SUPREME COURT OF THE UNITED STATES

No. 96–7151

DEBRA FAYE LEWIS, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March 9, 1998]

JUSTICE BREYER delivered the opinion of the Court.

The federal Assimilative Crimes Act (ACA) assimilates into federal law, and thereby makes applicable on federal enclaves such as Army bases, certain criminal laws of the State in which the enclave is located. It says that:

> "Whoever within or upon any [federal enclave], is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, . . . shall be guilty of a like offense and subject to like punishment." 18 U. S. C. §13(a).

The question in this case is whether the ACA makes applicable on a federal Army base located in Louisiana a state first-degree murder statute that defines first-degree murder to include the "killing of a human being . . . [w]hen the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve . . . ." La. Rev. Stat. Ann. §14:30(A)(5) (West 1986 and Supp. 1997).

We hold that the ACA does not make the state provision part of federal law. A federal murder statute, 18 U. S. C. §1111, therefore governs the crime at issue– the killing of a four year-old child "with malice aforethought" but without "premeditation." Under that statute this crime is second-degree, not first-degree, murder.

I

A federal grand jury indictment charged that petitioner, Debra Faye Lewis, and her husband James Lewis, beat and killed James' four year-old daughter while all three lived at Fort Polk, a federal Army base in Louisiana. Relying on the ACA, the indictment charged a violation of Louisiana's first-degree murder statute. La. Rev. Stat. Ann. §14:30 (West 1986 and Supp. 1993). Upon her conviction, the District Court sentenced Debra Lewis to life imprisonment without parole. See *id.* §14:30(C) (West 1986).

On appeal the Fifth Circuit held that Louisiana's statute did not apply at Fort Polk. *United States* v. *Lewis*, 92 F. 3d 1371 (1996). It noted that the Assimilative Crimes Act made state criminal statutes applicable on federal enclaves only where the wrongful "act or omission" was "not made punishable by any enactment of Congress." *Id.*, at 1373–1374 (citing 18 U. S. C. §13). Because Congress made Lewis' acts "punishable" as federal second-degree murder, and the federal and state laws were directed at roughly the same sort of conduct, the Fifth Circuit reasoned that the ACA did not permit the application of Louisiana's first-degree murder statute to petitioner's acts. 92 F. 3d, at 1375–1377. The Court nonetheless affirmed Lewis' conviction on the ground that in convicting her of the state charge the jury had necessarily found all of the requisite elements of federal second-degree murder. *Id.*, at 1378; cf. *Rutledge* v. *United States*, 517 U. S. 292, 305–

306 (1996). And it affirmed the sentence on the ground that it was no greater than the maximum sentence (life) permitted by the federal second-degree murder statute. 92 F. 3d, at 1379–1380.

We granted certiorari primarily to consider the Fifth Circuit's Assimilative Crimes Act determination. We conclude that the holding was correct, though we also believe that Lewis is entitled to resentencing on the federal second-degree murder conviction.

II

The ACA applies state law to a defendant's acts or omissions that are "not made punishable by *any enactment* of Congress." 18 U. S. C. §13(a) (emphasis added). The basic question before us concerns the meaning of the italicized phrase. These words say that the ACA does *not* assimilate a state statute if the defendant's "act" or "omission" is punished by "any [federal] enactment." If the words are taken literally, Louisiana's law could not possibly apply to Lewis, for there are several federal "enactments" that make Lewis' acts punishable, for example, the federal (second degree) murder statute, 18 U. S. C. §1111, and the federal assault law, §113. We agree with the Government, however, that this is not a sensible interpretation of this language, since a literal reading of the words "any enactment" would dramatically separate the statute from its intended purpose.

The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves. See *Williams* v. *United States*, 327 U. S. 711, 718–719 (1946) (ACA exists "to fill in gaps" in federal law where Congress has not "define[d] the missing offenses"); *United States* v. *Sharpnack*, 355 U. S. 286, 289 (1958) (ACA represents congressional decision of "adopting for otherwise undefined offenses the policy of general conformity to local

law"); *United States* v. *Press Publishing Co.*, 219 U. S. 1, 9–10 (1911) (state laws apply to crimes "which were not previously provided for by a law of the United States"); *Franklin* v. *United States*, 216 U. S. 559, 568 (1910) (assimilation occurs where state laws "not displaced by specific laws enacted by Congress").

In the 1820's, when the ACA began its life, federal statutory law punished only a few crimes committed on federal enclaves, such as murder and manslaughter. See 1 Stat. 113. The federal courts lacked the power to supplement these few statutory crimes through the use of the common law. See *United States* v. *Hudson*, 7 Cranch 32, 34 (1812). Consequently James Buchanan, then a Congressman, could point out to his fellow House Members a "palpable defect in our system," namely that "a great variety of actions, to which a high degree of moral guilt is attached, and which are punished . . . at the common law, and by every State . . . may be committed with impunity" on federal enclaves. 40 Annals of Cong. 930 (1823). Daniel Webster sought to cure this palpable defect by introducing a bill that both increased the number of federal crimes and also made "the residue" criminal, see 1 Cong. Deb. 338 (1825), by assimilating state law where federal statutes did not provide for the "punishment" of an "offence." 4 Stat. 115. This law, with only a few changes, has become today's Assimilated Crimes Act. See *Williams*, *supra*, at 719–723 (describing history of ACA).

Two features of the Act indicate a congressional intent to confine the scope of the words "any enactment" more narrowly than (and hence extend the Act's reach beyond what) a literal reading might suggest. First, a literal interpretation of the words "any enactment" would leave federal criminal enclave law subject to gaps of the very kind the Act was designed to fill. The Act would be unable to assimilate even a highly specific state law aimed directly at a serious, narrowly defined evil, if the language of

any federal statute, however broad and however clearly aimed at a different kind of harm, were to cover the defendant's act. Were there only a state, and no federal, law against murder, for example, a federal prohibition of assault could prevent the state statute from filling the obvious resulting gap.

At the same time, prior to its modern amendment the ACA's language more clearly set limits upon the scope of the word "any." The original version of the ACA said that assimilation of a relevant state law was proper when "any offence shall be committed . . . the punishment of which *offence* is not specially provided for by any law of the United States." 4 Stat. 115 (emphasis added); see also 30 Stat. 717 (1898) (later reenactment also using "offense"). The word "offense" avoided the purpose-thwarting interpretation of the Act discussed above, for it limited the relevant federal "enactment" to an enactment that punished *offenses* of the same *kind* as those punished by state law. Presumably, a federal assault statute would not have provided punishment for the "offense" that state murder law condemned. Congress changed the Act's language in 1909, removing the word "offense" and inserting the words "act or thing," 35 Stat. 1145, which later became the current "act or omission." But Congress did so for reasons irrelevant here, see H. R. Rep. No. 2, 60th Cong., 1st Sess., 25 (1908) (stating that, technically speaking, conduct otherwise not forbidden by law was not an "offense"), and did not intend to alter the basic meaning of the Act. See *Williams*, *supra*, at 722–723.

For these or similar reasons, many lower courts have interpreted the words "any enactment" more narrowly than a literal reading might suggest. And they have applied the Act to assimilate state statutes in circumstances they thought roughly similar to those suggested by our assault/murder example above. See, *e.g.*, *United States* v. *Kaufman*, 862 F. 2d 236, 238 (CA9 1989) (existence of

federal law punishing the carrying of a gun does not prevent assimilation of state law punishing threatening someone with a gun); *Fields* v. *United States*, 438 F. 2d 205, 207–208 (CA2 1971) (assimilation of state malicious shooting law proper despite existence of federal assault statute); *United States* v. *Brown*, 608 F. 2d 551, 553–554 (CA5 1979) (child abuse different in kind than generic federal assault, and so state law could be assimilated). But see *United States* v. *Chaussee*, 536 F. 2d 637, 644 (CA7 1976) (stating a more literal test). Like the Government, we conclude that Congress did not intend the relevant words– *"any* enactment"– to carry an absolutely literal meaning.

On the other hand, we cannot accept the narrow interpretation of the relevant words (and the statute's consequently broader reach) that the Solicitor General seems to urge. Drawing on our language in *Williams*, 327 U. S., at 717, some lower courts have said that the words "any enactment" refer only to federal enactments that make criminal the same "precise acts" as those made criminal by the relevant state law. See, *e.g.*, *United States* v. *Johnson*, 967 F. 2d 1431, 1436 (CA10 1992). The Government apparently interprets this test to mean that, with limited exceptions, the ACA would assimilate a state law so long as that state law defines a crime in terms of at least one element that does not appear in the relevant federal enactment. See Tr. of Oral Arg. 27 ("[I]n the great majority of cases the question of whether the State law offense has been made punishable by an enactment of Congress can be resolved by asking, is there a Federal statute that contains precisely the same essential elements as the State statute"). But this interpretation of federal "enactments" is too narrow.

The Government's view of the "precise acts" test– which comes close to a "precise elements" test– would have the ACA assimilate state law even where there is no

gap to fill. Suppose, for example, that state criminal law (but not federal criminal law) makes possession of a state bank charter an element of an offense it calls "bank robbery"; or suppose that state law makes purse snatching criminal under a statute that is indistinguishable from a comparable federal law but for a somewhat different definition of the word "purse." Where, one might ask, is the gap? As Congress has enacted more and more federal statutes, including many that are applicable only to federal enclaves, see, *e.g.*, 18 U. S. C. §113 (assault); §1460 (possession with intent to sell obscene materials), such possibilities become more realistic. And to that extent the Government's broad view of assimilation threatens, not only to fill nonexistent gaps, but to rewrite each federal enclave-related criminal law in 50 different ways, depending upon special, perhaps idiosyncratic, drafting circumstances in the different States. See *Williams, supra*, at 718 (ACA may not be used to "enlarg[e] . . . modif[y] or repea[l] existing provisions of the Federal Code"). It would also leave residents of federal enclaves randomly subject to three sets of criminal laws (special federal territorial criminal law, general federal criminal law, and state criminal law) where their state counterparts would be subject only to the latter two types.

Nothing in the Act's language or in its purpose warrants imposing such narrow limits upon the words "any enactment" and thereby so significantly broadening the statute's reach. Nor does the use by this Court of the words "precise acts" in the leading case in which this Court has applied the Act, *Williams*, 327 U. S., at 717, help the Government in this respect. In *Williams*, the Court held that the ACA did not assimilate a State's "statutory rape" crime (with a cut-off age of 18) both because federal adultery and fornication statutes covered the defendant's "precise acts," and because the policies underlying a similar federal statute (with a cut-off age of 16)

made clear there was no gap to fill. *Id.*, at 724–725. The Court's opinion refers to both of these circumstances and does not decide whether the Act would, or would not, have applied in the absence of only one. We cannot find a convincing justification in language, purpose, or precedent for the Government's interpretation. Hence, we conclude that, just as a literal interpretation would produce an ACA that is too narrow, see *supra*, at 4–6, so the Government's interpretation would produce an ACA that is too broad.

In our view, the ACA's language and its gap-filling purpose taken together indicate that a court must first ask the question that the ACA's language requires: Is the defendant's "act or omission . . . made punishable by *any* enactment of Congress." 18 U. S. C. §13(a) (emphasis added). If the answer to this question is "no," that will normally end the matter. The ACA presumably would assimilate the statute. If the answer to the question is "yes," however, the court must ask the further question whether the federal statutes that apply to the "act or omission" preclude application of the state law in question, say because its application would interfere with the achievement of a federal policy, see *Johnson* v. *Yellow Cab Transit Co.*, 321 U. S. 383, 389–390 (1944), because the state law would effectively rewrite an offense definition that Congress carefully considered, see *Williams*, *supra*, at 718, or because federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue, see *id.*, at 724 (no assimilation where Congress has "covered the field with uniform federal legislation"). See also *Franklin*, 216 U. S., at 568 (assimilation proper only where state laws "not displaced by specific laws enacted by Congress").

There are too many different state and federal criminal laws, applicable in too many different kinds of circumstances, bearing too many different relations to other laws, to common law tradition, and to each other, for a

touchstone to provide an automatic general answer to this second question. Still, it seems fairly obvious that the Act will not apply where both state and federal statutes seek to punish approximately the same wrongful behavior– where, for example, differences among elements of the crimes reflect jurisdictional, or other technical, considerations, or where differences amount only to those of name, definitional language, or punishment. See, *e.g.*, *United States* v. *Adams*, 502 F. Supp. 21, 25 (SD Fla. 1980) (misdemeanor/felony difference did not justify assimilation).

The Act's basic purpose makes it similarly clear that assimilation may not rewrite distinctions among the forms of criminal behavior that Congress intended to create. *Williams*, *supra*, at 717–718 (nothing in the history or language of the ACA to indicate that once Congress has "defined a penal offense, it has authorized such definition to be enlarged" by state law). Hence, ordinarily, there will be no gap for the Act to fill where a set of federal enactments taken together make criminal a single form of wrongful behavior while distinguishing (say, in terms of seriousness) among what amount to different ways of committing the same basic crime.

At the same time, a substantial difference in the kind of wrongful behavior covered (on the one hand by the state statute, on the other, by federal enactments) will ordinarily indicate a gap for a state statute to fill– unless Congress, through the comprehensiveness of its regulation, cf. *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 604–605 (1991), or through language revealing a conflicting policy, see *Williams*, *supra*, at 724–725, indicates to the contrary in a particular case. See also *Johnson* v. *Yellow Cab*, *supra*, at 389–390; *Blackburn* v. *United States*, 100 F. 3d 1426, 1435 (CA9 1996). The primary question (we repeat) is one of legislative intent: Does applicable federal law indicate an intent to punish conduct such as the defend-

ant's to the exclusion of the particular state statute at issue?

III

We must now apply these principles to this case. The relevant federal murder statute– applicable only on federal enclaves– read as follows in 1993, the time of petitioner's crime:

> "§1111. Murder
>
> "(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> "Any other murder is murder in the second degree.
>
> "(b) Within the special maritime and territorial jurisdiction of the United States,
>
> "Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment', in which event he shall be sentenced to imprisonment for life;
>
> "Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life." 18 U. S. C. §1111 (1988 ed.).

This statute says that "murder in the first degree" shall be punished by death or life imprisonment. It says that "murder in the second degree" shall be punished by imprisonment for "any term of years or for life." It defines first-degree murder as a "willful, deliberate, malicious, and premeditated killing," and also adds certain kinds of felony murder (*i.e.*, murder occurring during the commission of other crimes) and certain instances of transferred intent (*i.e.*, D's killing of A, while intending to murder B). It defines second degree murder as "any other murder."

Louisiana's statute says the following:

> "A. First degree murder is the killing of a human being:
>
> "(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, drive-by shooting, first degree robbery, or simple robbery.
>
> "(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;
>
> "(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
>
> "(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

> *"(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.*
>
> "(6) When the offender has the specific intent to kill or to inflict great bodily harm while engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedules I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.
>
> "(7) When the offender has specific intent to kill and is engaged in the activities prohibited by R. S. 14:107.1(C)(1).
>
> . . . . .
>
> C. Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury." La.Rev.Stat. Ann. §14:30 (West 1986 and Supp. 1997) (emphasis added).

This statute says that murder in the first degree shall be punished by "death or life imprisonment" without parole. It defines first degree murder as the "killing of a human being" with a "specific intent to kill or to inflict great bodily harm" where the "offender" is committing certain other felonies or has been paid for the crime or kills more than one victim, or kills a fireman, a peace officer, someone over the age of 64, or someone under the age of 12. In this case, the jury found that the defendant killed a child under the age of 12 with a "specific intent to

kill or to inflict great bodily harm" upon that child.

In deciding whether the ACA assimilates Louisiana's law, we first ask whether the defendant's "act or omission" is "made punishable by *any* enactment of Congress." 18 U. S. C. §13(a) (emphasis added); see *supra*, at 8. The answer to this question is "yes." An "enactment of Congress," namely 18 U. S. C. §1111, makes the defendant's "act . . . punishable" as second degree murder. This answer is not conclusive, however, for reasons we have pointed out. Rather, we must ask a second question. See *supra*, at 8. Does applicable federal law indicate an intent to punish conduct such as the defendant's to the exclusion of the particular state statute at issue?

We concede at the outset the Government's claim that the two statutes cover different forms of behavior. The federal second-degree murder statute covers a wide range of conduct; the Louisiana first degree murder provision focuses upon a narrower (and different) range of conduct. We also concede that, other things being equal, this consideration argues in favor of assimilation. Yet other things are not equal; and other features of the federal statute convince us that Congress has intended that the federal murder statute preclude application of a first-degree murder statute such as Louisiana's to a killing on a federal enclave.

The most obvious such feature is the detailed manner in which the federal murder statute is drafted. It purports to make criminal a particular form of wrongful behavior, namely "murder," which it defines as "the unlawful killing of a human being with malice aforethought." It covers all variants of murder. It divides murderous behavior into two parts: a specifically defined list of "first degree" murders and all "other" murders, which it labels "second degree." This fact, the way in which "first degree" and "second degree" provisions are linguistically interwoven; the fact that the "first degree" list is detailed; and the fact that

the list sets forth several circumstances at the same level of generality as does Louisiana's statute, taken together, indicate that Congress intended its statute to cover a particular field– namely, "unlawful killing of a human being with malice aforethought"– as an integrated whole. The complete coverage of the federal statute over all types of federal enclave murder is reinforced by the extreme breadth of the possible sentences, ranging all the way from *any* term of years, to death. There is no gap for Louisiana's statute to fill.

Several other circumstances offer support for the conclusion that Congress' omissions from its "first degree" murder list reflect a considered legislative judgment. Congress, for example, has recently focused directly several times upon the content of the "first degree" list, subtracting certain specified circumstances or adding others. See Pub. L. 99–646, 100 Stat. 3623 (1986) (substituting "aggravated sexual abuse or sexual abuse" for "rape"); Pub. L. 98–473, 98 Stat. 2138 (1984) (adding "escape, murder, kidnaping, treason, espionage" and "sabotage" to first-degree list). By drawing the line between first and second degree, Congress also has carefully decided just when it does, and when it does not, intend for murder to be punishable by death– a major way in which the Louisiana first-degree murder statute (which provides the death penalty) differs from the federal second-degree provision (which does not). 18 U. S. C. §1111(b); La.Rev.Stat. Ann. §14:30(C) (West Supp. 1997). The death penalty is a matter that typically draws specific congressional attention. See, *e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, §60003, 108 Stat. 1968 (section entitled "Specific Offenses For Which [the] Death Penalty Is Authorized"). As this Court said in *Williams*, "[w]here offenses have been specifically defined by Congress and the public has been guided by such definitions for many years," it is unusual for Congress through general legisla-

tion like the ACA "to amend such definitions or the punishments prescribed for such offenses, without making clear its intent to do so." 327 U. S., at 718 (footnote omitted).

Further, Congress when writing and amending the ACA has referred to the conduct at issue here– murder– as an example of a crime covered by, not as an example of a gap in, federal law. See H. R. No. 1584, 76th Cong., 3d Sess., 1 (1940) ("Certain of the major crimes . . . such . . . as murder" are "expressly defined" by Congress; assimilation of state law is proper as to "other offenses"); 1 Cong. Deb. 338 (1825) (Daniel Webster explaining original assimilation provision as a way to cover "the residue" of crimes not "provide[d] for" by Congress; at the time federal law contained a federal enclave murder provision, see 1 Stat. 113); see also *United States* v. *Sharpnack*, 355 U. S. 289 and n. 5 (citing 18 U. S. C. §1111 for proposition that Congress has increasingly "enact[ed] for the enclaves specific criminal statutes" and "to that extent, [has] excluded the state laws from that field").

Finally, the federal criminal statute before us applies only on federal enclaves. §1111(b). Hence, there is a sense in which assimilation of Louisiana law would treat those living on federal enclaves differently from those living elsewhere in Louisiana, for it would subject them to two sets of "territorial" criminal laws in addition to the general federal criminal laws that apply nationwide. See *supra*, at 7. Given all these considerations, it is perhaps not surprising that we have been unable to find a single reported case in which a federal court has used the ACA to assimilate a state murder law to fill a supposed "gap" in the federal murder statute.

The Government, arguing to the contrary, says that Louisiana's provision is a type of "child protection" statute, filling a "gap" in federal enclave-related criminal law due to the fact that Congress left "child abuse," like much

other domestic relations law, to the States. See Brief for United States 23, 29–30. The fact that Congress, when writing various criminal statutes, has focused directly upon "child protection" weakens the force of this argument. See, *e.g.*, 21 U. S. C. §§859(a)–(b) (person selling drugs to minors is subject to twice the maximum sentence as one who deals to adults, and repeat offenders who sell to children subject to *three times* the normal maximum); 18 U. S. C. §1201(g) ("special rule" for kidnapping offenses involving minors, with enhanced penalties in certain cases); §§2241(c) and 2243 (prohibiting sexual abuse of minors); §2251 (prohibiting sexual exploitation of children); §2251A (selling and buying of children); §2258 (failure to report child abuse). And, without expressing any view on the merits of lower court cases that have assimilated state child abuse statutes despite the presence of a federal assault law, §113, see, *e.g.*, *United States* v. *Brown*, 608 F. 2d, at 553–554; *United States* v. *Fesler*, 781 F. 2d 384, 390–391 (CA5 1986), we note that the federal assault prohibition is less comprehensive than the federal murder statute, and the relevant statutory relationships are less direct than those at issue here. We conclude that the consideration to which the Government points is not strong enough to open a child-related "gap" in the comprehensive effort to define murder on federal enclaves.

For these reasons we agree with the Fifth Circuit that federal law does not assimilate the child victim provision of Louisiana's first-degree murder statute.

IV

The Fifth Circuit affirmed petitioner's conviction on the ground that the jury, in convicting petitioner under the Louisiana statute, necessarily found all of the requisite elements of the federal second-degree murder offense. 92 F. 3d at 1379; cf. *Rutledge* v. *United States*, 517 U. S., at

305–306. Petitioner does not contest the legal correctness of this conclusion.

Petitioner, however, does argue that the Fifth Circuit was wrong to affirm her sentence (life imprisonment). She points out that the federal second-degree murder statute, unlike Louisiana's first-degree murder statute, does not make a life sentence mandatory. See 18 U. S. C. §1111(b) (sentence of "any term of years or for life"). Moreover, the Sentencing Guidelines provide for a range of 168 to 210 months' imprisonment for a first-time offender who murders a "vulnerable victim," United States Sentencing Commission, Guidelines Manual §§2A1.2, 3A1.1, and Ch. 5, pt. A (Nov. 1994), although a judge could impose a higher sentence by departing from the Guidelines range. See *id.*, at ch. 5, pt. K; see also *Koon* v. *United States*, 518 U. S. 81, 92–96 (1996) (describing circumstances for departures).

The Government concedes petitioner's point. The Solicitor General writes:

> "If the jury had found petitioner guilty of second degree murder under federal law, the district court would have been required to utilize the Sentencing Guidelines provisions applicable to that offense, and the court might have imposed a sentence below the statutory maximum. An upward departure from that range, if appropriate, could reach the statutory maximum of a life sentence, but it is for the district court in the first instance to make such a determination. Resentencing under the Guidelines is therefore appropriate if this Court vacates petitioner's conviction on the assimilated state offense and orders entry of a judgment of conviction for federal second degree murder." Brief for United States 38 (footnote and citations omitted).

We consequently vacate the Fifth Circuit's judgment in respect to petitioner's sentence and remand the case for resentencing.

It is so ordered.