION: -- in relation to any crime of  
8 violence or drug-trafficking crime uses or carries a  
9 firearm. They have to go together, do they, during and in  
10 relation to?  
11 QUESTION: It has to be both.  
12 MR. ZALKIND: Justice O'Connor, I agree with  
13 that.  
14 QUESTION: Yes, but isn't --  
15 MR. ZALKIND: During and in relation --  
16 QUESTION: -- the point that he is committing  
17 and that he has taken the substantial step so that he has  
18 committed the crime of attempt when he starts loading the  
19 guns in the car?  
20 MR. ZALKIND: Justice Souter, not if he doesn't  
21 place them at or near the scene of the crime. When he  
22 placed the firearms in the car, that was not -- that would  
23 not be considered --  
24 QUESTION: Well, I don't have to be near the  
25 scene of the consummated crime to engage in an attempt, if



1 I take a substantial step somewhere else.

2 MR. ZALKIND: Most respectfully, we would  
3 disagree with you, Justice Souter. You would have to take  
4 a -- the substantial step would be if the instruments of  
5 the crime were placed there at or near the scene of the  
6 crime that he's attempting.

7 If you get burglarious instruments and you don't  
8 go to the place, you just have, you know, hammers and  
9 tongs, you're not going to be committing that crime.

10 If you decide in your mind you're going to  
11 murder someone and you get the firearm and you put it in  
12 your car and you're going to go looking for this person,  
13 at that point you're not committing an attempted murder.  
14 It's only when --

15 QUESTION: You haven't taken the substantial  
16 step at that point?

17 MR. ZALKIND: You have not. Even though you --  
18 but you are guilty of the possession of the firearm, but  
19 that's a separate -- that's a State statute, or it could  
20 be a Federal statute, but it's not this case, 924(c), or I  
21 gave -- given hypotheticals relating to other kinds of  
22 crimes.

23 QUESTION: If we had just the word, in relation  
24 to, I should think that the modifying phrase has something  
25 more than a temporal aspect to it, that it's pragmatic as

1 well if it -- it's accessible if it facilitates the drug  
2 offense. During does seem to be mostly a temporal term.

3 MR. ZALKIND: Justice Kennedy, I would -- if I  
4 understand the word temporal, because I don't want to say  
5 something that I don't totally understand, but as I  
6 understand what you're saying I would agree with you that  
7 it's an active -- it's an active word, and it does -- we  
8 would prevail under that definition, as we would prevail  
9 under immediate accessibility, but we think immediate  
10 accessibility is another transport excuse.

11 To carry, you don't have to move the firearm.  
12 You can carry a firearm by just having it inside your  
13 pocket. As the examples were made both in -- both in  
14 Bailey and Smith as to what carry would be, and although  
15 that's not totally instructive to us, it is saying  
16 something.

17 QUESTION: You say, are you carrying any money  
18 to somebody, and even though they're standing still they  
19 would say, yes, I am carrying money.

20 MR. ZALKIND: Chief Justice Rehnquist, I agree.  
21 If you have the money in your pocket you are carrying  
22 money.

23 If you have even an unloaded firearm in your  
24 pocket, you are carrying a firearm, and the -- what the  
25 transport theory does is, it might convict someone that

1 has an unloaded derringer in the trunk, but it won't  
2 convict the big drug dealer that has an automatic machine  
3 gun in the next room that's sitting there, so -- I mean,  
4 not that that has -- we have to draw a line somewhere, but  
5 I just want to point out our thinking about this.

6 Again, there's no linguistic reason to define  
7 carry as an auto -- as transporting, and pure transport  
8 has enormous problems, as I think we've pointed out to  
9 you.

10 QUESTION: Suppose you define carry as transport  
11 but omit the meaning of transport that means ship. In  
12 other words, transport some -- it's transport, but not  
13 arrange for transport.

14 MR. ZALKIND: Well, Justice Breyer, then you --  
15 you're adding to the interpretive problems even further.  
16 You're getting into ambiguity with that, and if you're  
17 getting into ambiguity we start to think about the Rule of  
18 Lenity, because we're talking about very serious crimes.

19 In the Cleveland and Gray case, they got 10  
20 years to begin with. Forget about the firearm. They  
21 start off with 10 years of their lives, and now we have  
22 this enormous minimum mandatory 5 years that's going to be  
23 added, and if they're not convicted of that the judge  
24 could have -- in that case he could have used the  
25 guidelines, bump it up two more levels anyway.

1           So it isn't that the trial judges don't have  
2 power to penalize bad behavior, but we're talking about  
3 carrying firearms, a sort of narrow class of separate  
4 minimum mandatory crimes for people that are being  
5 severely punished, so --

6           QUESTION: Do you accept the Kozinski line that  
7 it's not -- doesn't have to be on the defendant's body,  
8 but if it's right next to him where it's within hands-  
9 reach --

10          MR. ZALKIND: Justice Ginsburg, no, we don't  
11 accept that line, although if you accept that line, then  
12 we would prevail.

13          But again, that's another transport exception,  
14 because there is that movement that Justice Kozinski  
15 eloquently states in his en banc decision, and we're  
16 saying that no, that that would not be carry. That would  
17 be the line that's drawn, would be at that point. Even  
18 though it was within immediate access, that would not be  
19 carry, and I think that's consistent with the Bailey  
20 decision.

21          And again, once those lines are drawn --

22          QUESTION: So if a defendant starts out with the  
23 gun in his pocket, and in the course of the ride to the  
24 scene of the deal puts it on the seat, then the statute  
25 doesn't apply?

1 MR. ZALKIND: Justice Ginsburg, if there was,  
2 for instance, somebody in the back seat, and that person  
3 ended up cooperating with the Government and said, look,  
4 we're driving along in the car and he sees the police and  
5 he flips the gun beside him, he's be -- he'd be guilty of  
6 carrying, because his is during, in relation to a drug  
7 crime.

8 But if it just so happens he puts the gun on the  
9 seat, he might be guilty of use, because if somebody comes  
10 over and they see that gun and says, now --

11 QUESTION: I think you've answered the question,  
12 Mr. Zalkind. Thank you.

13 MR. ZALKIND: Thank you.

14 QUESTION: Mr. Feldman, we'll hear from you.

15 ORAL ARGUMENT OF JAMES A. FELDMAN

16 ON BEHALF OF THE RESPONDENT

17 QUESTION: Mr. Feldman, do you know if criminals  
18 still talk about packing heat, or has Judge Kozinski been  
19 watching too many Bogey movies? I --

20 (Laughter.)

21 MR. FELDMAN: I haven't -- I'm not aware of the  
22 continued use of that phrase, no.

23 The Government's position is that Congress used  
24 the term, carries a firearm in section 924(c) in its  
25 ordinary sense, to refer to all of the means by which a

1 firearm would ordinarily be said to be carried.

2 Now, it is --

3 QUESTION: I think the Government has some  
4 problem just in the colloquial sense of the word. You ask  
5 a person, are you carrying a gun, you know, and the person  
6 I think ordinarily thinks that means on your person.

7 MR. FELDMAN: I -- Mr. Chief Justice, I think a  
8 lot depends on when it's asked. If you imagine a case  
9 where a policeman stops a motorist and says -- walks up to  
10 the motorist and says, are you carrying a firearm, I don't  
11 think the motorist would have to stop to think if he  
12 wanted to answer honestly, is it on my person, did I put  
13 it on the seat, is it in the trunk or in the glove  
14 compartment, did I lock the glove compartment.

15 QUESTION: I'm not sure I agree with you.

16 MR. FELDMAN: You don't think -- I -- well --

17 QUESTION: Maybe my eight colleagues do, but I'm  
18 not sure that I do.

19 MR. FELDMAN: At least our feeling, and it's  
20 consistent with standard dictionary definitions, that if  
21 you ask someone if they're carrying a gun in their car  
22 they would say either yes, or no, depending on whether the  
23 gun was in the car.

24 QUESTION: If you ask them if they're carrying  
25 your gun in the car, yes. But what if you ask them just,

1 are you carrying a gun?

2 MR. FELDMAN: No, I think the same answer  
3 would -- I think the same answer would be true even if you  
4 said if you're carrying a gun, in a circumstance where  
5 you're talking about where that seems the reasonable  
6 reference. If you're talking -- going up to someone  
7 walking on the street, they'll likely interpret that to  
8 mean on the person.

9 QUESTION: Most dictionaries seem to -- which  
10 I'm sure we've all been looking at since this case arose,  
11 they seem to say two different things. They say carry  
12 means to convey or transport as in a cart or a car, and  
13 also they say, to have or bear about one's person, as a  
14 watch or a weapon, locomotion not being essential.

15 I mean, they seem to have both concepts in  
16 there, so which one do we look to, and do you think  
17 movement is required?

18 MR. FELDMAN: Our position is that Congress  
19 intended it to refer to both, and that movement is --

20 QUESTION: So someone with a gun in a pocket  
21 who's sitting in a chair and not moving is covered under  
22 your definition?

23 MR. FELDMAN: Yes, and I'll tell you why.  
24 Ordinarily the word carry, with its etymological roots and  
25 its many common usages, refers to locomotion, but because

1 common experience tells us that people move a lot, unlike  
2 vehicles, which sit parked in garages or at the curb for  
3 long periods of time, I think the concept that you have to  
4 have movement at a particular moment with a person has  
5 kind of dropped out or become vestigial.

6 And as a result when it's talking about carrying  
7 it on a person, although in point of fact if movement were  
8 required it wouldn't make any difference, because people  
9 do move, and the inference that someone has moved, if they  
10 have one on their person, would be very, very strong,  
11 but --

12 QUESTION: Well, if the weapon is in the car, in  
13 the Government's view is movement required?

14 MR. FELDMAN: Yes, and my only qualification I  
15 would give for that, if the defendant is just storing a  
16 gun in the car in his garage, for example, I don't think  
17 he's carrying it. If the car is in the process of moving  
18 from one place to another and stops at a red light for a  
19 minute, or is in the -- a process of movement --

20 QUESTION: Well, the car stops, so the drug  
21 transaction can be carried out. There's no movement at  
22 the time, during the drug transaction. The car is parked.

23 MR. FELDMAN: Right. At that time I would say  
24 he's still carrying it. If there's a course of movement  
25 that's going on and this is part of it I think the



1 defendant is still carrying it at that time.

2

3 QUESTION: And what about --

4 QUESTION: But if he --

5 QUESTION: -- the overlap between carry and  
6 transport?

7 MR. FELDMAN: I -- carry and transport, as the  
8 dictionaries, as every dictionary I think recognizes,  
9 there is a lot of overlap between the terms, but there's a  
10 couple of features that clearly -- I think three things  
11 that clearly distinguish them.

12 First, carry requires that the person who's  
13 carrying it accompany the item that's carried. I don't  
14 think transport requires that.

15 Second, carrying is more commonly used, and this  
16 may be just a question of connotations, but where the  
17 person who's doing the carrying also intends to use it,  
18 it's much more common to say that it's carried than used,  
19 and an example I'd give simply would be, if you're talking  
20 about a flashlight that maybe in the glove compartment of  
21 a car, it would be unusual for somebody to say, I  
22 transport a flashlight in the glove compartment of my car.  
23 I don't think it would be unusual to say, I carry a  
24 glove -- a flashlight in the glove compartment.

25 QUESTION: Well, what do you do about two people

1 in a vehicle in the Government's definition? There's a  
2 driver and there's a passenger and there's a gun in the  
3 glove compartment. Who's carrying the weapon?

4 MR. FELDMAN: I think it's usually -- those  
5 cases are resolved in terms of who has dominion and  
6 control over the gun. It may be one or the other, or  
7 both.

8 QUESTION: Well, who has it, in the Government's  
9 view, driver, passenger, weapon in glove compartment?

10 MR. FELDMAN: I -- you know, I don't --  
11 ordinarily it would be the driver, but it could easily be  
12 the passenger too, or instead of. It depends on whose gun  
13 it was, whether the passenger know the gun was in the  
14 glove compartment, a number of facts. In other words, in  
15 order --

16 QUESTION: It could be both?

17 MR. FELDMAN: It could be both, also.

18 Generally speaking possession, I think, is  
19 necessary for either use or carrying, and that would be --  
20 you have to look and see who's exercising dominion and  
21 control, but they're both responsible for the movement of  
22 the car and the movement of the gun.

23 QUESTION: What about the examples of being in a  
24 catamaran, or being in the caboose of a long train? Is it  
25 still being carried?

1        MR. FELDMAN: Our position is that it's still  
2 being carried. It's still being carried because if the  
3 gun -- it may or may not be in relation to a drug-  
4 trafficking offense, but if the gun is being moved from  
5 one place to another so that it can be of use and  
6 available in a drug-trafficking crime, then it is being  
7 carried.

8        QUESTION: It's very strange for Congress to  
9 convey those two quite different meanings. Number 1, I'm  
10 worried about somebody carrying a gun on his person, so  
11 that even if he's sitting there stock still, I want this  
12 statute to cover him, but I'm also worried about that gun  
13 in the caboose, and -- here, and it was not material to

14        MR. FELDMAN: I don't -- in a suitcase, on

15        QUESTION: -- to use the same word to cover both  
16 of those things, I find that extraordinary.

17        MR. FELDMAN: I think -- let me approach that in  
18 two ways. One is, the case with the caboose, I do think  
19 that would be a carry, but the term, the fact that the  
20 term carry, when you get a vehicle that's sufficiently  
21 large, the Queen Elizabeth, or something like that,  
22 whether -- the defendant is in one place, the gun is in  
23 another, whether the term carry has some fuzziness in that  
24 kind of a case I don't think should affect the fact that  
25

1 in a case like these, which is where you have it in a  
2 vehicle and where I think it would ordinarily be said that  
3 the gun is carried --

4 QUESTION: Those cases just make the point more  
5 vivid, and the point is, it seems strange -- sure, the  
6 word can bear each of those meanings, but it seems strange  
7 for Congress to pick that word without using an additional  
8 word to cover both of them.

9 MR. FELDMAN: I -- yes. Your Honor, I don't  
10 think it is strange, for two reasons. One is, I do think  
11 what Congress was getting at was the act of taking that  
12 gun to the scene of a drug transaction, just as the  
13 defendants were doing here, and it was not material to  
14 Congress whether defendants did that in a suitcase, on  
15 their -- in a pocket, in the car, in the trunk, or on the  
16 seat. They --

17 QUESTION: Well, your definition is really --  
18 adds very little to the word -- makes carry very little  
19 different from possess.

20 MR. FELDMAN: No, I don't think that's true,  
21 Your Honor.

22 QUESTION: The movement is the only thing that  
23 makes it different, isn't it?

24 MR. FELDMAN: Right, and I think that that's  
25 crucial, because what Congress -- as this Court I think

1 recognized in Bailey, what Congress was concerned about  
2 was not just criminalizing their possession of someone who  
3 keeps a gun in their house and who then -- they were  
4 worried that that, the fact that someone keeps a gun in  
5 their house should not be a predicate liability here if it  
6 has no other relationship to the crime or if it's just a  
7 matter of intent.

8 But where someone takes the intentional act of  
9 taking the gun and taking it with that person, as these  
10 defendants did, so it would be at the scene of the  
11 crime -- in fact, in the case of Cleveland and Gray, it  
12 would be essential to commit that crime because they were  
13 intending to rob drugs from another, a dealer, then I  
14 think that is the crime that Congress was trying to get  
15 at.

16 It was trying to get at the conduct that's  
17 preparatory to the use --

18 QUESTION: Under your view, can you give me an  
19 example of where you are not carrying a firearm but you  
20 are using it, so that we can give each of the terms in the  
21 statute an independent force?

22 MR. FELDMAN: Yes. I would point out -- I can.  
23 An example would be where you refer to it, where you  
24 display it, perhaps in some circumstances where you trade  
25 somebody for it --

1 QUESTION: Well, how can you do that if it's not  
2 in your car or on your person?

3 MR. FELDMAN: No, well, for example, if it's  
4 sitting on a table in your house and sitting out there on  
5 the table while you're doing the drug transaction, or not  
6 in your house, or some other location, I think that you  
7 might be referring to it or displaying it, but I don't  
8 think you would be carrying it.

9 But I would also point out that I think that the  
10 same view would hold true if you adopt petitioner's view  
11 of the statute.

12 QUESTION: Excuse me. You're saying that when  
13 we say using a firearm included displaying it, it means  
14 displaying it up on the wall? I thought it meant, you  
15 know, hands up.

16 MR. FELDMAN: No, Your --

17 QUESTION: You know, you're not shooting at  
18 anybody, but you're brandishing the firearm. You think if  
19 you have it displayed on the wall, that -- you're  
20 displaying a firearm, you're using a firearm.

21 MR. FELDMAN: Your Honor, I was -- I answered --  
22 I meant to refer to, if it's sitting on a table, for  
23 example, and the drugs --

24 QUESTION: You think that's displaying it. I  
25 don't think that's displaying it.

1 MR. FELDMAN: Well, we would take the position  
2 that it is if the -- if you imagine a case where the drugs  
3 are being dealt right there, the gun is sitting on the  
4 table, it's a very powerful message to whoever's on the  
5 other side of the table --

6 QUESTION: Well, you wouldn't have it on the  
7 table so -- when either person can grab it.

8 (Laughter.)

9 MR. FELDMAN: Well, grab -- again -- you're  
10 right, the circumstances could vary, but perhaps somewhere  
11 where it's available. It's quite clear out there in the  
12 open where the dealer can deal with it and not the  
13 adversary.

14 QUESTION: The two things I don't see about your  
15 definition. The first thing I don't see -- these may or  
16 may not be relevant, but I don't see why you say the  
17 train, why he's carrying it in the train, unless he  
18 happens to be Sidney -- who was the person, Averell  
19 Harriman or someone, who owned the train and was also the  
20 engineer at the time. Then I guess he's carrying it, but  
21 otherwise I would think he's arranging to have it carried.

22 I don't understand that part, and I also don't  
23 understand this last part where you say having it on the  
24 person is carry within this, because I would have thought  
25 on your theory that's what Kozinski was talking about,

1 packing a gun.

2 That is, I thought that the second definition in  
3 there, in the dictionary, was referring to the instance  
4 where there is no physical movement but you say, are you  
5 carrying a gun, and the answer to that question is yes,  
6 even if the person has never moved an inch, because  
7 sometimes carry means packing, and I don't see why you  
8 bring either of those two things within your definition.

9 MR. FELDMAN: I think the train, perhaps you're  
10 right, it may be it would only be an extraordinary  
11 circumstance where a train had a case like that where it  
12 would be said to be carried. I'm really not sure.

13 As far as on the person, I do think that  
14 Congress intended to use the term in all of --

15 QUESTION: Well, they put use. That's why use  
16 is there. I mean, certainly it's an odd -- I mean, it's  
17 in the dictionary.

18 You go ahead, because I want your answer.

19 MR. FELDMAN: I was going to say, I think  
20 Congress -- our basic submission is that Congress intended  
21 to use the term in all of the ways in which the term would  
22 ordinarily be used to talk about carrying and when it's on  
23 the person, if the Court were to hold that there had to be  
24 movement, it really wouldn't make very much difference.

25 I guess -- I think that because of common --



1 under common experience people do move very frequently,  
2 the word no longer requires much in the way of movement at  
3 a particular movement when it's on the person, but if the  
4 Court were to hold otherwise that would be satisfactory  
5 with us.

6 QUESTION: You know, words are not normally used  
7 in those -- in every sense that they can have. They're  
8 usually used in a -- you know, there's some line by -- I  
9 think it's an Ogden Nash line. He -- she made out his  
10 purpose up his mind, up her mind and a dash for the door.

11 I mean, you know, made has all of those  
12 meanings. She made out his purpose up her mind and a dash  
13 for the door. But you don't use words with all three  
14 meanings, and I find it strange to think that Congress is  
15 going to use the word carry with those two quite different  
16 meanings.

17 MR. FELDMAN: I think -- I guess I think  
18 Congress did, and I'd like to point out that in the  
19 numerous authorization statutes that we cite Congress  
20 plainly intended to use the word carry to refer to all of  
21 those things. There are numerous statutes that authorize  
22 Federal officers to carry firearms.

23 But equally important, State law consistently  
24 recognizes that carry can be used to mean all of those  
25 things in a wide range of different contexts and statutes,

1 and --

2 QUESTION: But this is carry during and in  
3 relation to, and --

4 MR. FELDMAN: That's right, and that is -- that  
5 is certainly a separate qualification, and things like  
6 immediate -- not immediate accessibility, maybe, but a  
7 degree of accessibility may be relevant for whether it's  
8 in relation to a drug-trafficking crime.

9 QUESTION: That was the one part of your brief  
10 was stymied me was the, and you said, well, as far as  
11 Cleveland is concerned, he's out because he carried the  
12 gun from the shop to the car, and I thought, trying to  
13 fathom what line a sensible Congress would draw, it  
14 wouldn't make a distinction based on whether it's the shop  
15 clerk that carries the gun and puts it on the seat, or the  
16 defendant purchased the gun and carried it out himself.

17 MR. FELDMAN: In our view, both cases -- I mean,  
18 our primary submission here is that both cases would  
19 plainly be carrying, because when he drives off in that  
20 vehicle he's carrying the car, the gun in the car.

21 But I'd like to make one other point about --

22 QUESTION: Before you get off the example you  
23 gave about these other statutes, I think it seems to me  
24 that the petitioners have an adequate response to that,  
25 and that is when you talk about permissive statutes

1 authorizing Federal agents to carry guns you can apply the  
2 principle that the authorization of the greater is  
3 implicitly an authorization of the lesser.

4 MR. FELDMAN: I agree with --

5 QUESTION: So that if you \*author them to carry  
6 a gun in the sense of bear it on their person, you  
7 obviously authorize them to take it from place to place  
8 whether it's in the trunk of the car or on the seat, but  
9 you cannot use the greater includes the lesser for  
10 criminal punishments.

11 MR. FELDMAN: But Your Honor, I don't believe  
12 that we are trying to use the greater to include the  
13 lesser here. I think you could construe those statutes  
14 that way, but you also could look at those dozens of  
15 statutes and say that Congress used the natural word  
16 there, carry, to refer to a whole variety of things that  
17 they were referring --

18 QUESTION: If there is this amount of different  
19 possibilities \*in the meaning of ambiguities, then surely  
20 the Rule of Lenity comes into play somewhere.

21 MR. FELDMAN: Your Honor, I would think it  
22 would, but not in this case, because I don't think there  
23 is any ambiguity, any substantial ambiguity in the  
24 question of whether you can be said to carry something in  
25 a vehicle. I think that that's clarified by all of the

1 ordinary canons of statutory interpretation.

2 I'd like to make one point related to the State  
3 law, which is petitioners argue that Congress was unaware  
4 of all these numerous State laws and therefore we  
5 shouldn't pay any attention to them in construing section  
6 924(c).

7 Well, when Congress enacted section 924(c) in  
8 1968 it said the statute provided for prohibition of  
9 carrying unlawfully during a predicate offense. When they  
10 said carry unlawfully, they were exactly intending to pick  
11 up, and they knew that they were intending to pick up  
12 State law on carrying. An unlawful carry was a carry that  
13 was primarily in violation of State law. There were very  
14 few Federal laws that governed carrying at the time.

15 Now, there's no denying that in 1968 there were  
16 numerous State statutes that prohibited carrying in a  
17 vehicle, and when Congress removed that --

18 QUESTION: But there were also State statutes  
19 that were limited to carrying on the person.

20 MR. FELDMAN: That's right, and it was only the  
21 ones they were -- they were referring to State law which  
22 plainly recognizes that carrying can -- some States it  
23 could refer to a vehicle, some States it couldn't, but the  
24 term -- the ones that we've heard of person say, carry on  
25 a person, and the ones that require immediate

1 accessibility say, carry about a person.

2 QUESTION: Oh, I don't know, it seems to me if  
3 I'm a person reading -- isn't that the test? If I'm a  
4 person reading a statute, would I be given adequate notice  
5 that that's what it's about? It's a statute making it  
6 unlawful to carry a firearm, and you think I'm put on  
7 adequate notice that it's if I have it in the trunk of my  
8 car I'm carrying --

9 MR. FELDMAN: I think there would be ample  
10 notice. As I said, I think --

11 QUESTION: I don't care about State statutes or  
12 anything else. You could have dozens of them, but if the  
13 language doesn't give fair notice to whoever's going to  
14 be -- going to get this mandatory minimum --

15 MR. FELDMAN: I think if someone were to read  
16 this statute and take -- and say to his confederate in  
17 crime, say, well, you know, let's make sure that we have  
18 the gun on the seat of the car and not in your pocket,  
19 because if it's in your pocket you're going to be carrying  
20 it when we're driving to the drug deal, I think that would  
21 be a pretty improbable event, that most likely someone  
22 would read the statute and say, there's a severe penalty  
23 that Congress has imposed for this, and we should make  
24 sure that we're not carrying it, and we can't carry it in  
25 the car, we can't carry it on our persons, we can't carry

1 it in any way.

2 I just want to add, though, about State law that  
3 when Congress removed the requirement of unlawfully in  
4 1984 they were plainly intending to broaden the reach of  
5 the statute, and so it's really just a little question  
6 that from the time the statute was enacted in 1968 until  
7 the present, it's referred to carrying in a vehicle as  
8 well as carrying on a person.

9 QUESTION: May I just -- I just want to clear up  
10 one very small point that I was unclear about your answer  
11 to Justice Kennedy. You don't take the position, do you,  
12 that the two -- the term use and the term carry are  
13 mutually exclusive?

14 MR. FELDMAN: No.

15 QUESTION: So you could do one thing that would  
16 violate both.

17 MR. FELDMAN: You certainly could.

18 QUESTION: Yes.

19 MR. FELDMAN: Petitioners have argued that we  
20 should -- that the Court should construe the term carry  
21 narrowly because the Court adopted a narrow construction  
22 of the term use in Bailey, but I think that would be  
23 turning the reasoning of Bailey on its head. One of the  
24 reasons why the Court in Bailey construed the term use a  
25 little bit narrowly was to still leave some room for

1 carrying.

2 That principle shouldn't be applied here to  
3 construe the term carrying narrowly and therefore leave a  
4 complete gap in the statute for things that people --

5 QUESTION: Well, there are separate offenses for  
6 transporting firearms.

7 MR. FELDMAN: That's correct, but the -- but  
8 nonetheless, when you're -- it's true that there are, and  
9 those offenses cover somewhat different conduct. They  
10 cover people who give somebody -- who consign something to  
11 be transported, and also people don't -- people don't  
12 accompany the item, and also that --

13 QUESTION: Well, they cover this, too, don't  
14 they?

15 MR. FELDMAN: They'd cover -- I think they'd  
16 probably cover most of this, that's correct, but --

17 QUESTION: The transport statutes would cover  
18 what happened here, do you think?

19 I mean, could the Government have charged either  
20 of these petitioners with one of the transportation  
21 offenses?

22 MR. FELDMAN: The transportation statute,  
23 924(b), which is the one that's been referred to earlier  
24 today, requires that the crime be committed therewith.  
25 You're transporting it with intent that the crime be

1 committed therewith, and I'm not sure whether it would  
2 cover these cases or not. It would depend on whether the  
3 crime was actually being committed with the gun, or  
4 whether the gun was -- it was -- whether the gun was being  
5 carried in relation to the crime.

6 QUESTION: Well, you don't need a gun to commit  
7 the basic offense --

8 MR. FELDMAN: Right.

9 QUESTION: -- do you?

10 MR. FELDMAN: That's correct, and that's why I'm  
11 not sure as -- it may depend on the facts of the case.  
12 I'm not sure whether the -- whether those -- what occurs  
13 here and what occurs in the majority of 924(c) cases would  
14 be covered by the other -- by 924(b).

15 QUESTION: Well, it also says, or with knowledge  
16 or reasonable cause to believe that an offense is to be  
17 committed therewith.

18 MR. FELDMAN: Right. Right, but it's the  
19 point -- the offense has to be committed with the gun, and  
20 that is not the formulation that Congress used in 924(c),  
21 where it said during and in relation to. The gun has to  
22 be carried during and in relation to.

23 But I think most significantly 924(b) is a  
24 broader statute because transport is a broader statute and  
25 as I said, where -- what Congress had in mind was that the



1 defendant him or herself is going to be the one who not  
2 only has the gun in the car, but then -- with the idea  
3 that it will be used at some later date, I think it's much  
4 more natural to use the word carry than transport, which  
5 refers just to the bare movement from one place to another  
6 for some purpose or for somebody else to use it or for  
7 all -- for all kinds of other possible reasons.

8 QUESTION: May I go back to the provision, for  
9 transportation with intent that the crime be committed  
10 therewith. Would that intent element be satisfied if they  
11 transported knowing that they might need to use the gun,  
12 but hoping that they might in fact be able to commit their  
13 crime without it? Would the intent element be satisfied  
14 with that state of mind?

15 MR. FELDMAN: You know, I'm not really aware of  
16 exactly how that's been interpreted in a case like -- I  
17 guess -- if I can be permitted I'd guess at it, but I'm  
18 not sure it's going to be borne out by whatever cases have  
19 come up, which is in Muscarello's case it may be difficult  
20 to show that it was transported, that the crime would be  
21 committed with the gun, because the gun was there to  
22 provide him protection during the crime.

23 In Cleveland and Gray's case I think probably it  
24 would be, because they were going to use the gun in order  
25 to rob the dealer and -- to steal drugs from another drug

1 dealer, and I think --

2 QUESTION: Well, that does argue, then, for a  
3 comparatively narrow reason, narrow reading of carry.

4 MR. FELDMAN: I don't believe --

5 QUESTION: Because you don't need -- you don't  
6 need the broad reading of carry to get the kind of  
7 instance which, as a matter of fact, most of our  
8 hypotheticals have been describing.

9 MR. FELDMAN: I don't know -- I don't know -- it  
10 may be that there's an overlap and there's other statutes  
11 in title 18 that would cover the conduct of these  
12 defendants, and there's a very broad range of different  
13 kinds of cases that come up under 924(c), but I think the  
14 important point is that the term carry is naturally used  
15 to carrying it in a vehicle. It's been used that way  
16 since 1968.

17 There's -- no court has ever said that it's not  
18 used that way, and I think that's a reflection of the way  
19 that term would ordinarily be used and ordinarily  
20 understood by Congress at that time and at each of the  
21 times that it's amended the statute since then.

22 And for that reason I don't -- I think that  
23 Congress was very concerned with seeing to it that the  
24 conduct that leads up to the possible use of a gun, this  
25 was -- the carrying offense is really meant to kind of

1 take care of the preparation for use, and for Congress it  
2 was of no moment whether someone takes a gun, puts it in  
3 an attache case, locks it, and carries it --

4 QUESTION: You say preparation, but the statute  
5 says during and in relation. You say during any crime.  
6 Surely the during has a different connotation than  
7 preparation.

8 MR. FELDMAN: That's correct, but for instance,  
9 if the offense is possession with intent to distribute,  
10 that's a crime that can be -- that can --

11 QUESTION: Oh, you're talking not just a  
12 carry --

13 MR. FELDMAN: I'm talking about in preparation  
14 for the use. I'm really not talking about, here, in  
15 preparation for the crime, and I think what Congress was  
16 trying to get at was that if someone takes a gun in  
17 preparation to commit a drug offense and puts it in a  
18 suitcase -- Cleveland and Gray, for example, in this case  
19 had taken -- they took -- they planned to rob the other  
20 dealers.

21 They put the gun in a bag. They put it in the  
22 trunk of their car and waited for the call to determine  
23 the rendez-vous point where they would meet them.

24 Now, if they had instead -- and it happened it  
25 was far enough away they needed to take the car, so they

1 got in the car and drove there.

2 QUESTION: But robbery is a separate offense.

3 MR. FELDMAN: That's correct.

4 QUESTION: That isn't the drug crime.

5 MR. FELDMAN: That's correct, but their drug  
6 crime was attempted possession with intent to distribute.  
7 It was going to be their attempt to get the drugs.

8 But if they had carried -- the rendez-vous point  
9 had been a couple of blocks from where they were and they  
10 had carried the bag in their hands rather than in the  
11 trunk of the car, it would have made no difference from  
12 what Congress was trying to get at in this statute.

13 What they were concerned was getting that --  
14 people taking that gun to the scene of the crime and  
15 especially as this Court has interpreted use, I think they  
16 didn't want to have to wait until someone actually pulls  
17 it out and starts using it in a very active sense in order  
18 to say that that -- we want to keep that gun away from  
19 that drug offense, and whether they take it there in their  
20 car, or take it there in a bag I don't think was of great  
21 significance, nor should be in interpreting the statute.

22 QUESTION: Is carrying -- the half of carrying  
23 that doesn't consist of on the person, is that always  
24 transportation?

25 MR. FELDMAN: Yes. I think -- is it always

1 transportation?

2 QUESTION: Let me tell you why you should say  
3 no.

4 (Laughter.)

5 MR. FELDMAN: No, it's not always --

6 QUESTION: I don't want to lead you into the  
7 hole.

8 MR. FELDMAN: Yes.

9 QUESTION: But I am sort of bemused by section  
10 925, which says the provisions of this chapter, except for  
11 a few sections which are not the one we're talking about  
12 here, shall not apply with respect to the transportation,  
13 shipment, receipt, possession, or importation of any  
14 firearm or ammunition imported for, sold, or shipped to or  
15 issued for the use of the United States or any department  
16 or agency thereof, or any State.

17 Now, I suppose that that -- you know, if  
18 transportation includes carry, I guess that would let  
19 the -- or if carry is always transportation, the carry  
20 section wouldn't apply if you're using a -- I don't know,  
21 a gun that's been taken from a Federal agent, which  
22 wouldn't make much sense.

23 MR. FELDMAN: That may be true. I'm --

24 QUESTION: So your answer is no.

25 MR. FELDMAN: My answer is no.

1 My answer is no for another reason as well,  
2 which is, as I said, I think transportation doesn't  
3 require that the defendant accompany the gun, and I think  
4 carrying does require that the defendant accompany the  
5 gun.

6 And again, that points out why the -- the  
7 seriousness of this offense and the reason why Congress  
8 wanted to get at carrying, which is, they were concerned  
9 with the defendant taking the gun along so that it would  
10 be there and available for use at the time when the  
11 defendant is prepared to commit a drug deal to possess the  
12 drugs, to rip off another dealer, to sell the drugs,  
13 whatever it is the defendant --

14 QUESTION: Your answer isn't really no.

15 MR. FELDMAN: I beg your pardon?

16 QUESTION: Your answer wasn't really no, was it?

17 MR. FELDMAN: Yes, it was.

18 QUESTION: Then I am confused. You mean that  
19 carry is not -- does not include trans --

20 MR. FELDMAN: Because I don't think it requires  
21 that you accompany the item that's being transported,  
22 unless I'm misunderstanding your -- in other words, I  
23 think --

24 QUESTION: I'm sorry --

25 MR. FELDMAN: -- carrying usually involves

1 transporting it, but transporting it does not always  
2 involve carrying it. I don't -- does that help?

3 QUESTION: I thought carrying, at its heart,  
4 from Middle English on, was having somebody in a cart, or  
5 a car, and we often use the word transportation for that.

6 MR. FELDMAN: That's correct, and I think -- I  
7 didn't -- there's certainly a great overlap between the  
8 two words, but there are some different uses. For  
9 example, where you take a gun to have it -- to transport  
10 it to somebody else in another State, but you're not going  
11 to accompany it, I don't think you'd say that you're  
12 carrying it in that case.

13 So there are differences between the two  
14 statutes, and there's reasons why Congress would have  
15 chosen to treat them differently.

16 I also think, though, that where it's ultimately  
17 intended that the person who's doing the carrying is going  
18 to be the one who's doing the using also, it's much more  
19 natural to refer to carry rather than use, as, for  
20 example, you carry -- as I said before, you carry a pen in  
21 your pocket, you carry a flashlight in your glove  
22 compartment.

23 You could say you're transporting the  
24 flashlight, but I think it's much more natural to say that  
25 you're carrying it.

1 Thank you very much.

2 QUESTION: Thank you, Mr. Feldman.

3 Mr. Klonoff, you have 3 minutes remaining.

4 REBUTTAL ARGUMENT OF ROBERT H. KLONOFF

5 ON BEHALF OF PETITIONER MUSCARELLO

6 MR. KLONOFF: Thank you.

7 he Government's argument in answer to Justice  
8 Breyer's question about where are the anomalies in the  
9 Government's position, the Government really couldn't  
10 answer what happens when a car is stopped, and if it does  
11 apply, then the whole theory of transportation makes no  
12 sense.

13 The Government couldn't answer the train  
14 hypothetical. These are going to create enormous line-  
15 drawing problems for the, for future courts.

16 The Government really couldn't explain the  
17 passenger situation. Where does this rule get them if the  
18 only person that can be charged under that theory is the  
19 driver, so we would submit that the Government --

20 QUESTION: Well, it seems to me in the great  
21 run-of-the-mind cases the gun is in the glove compartment,  
22 or in the -- in a bag under a newspaper on the passenger  
23 seat within easy reach, or even in the trunk. We don't  
24 have too many cases -- just like we don't have too many  
25 cases with missiles, we don't have too many cases with



1 guns in cabooses, and --

2 MR. KLONOFF: There are cases of guns in ships  
3 and trains, and there are many, many cases of guns in the  
4 back seat between the passengers, and the Government's  
5 position is anomalous there.

6 Now, in response to Justice --

7 QUESTION: Guns in the suitcase on the train. I  
8 mean, if you get on a train, you chuck your suitcase up on  
9 the rack or in the back of the car.

10 MR. KLONOFF: Exactly.

11 In response to Justice O'Connor's question --  
12 this points up Justice Souter's point about the reason for  
13 construing carry narrowly -- the Government does prosecute  
14 transport in precisely these circumstances.

15 We cite in our reply brief *United States v.*  
16 *Albaron*, the Fourth Circuit case, exactly the same  
17 situation, gun in a glove compartment on the way to a drug  
18 transaction, so there are statutes to get at precisely  
19 this situation.

20 In terms of the State statutes, we would  
21 disagree with the Government's position. The Congress was  
22 not incorporating the whole sweep of State statutes. It  
23 would be --

24 QUESTION: No, but on the State statutes let me  
25 ask you this question. There are several State statutes

1 that say carry on the person.

2 MR. KLONOFF: There are a few. Most of the --

3 QUESTION: Would you not agree that if you're  
4 correct the words, on the person in those statutes are  
5 redundant?

6 MR. KLONOFF: Those few statutes. There are  
7 many statutes that say --

8 QUESTION: So at least some States thought carry  
9 was broader than on a person.

10 MR. KLONOFF: Well, most of the States say on or  
11 about, and many of them, 22 of them, and they're cited in  
12 the Cleveland brief, say on or about, or including  
13 broadly, in the vehicle. Now, those 22 States would be  
14 surplusage under the Government's position. You wouldn't  
15 need to say in the vehicle.

16 So the overwhelming weight of the State  
17 statutes, we submit, supports our position and not the  
18 Government's, and at most, as was pointed out in the  
19 questioning I think by the Chief Justice, all you get from  
20 looking at the State statutes ultimately is an application  
21 of the Rule of Lenity.

22 There is no way that you come to the conclusion  
23 that the Government's position is unambiguous, so we  
24 submit that that whole exercise simply demonstrates why  
25 the petitioner should prevail.

1           QUESTION: May I ask you to comment on one other  
2 thing that's kind of puzzled me? In our opinion in Bailey  
3 we said that a person puts a gun next to him during the  
4 transaction, it just sits there, that's not use, and one  
5 reason why it's not use was, that would leave no room for  
6 carry to cover that situation. Do you think that  
7 situation is covered either by carry or use?

8           MR. KLONOFF: Well, I don't believe that the  
9 Court was referring to the situation where the gun was  
10 just laying there in terms of carry. The examples of  
11 carry --

12           QUESTION: Well, he puts -- the defendant puts a  
13 gun into a place to protect drugs or to embolden himself,  
14 were the Court's words, and we all signed on to that.

15           MR. KLONOFF: Right, but the Court was not  
16 describing carry there. Every time the Court used --

17           QUESTION: It was saying the reason that we  
18 don't want to read it as use is, that would mean -- it  
19 would leave no room for carry to cover that situation.

20           MR. KLONOFF: Well, I -- respectfully, Justice  
21 Stevens, I would submit that the Court was not in any way  
22 suggesting that carry cover that situation. The Court's  
23 examples of carry in Bailey were always in reference to on  
24 the person.

25           CHIEF JUSTICE REHNQUIST: Thank you,

1 Mr. Klonoff.

2 MR. KLONOFF: Thank you.

3 CHIEF JUSTICE REHNQUIST: The case is submitted.

4 (Whereupon, at 11:01 a.m., the case in the  
5 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

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FRANK J. MUSCARELLO, Petitioner v. UNITED STATES and DONALD E. CLEVELAND AND ENRIQUE GRAY-SANTANA, Petitioners v. UNITED STATES  
CASE NO: 96-1654 & 96-8837

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