OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JAIME CASTILLO, ET AL. Petitioners v. UNITED STATES

CASE NO: 99-658 C-2

PLACE: Washington, D.C.

DATE: Monday, April 24, 2000

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IN THE SUPREME COURT OF THE UNITED STATES

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JAIME CASTILLO, ET AL. :

Petitioners :

v. : No. 99-658

UNITED STATES :

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Washington, D.C.

Monday, April 24, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

STEPHEN P. HALBROOK, ESQ., Fairfax, Virginia; on behalf of the Petitioners.

JAMES K. ROBINSON, ESQ., Assistant Attorney General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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PROCEEDINGS

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-658, Jaime Castillo v. The United States.

Mr. Halbrook.

ORAL ARGUMENT OF STEPHEN P. HALBROOK

ON BEHALF OF THE PETITIONERS

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

From the time of the enactment of the amendment to section 924(c) in 1986, which added various firearm types to the section, it was the common practice in the Federal courts to allege in the indictment and to submit to the jury for determination beyond a reasonable doubt the firearm type. This reflected a long tradition in both Federal and State law under which firearm type was an element of the offense, of the various offenses.

Firearm type is frequently contested at trial, and is the kind of issue that juries normally resolve. Based on its reading of legislative history, the lower court in this case found for the first time that, in essence, the jury is a lower level gatekeeper in the sense that it finds facts justifying a 5-year period of incarceration, but opening the door to factual findings by the sentencing court according to the preponderance-of-

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evidence standard that justify a 30-year sentence, as in this case, or, in the case of a second conviction, life imprisonment.

The section in question, the first part of the section, sets forth elements for the lower level offense in some 83 words. If you looked at from whoever to 5 years you'll find the various elements, you'll find the Federal jurisdictional nexus, and we submit that Congress, in a very concise manner, instead of repeating all of that wording, simply set forth the concise way of speaking that if the firearm is, and then to give a list of firearm types, then the punishment is of another --

QUESTION: Well, what are the basic elements of the offense, the 5-year thing, Mr. Halbrook?

MR. HALBROOK: The elements of the offense is that a person carried or used a firearm therein and in relation to a Federal crime of violence -- in this case there's also drug-trafficking, and other cases. It has to be something that is prosecutable in a Federal court, and --

QUESTION: The crime of violence?

MR. HALBROOK: A crime of violence, yes, Your Honor. So those are basically the elements, and when Congress amended the law in 1986 to include other firearm types, it simply sets forth the wording that if the

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firearm is, and in this case in '86 the amendment was a machinegun or a firearm that's equipped with a firearm silencer or firearm muffler, and those were treated as elements of the offense up until basically this case.

That was the practice in the Federal courts. There were at least three circuits that adopted the rule that those are offense elements.

QUESTION: Well, do you take the position that if a person is charged with a crime of violence or drug-trafficking and with using or carrying a firearm, that that is an indictable offense, and sets out elements of a crime?

MR. HALBROOK: Yes, Your Honor, we do think that, and I -- this Court first held --

QUESTION: Because I would think your position might lead to the conclusion that that doesn't even set out the elements of a complete offense.

MR. HALBROOK: Oh, because it doesn't start by saying it shall be unlawful.

The way this was adopted originally back in the 1968 Gun Control Act was, it was a floor amendment and section 924(c) had penalties but also elements were put in.

QUESTION: But you do agree that that states out the elements of an offense?

MR. HALBROOK: Yes, Your Honor, we do agree with that. It says, whoever shall do this, and it doesn't say it's unlawful, but then when you get to the penalty clause it's obviously by inference. I think this Court indicated in the Jones case about the Federal carjacking law that it characterized the initial part of the statute as describing some pretty obnoxious behavior without saying that it's unlawful, but then you get to the penalty clause and then it's obvious that that's an offense.

And this Court first held in the Simpson case back in the post '68 period that 924(c) is an offense and it's not just a sentencing factor for some other crime, because --

QUESTION: Mr. Halbrook, are you making both a statutory argument and a constitutional argument with the --

MR. HALBROOK: Well, we're not arguing the statute's unconstitutional. We're arguing that the statute should be interpreted such that the different firearm types are offense elements.

QUESTION: But you have an alternative argument that if the statute is interpreted as the Government urges, then it would be unconstitutional?

MR. HALBROOK: We don't make that argument, and the reason we don't make that argument -- we do appeal to

the doctrine of constitutional doubt, but when the decision was first made that these are sentencing factors, it was the universal practice in the Federal courts that they were elements, and then we had several circuit opinions saying that these are offense elements, and we didn't think, and don't think to this day that it would be a service to this Court in a loose way to say that something's unconstitutional when it can so easily be interpreted in the narrow way to avoid the unconstitutional result or according to the rule of lenity --

QUESTION: And if we don't agree with you on that, you're prepared to lose the case.

MR. HALBROOK: Well, we might not be prepared to lose the case, Your Honor --

QUESTION: Well, but you don't make a constitutional argument. If we disagree with you that, as set forth in this statute, these matters were meant to be elements of the offense, if we think that they were meant to be sentencing factors, you're content to lose.

MR. HALBROOK: That's --

QUESTION: And you will not make the argument that the statute would be unconstitutional.

MR. HALBROOK: We haven't made that argument. It was not in our statement of issues, and the reason we

didn't make it, once again, is that so many times it seems that, like defense lawyers very quickly at the drop of a hat say some law's unconstitutional when there's no need to make that argument.

QUESTION: But you know there is a case pending before this Court, Apprendi --

MR. HALBROOK: Yes, Your Honor.

QUESTION: -- that does make the argument that anything that enhances a sentence beyond the maximum, that that must be given to the jury. That argument would be equally available in your case, but you say you're not making it.

QUESTION: He said it three times, I think.

(Laughter.)

MR. HALBROOK: We're making it in the sense of the rule of constitutional doubt. I mean, in the Apprendi case the statute explicitly declares that it's not an element, that the judge makes the determination at sentencing, and it's based on the preponderance-of-evidence standard, and this statute doesn't say that.

QUESTION: I find it a strange argument you're making, that you say there's -- it's constitutionally doubtful, and therefore we should interpret it this way, but if we don't interpret it that way, well, you don't have any constitutional argument.

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MR. HALBROOK: Well --

QUESTION: If you don't have any constitutional argument, I guess it's not constitutionally doubtful. I mean, I find it extraordinary that you --

MR. HALBROOK: Oh, no -- no, Your Honor --

QUESTION: -- can make the statutory argument you're making without reaching the conclusion that if it's rejected there's at least a constitutional issue that we ought to consider, but you don't want it consider it, that's okay. You're right, you've said it three times.

MR. HALBROOK: Well, we appealed to the doctrine of constitutional doubt in the sense of the statutory interpretation. There may be --

QUESTION: What is your basis for saying there's any constitutional doubt about the validity of the statute?

MR. HALBROOK: Well, because the jury finds facts that result in a 5-year period, and the maximum is increased sixfold, up to 30 years, or even to life imprisonment, and it's not determined by the jury, and it's not in the indictment.

Footnote 6 in the Jones case is why we think that the rule of constitutional doubt applies here. Any fact other than recidivism that is to be determined by the jury and put in the indictment is in accord with the Fifth

and Sixth Amendment guarantees in that respect.

So it's our position that when you look at the statute it would be very difficult to say that reasonable minds could conclude only that it would be interpreted in the more stringent way, because that was not the way it was ever interpreted up until this case, and the general rule is that when there's two interpretations, and when the one interpretation raises the constitutional doubt, and is also the more stringent interpretation, then the rule of lenity also applies.

So when Congress enacted this, there's nothing in the legislative record, although we think that legislative history is a -- not something that overcomes the doctrine of constitutional doubt or the rule of lenity, but when you actually look at the legislative history, it does not state that these are sentencing factors and not offense elements. You simply have references to the fact that these are mandatory sentences.

The provision as adopted in 1968 had mandatory -- a mandatory sentence for carrying and use of a firearm, and with the 1986 amendment you have a mandatory sentence for machineguns and firearms equipped with silencers, and then over the years you have other amendments which put in short-barrel shotguns and rifles, and destructive devices, and there simply was no

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legislative history -- you'll see two paragraphs of legislative history in the Fifth Circuit opinion, and it in no way makes clear that these are offense elements.

The statute is written in a way such that there are 83 words in the first clause which gives the offense elements, and in a very concise way it doesn't repeat all of the Federal jurisdictional nexus. It does not -- it's not redundant in other words, and it was set forth in a way that there was never any question in the -- either in the legislative history or in the way that this law was administered in the Federal courts up until this case was decided that indicated in any way that the firearm types are not offense elements.

We think that by making the jury in essence a lower level gatekeeper which finds facts resulting in a 5-year period of incarceration, and then giving it to the sentencing judge to find by a mere preponderance, that those do implicate the Fifth and Sixth Amendments, the Indictment Clause of the Fifth Amendment as well as the Due Process Clause and the right to jury trial and the right to be informed of the nature of the accusation in the Sixth Amendment, and by interpreting the law to mean that these are offense elements, there is no constitutional doubt. That resolves the constitutional doubt against an interpretation that raises that issue.

If you want to go back in history, this long tradition of both Federal and State law under which these are offense elements, as far as Federal law goes we go back to the National Firearms Act of 1934, and for the first time Congress made it unlawful to possess or to receive unregistered machineguns and the short-barreled shotguns and some other types of firearms, and it was an offense element then.

In the 1968 act, there are various offenses under title I of the act related to machineguns, short-barreled shotguns and other -- and destructive devices, and those are invariably elements of the offense, and so if we were to take respondent's position we would assume that Congress simply did not make these elements without any indication that these were nonelements and without any structural provision. In other words, it was not written in a way that these are not elements.

In the carjacking case resolved by this Court in Jones, you'll see the same identical structure in this statute as exists with section 924(c), namely that whoever engages in certain action, in that case takes a car by use of a firearm, using intimidation or force or violence, shall be sentenced to a certain amount and, in the case of this statute, whoever uses or carries a firearm in a crime of violence prosecutable in a Federal court will receive a

certain sentence.

And in Jones, as in this case, it says, and if, the and-if clause exists. In other words, with Jones, and if there's bodily injury then the sentence is of a different type, and in this case, and if the firearm is a machinegun or destructive device, then there's another sentence.

So --

QUESTION: Now, if you're correct, I guess it would require setting aside the conviction and sentence, and sending it back, or what?

MR. HALBROOK: Not the conviction, Your Honor. Only the sentence. The mandatory penalty in this case is 5 years imprisonment, and so we're asking that the Court reverse only the portion of the lower court's opinion that relates to the sentence.

QUESTION: Is there any data that tells us how many defendants currently serving in prison as a result of an offense under this section would be affected by going along with your view?

MR. HALBROOK: There's no statistics, but I think the number is not very high yet, and in fact --

QUESTION: Why is that?

MR. HALBROOK: Well, because the statute was uniformly administered from 1986 when it was amended with

these other provisions, up until the Branch decision in this case, and during that time it was invariable that the type of firearm was alleged in the indictment, so none of those cases would reopen.

It would not be like the Bailey situation, where the term use was subjected to an overbroad interpretation by many of the appellate courts.

QUESTION: What would happen here, Mr. Halbrook -- if we rule for you, you say the conviction wouldn't have to be set aside, but suppose the Government wants to show again that this was one of the kind of firearms that would justify a sentence greater than 5 years, does the Government have to prove just that? It would have to prove it to a jury, I suppose.

MR. HALBROOK: It would, Your Honor, yes, so we don't see that the Government would have any opportunity to do that, but -- that would be double jeopardy.

QUESTION: It would be double jeopardy?

MR. HALBROOK: To -- well, these petitioners were indicted for and convicted of use of a firearm, a 5-year offense, and since the machinegun, or whatever the other types, were not in the indictment or found by the jury, they could not be tried again on these charges. The --

QUESTION: Well, if the elements of the crime

were not adequately set forth in the indictment, why wouldn't the Government be entitled to a new trial? The conviction is set aside, and there's a second trial. That's not double jeopardy.

MR. HALBROOK: Well, I think they've had their bite at the apple, Justice Kennedy. In other words, once a person is tried for a certain crime arising out of certain facts, and the jury makes a determination, and the Government's not satisfied with that, they're not entitled to go back and re-indict the crime again.

QUESTION: You mean that if they don't, in a murder case, indict for deliberation and premeditation and he's found guilty of first degree they can't retry him for first degree?

MR. HALBROOK: That's correct, Your Honor. You couldn't -- let's say you convicted someone of manslaughter, you couldn't go back and charge him again with murder and allege --

QUESTION: No, no --

MR. HALBROOK: -- malice aforethought.

QUESTION: No, my hypothetical's the other way. They find him guilty. They find him guilty of murder.

MR. HALBROOK: Well --

QUESTION: But there's been an element omitted.

MR. HALBROOK: Oh, you mean if the element was

not alleged in the indictment?

QUESTION: Yes, or -- and there was no instruction on it, let's say.

MR. HALBROOK: In --

QUESTION: I see your point is, is that they found him guilty only of the lesser offense.

MR. HALBROOK: Yes, Your Honor, and yours -- your hypothetical is, you've got the higher offense being alleged in the indictment without a certain element of it.

QUESTION: You're saying that if we find it's an element, the crime charge is a product of the elements charged, and if an element necessary to make it a graver as opposed to a lesser included offense was omitted, then it's only the lesser included offense --

MR. HALBROOK: Yes, Your Honor.

QUESTION: -- that was charged and the subject of the conviction.

MR. HALBROOK: Justice Souter, it would be as if manslaughter was charged, and the person was tried on that indictment, the jury makes that determination --

QUESTION: Well, happily if we reverse the judgment here the court of appeals can address that question.

(Laughter.)

QUESTION: Is this the only court of --

MR. HALBROOK: Well --

QUESTION: Sorry. I didn't -- were you about to say something in response? Go ahead.

MR. HALBROOK: We think that what should be done in this case is, it should be remanded for resentencing, as was done in the Jones case. We think this is an identical situation where, in that case bodily injury was not alleged in the indictment.

QUESTION: With the only permissible sentence being 5 years?

MR. HALBROOK: Your Honor, the statute imposes a mandatory sentence of 5 years, that's correct. It says, shall be sentenced to 5 years. It's not within the sentencing guidelines. Justice Breyer, sorry.

QUESTION: Is this the only court of appeals that has held that it is not an element of the offense?

MR. HALBROOK: Your Honor, there are two other courts of appeals who followed the Branch decision, and if I could answer that maybe and respond more completely to Justice O'Connor's earlier question, because it's only been in the last couple of years or so that the First Circuit and the Eleventh Circuit have indicated they agreed with the Branch decision.

The First Circuit prior to that time in the Melvin case had held the other way, and so in that circuit

the law would have been administered in a way consistent with that opinion, so we don't think there's that many who -- circuits where this will be a problem, and in those circuits we don't think that there would be a large number of cases to reopen, and I have a suspicion -- I cannot verify it, but probably in the Fifth Circuit and these other circuits where now that's the rule, I would be willing to guess that many times the type of firearm is alleged in the indictment.

Traditionally, an indictment, if you use this as an example, would say something like, the defendant did use or carry a firearm, to wit a machinegun, and you would have a description of the model number and the serial number and all of that.

QUESTION: If you're right, wouldn't the jury specifically have to be instructed that this is an element, or does it --

MR. HALBROOK: Yes, Your Honor.

QUESTION: Would --

MR. HALBROOK: Yes, Your Honor.

QUESTION: So merely -- it's -- merely the fact that it's in the indictment would not suffice, unless the jury --

MR. HALBROOK: That's correct.

QUESTION: -- were instructed that it had to

find everything alleged in the indictment.

MR. HALBROOK: That's correct, and it --

QUESTION: Is there some general instruction that the jury cannot convict unless it finds all of the facts set forth in the indictment to be true?

MR. HALBROOK: That's not the case if you have surplusage, or things that are not necessary for the --

QUESTION: That's what I would have thought.

MR. HALBROOK: -- those elements.

QUESTION: So it seems to me that you -- if you prevail, and this becomes precedent in other cases, the jury would have to have been specifically instructed in each case that this is an element that they must find.

MR. HALBROOK: That's correct.

QUESTION: The mere fact that it's in the indictment would be insufficient.

MR. HALBROOK: That's correct, and you would have to have the specific definition of the specific firearm that you're talking about, because when you start looking at the definitions under machinegun or destructive device, you'll find many different kinds of definitions, and there has to be some kind of allegation that the firearm type is of the type described in whatever the specific definition is.

When you look at the court decisions as to

whether elements were properly charged in regard to machineguns, destructive devices and what-not, and also cases involving sufficiency of evidence, the courts look at each and every one of the definitional elements, so that if a short-barreled rifle is charged, part of the definition of rifle is that it has a barrel with a bore that's rifled, and if there's no evidence in the case about it being rifled, that's not enough to sustain a conviction.

So by the same token, here, in 924(c) a properly charged indictment would allege a firearm, to wit, for example, destructive device or machinegun, and it would have some kind of definition that they're hanging their hat on as to which definition of destructive device, for example, is being alleged in the indictment, because the definitions run the course from a rifle over 50 caliber to a grenade or a bomb, or I mean, many diverse kinds of things are called destructive devices, so a properly worded indictment would have this information.

We think this case implicates the constitutional values that go back to the Winship case, for example, the idea that each and every element of the offense has to be in the indictment, and it has to be proven to the jury beyond a reasonable doubt.

The idea of what can the legislature make a

crime and what can it declare a sentencing factor, we think that that is further doctrine that supports our position here in terms of interpreting the statute to avoid constitutional doubt, that the Court has been grappling with that in other decisions, and in the Apprendi case, and it's our position that to avoid these issues, that the statute ought to be interpreted in a way to avoid any constitutional doubt, and that means that it has to be construed narrowly.

The case of Mullaney v. Wilbur, which had to do with the shifting of burdens, I think is relevant here in terms of avoiding constitutional doubt, and I'd like to say that in those kinds of cases where the burden would shift, it was still the jury that determined whether the defendant proved by a preponderance -- a lack of malice, for example.

And here you have the -- it's taken completely from the jury and given to the sentencing court in terms of -- I mean, the defendant cannot even put on a case before the jury that --

QUESTION: Mr. Halbrook, at what stage of the proceeding -- you said it wasn't alleged in the indictment. What stage of the proceedings was your client first notified that the Government contended he used a machinegun?

MR. HALBROOK: It was at sentencing, Your Honor. It was right before sentencing. The Government filed a brief arguing that the judge would be entitled to impose the 30-year sentences. It was never part of the case.

These petitioners were charged with far more serious crimes than 924(c), and the Government put its case into trying to prove those crimes, and the jury acquitted them under count 1, conspiracy to murder Federal officers. Count 2 was aiding and abetting murder of Federal agents, and they were acquitted of those crimes. They were convicted of aiding and abetting voluntary manslaughter.

So it was really never part of the case until it came around to sentencing, and then the Government filed a brief saying that we think that this is a sentencing factor and not an offense element, also raising for the first time the Pinkerton case and trying to apply it to sentencing issues as opposed to the type of Pinkerton instruction that you give to the jury.

QUESTION: Was there any evidence submitted about the kind of firearms in the jury trial? They must have submitted some elements of whether machineguns were used.

MR. HALBROOK: Yes, Your Honor. There was some testimony that some people said they heard machinegun

fire, and of course this -- the events took place that gave rise to the indictment on February 28 of 1993, but after the tragic end on April 19, in which there was a fire and everything was destroyed, there were alleged machineguns found on the premises.

But aside from that there was -- I mean, the evidence in regard to most of these petitioners is that they did have conventional firearms, and that -- but they did not fire any -- there was evidence that one of the petitioners did, but there's no evidence that ties a machinegun to any of these petitioners.

QUESTION: Well, I mean, the -- even if it didn't go to the jury, somebody thought that it was more likely than not that they had machineguns. What was that based on?

MR. HALBROOK: Well, at sentencing the judge said that there -- some people there had machineguns, and I'm going to hold these people responsible -- these defendants responsible for that.

QUESTION: But the jury had to find -- under the indictment, the jury had to find that they had a firearm.

MR. HALBROOK: Yes, Your Honor.

QUESTION: I'm -- and I'm still puzzled as to why that, under your theory of the case, isn't just an insufficient indictment that requires a new trial, because

it didn't say anything about what kind of firearm. You just assume that any time an element of an indictment is insufficient, the jury convicts of the lowest offense. I'm just not -- I don't understand that.

MR. HALBROOK: Well, I don't see the difference between indicting them for manslaughter and then trying to go back and indict them again, after a jury convicts them of manslaughter, convict them of murder. I don't think that's permissible.

QUESTION: Did the judge take additional evidence to -- on the machinegun issue, or did he rely on the transcript?

MR. HALBROOK: He just relied on the transcripts, Your Honor.

QUESTION: And the machinegun was attributed to your client under Pinkerton?

MR. HALBROOK: That's correct, in the sentencing aspect, not in terms of jury instructions where that was found.

QUESTION: What did the transcript show with respect to -- I mean, ordinarily someone doesn't get up on the stand and say, I saw him with a firearm. They say, I saw him with a machinegun, or --

MR. HALBROOK: Right.

QUESTION: -- I saw him with a shotgun or

something like that.

MR. HALBROOK: Yes, Your Honor. The petitioners by and large were seen with -- or some of them actually made statements to Texas Rangers after this ended and they said, I had a rifle or I had a pistol. There was no evidence tying specific people to machineguns and -- petitioners, rather, and of course we think it's not what's in the record, but what was in the indictment and what was in the jury instructions that count here.

If there are no further questions, I'll reserve the balance of my time.

QUESTION: Very well, Mr. Halbrook.

Mr. Robinson, we'll hear from you.

ORAL ARGUMENT OF JAMES K. ROBINSON

ON BEHALF OF THE RESPONDENT

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

For purposes of sorting offense elements from sentencing factors in this case, we believe the Court should view section 924(c)(1) as much more like the reentry after deportation statute reviewed in Almendarez-Torres than the carjacking statute reviewed in Jones, and we believe this for three major reasons.

First, the sentencing-enhancing factors in section 924(c) are very different from the carjacking

statute, particularly in their importance compared to the core elements of the offense.

Second, the sentence-increasing factor of serious bodily injury in the carjacking statute was found by the Court in Jones to have been traditionally treated as an offense element of aggravated robbery. There is no comparable history or tradition for treating firearm type in connection with a crime of violence.

And third, the legislative history of section 924(c) is far more indicative than was the carjacking statute of an attempt by Congress to treat the sentencing-enhancing factor of firearm type --

QUESTION: Mr. Robinson --

MR. ROBINSON: Yes.

QUESTION: -- one of the cases relied on by the majority in Almendarez-Torres was McMillan v. Pennsylvania, which sustains some sentencing factors like this, but it also said in that case that one of the limitations was that the tail couldn't wag the dog. Here you have a jury finding that would justify 5 years imprisonment, but you have judicial sentencing factor findings that can go up to 30 years.

MR. ROBINSON: That's quite true, Your Honor, and I think it's important to keep in mind the way in which that evolved as a matter of legislative history, and

when the machinegun clause provision was initially inserted into the statute in 1986, the original jump was from 5 to 10, admittedly a substantial one, and then it was later that this graduated scheme was put in place.

But I think what's important here to keep in mind is that the predicate offenses, the predicate offense, a crime of violence, is one of the elements of this crime, and a jury must find beyond a reasonable doubt that in fact the defendants used a firearm, used or carried a firearm in connection with that predicate offense and it seems to us that, while there is a substantial increase here, that it is an -- it's appropriate under these circumstances that the judge determine the gradation of the firearm type that has been found by the jury beyond a reasonable doubt.

QUESTION: Mr. Robinson, what has the practice been in the various circuits under this statute? Have they been, as petitioner's counsel tell us, in most circuits treating the type of weapon as something alleged specifically in the indictment and proven at trial?

MR. ROBINSON: It has varied, Justice O'Connor. In some circuits they have included it, in others they have not and, as counsel indicated, there is a split in the circuits as to whether or not the type of firearm must be included in the indictments of the --

QUESTION: Do you have data showing how many sentences will be affected by a conclusion by this Court that the petitioner is correct in his reading?

MR. ROBINSON: We -- I don't have the exact number. I think that counsel's probably right that there's not a lot of those at the moment and, of course, the current vision -- version of 924(c) increases the maximum penalty to life, and therefore it's a different statute in that respect from the one that is before the Court.

QUESTION: You think that may be the dog rather than the tail?

MR. ROBINSON: No.

QUESTION: -- I don't think it still -- is even the dog. From 5 years to life.

MR. ROBINSON: I think that --

QUESTION: It's a long tail.

(Laughter.)

MR. ROBINSON: It's a long tail, and Congress is entitled to set out the elements, in our view, of the offense and to -- and within limits that have not yet, to our understanding, been reached.

QUESTION: It's not the problem with the dog and the tail that's worrying me so much as a different problem, which is that this is a statute that you might

have said that the whole statute is simply a sentencing factor.

MR. ROBINSON: It's --

QUESTION: You might have.

MR. ROBINSON: You might have.

QUESTION: But looking at it as a whole, it seems it isn't, and so if it is creating a crime out of carrying a gun somewhere in relation to a different crime, it's pretty hard to see, given the numbers, and given the qualitative difference between handling a machinegun or a bomb and a pistol, why this suddenly becomes a sentencing factor.

It's not really written that way. It's -- I mean, you have three separate things. The numbers are different, and in relation to the underlying crime here, which is the carrying of the weapon, not the other crime, why wouldn't you say just what your opponent said? That's what's bothering me, that what they have here is, they have three separate things. If you have a drug crime and you have a pistol, it's 5 years. If you have a drug crime and have a rifle, it's 10. If you have a bomb or a machinegun, it's 30.

I mean, they all look like, as they're lined up -- I don't know how to argue it exactly. It's just, when you read this statute, how does it look?

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MR. ROBINSON: Well, it seems --

QUESTION: And that's the --

MR. ROBINSON: It seems to me when you --

QUESTION: -- thing that's bothering me.

MR. ROBINSON: When you go back to the traditional means of statutory interpretation used by this Court in Jones and Almendarez-Torres, even in Jones the Court, certainly the minority felt that the structure of the statute was such --

QUESTION: I was one of those, and I did, but there I thought that carjacking is the basic crime, and that the -- whether you hurt somebody or not in the course is rather a typical sentencing factor that has to do with the manner.

But here, the underlying thing is a -- is new, and unique, and special, created by the statute.

MR. ROBINSON: Well --

QUESTION: And therefore it becomes somewhat harder for me to see this as a traditional, or -- a traditional way of punishing somebody for the way in which he carried out the crime.

MR. ROBINSON: Well, it's much more than the way, Justice Breyer. The jury in this case was required to find that the defendants conspired to murder Federal agents. That had to be found.

QUESTION: Exactly. Now, if you --

MR. ROBINSON: And that they did so carrying or using a firearm, and it's clear from the architecture of the statute that those are the two key elements which makes up initially a 5-year sentence, and then we're talking about determining the means by which that has been accomplished, and the means here, according to the way Congress has set out the statute, is to differentiate the punishment based upon the dangerousness of the instrumentality.

QUESTION: Well, it's vastly different in terms of results if the firearm is a machinegun, and according to petitioner's counsel the evidence isn't all that clear linking this particular individual with a machinegun, and we don't know if the jury would have been able to make that determination, do we?

MR. ROBINSON: Well, we --

QUESTION: Beyond a reasonable doubt, anyway.

MR. ROBINSON: I think -- I think based upon the findings of the court, the district court in sentencing, I would say that for one thing the evidence that these petitioners used machineguns and destructive devices was found very substantially by the district judge in the findings, based upon the record that was presented to the jury.

QUESTION: Yes, but may I ask you this question about the procedure: supposing all of the evidence presented to the jury dramatically showed they used rifles and then, after the trial was over, in the presentence study, the parole officer or whoever made the presentence report said, well, we've now found evidence they were actually using machineguns, and they came in and brought that evidence to the judge.

I assume under the statute there would be nothing to prevent the judge from saying, I think that's right, they should get the 30 years.

MR. ROBINSON: I think that could happen under the statute, Your Honor. That's --

QUESTION: Right. Right.

MR. ROBINSON: In this case, the court specifically found the -- that several of the petitioners actually -- had actual possession of a machinegun, that one had possession of a destructive device, that all of them had new, and it was foreseeable that machineguns were extensively used, as well as destructive devices, so that the findings of the district judge with regard to the sentencing phase, the Fifth Circuit found overwhelming evidence to support the notion that these petitioners used and carried sentence-enhancing weapons during the course of the conspiracy --

QUESTION: But it didn't go to the jury, and you don't find it strange that what goes to the jury is a finding that they have to make beyond a reasonable doubt, which accounts for only 5 years of the individual sentence, and then what is decided by a judge, without the protection of a jury, and just on the basis of a preponderance -- it's more likely than not that they had machineguns -- not on the basis of beyond a reasonable doubt, is going to account for 25 more years?

MR. ROBINSON: Well, I --

QUESTION: That doesn't seem strange to you?

MR. ROBINSON: I think it goes again to a question of what's before the Court in this case, and that is the construction of 924(c). Obviously, there is a backdrop of the Apprendi matter that's pending before this Court, but I think in the first instance our obligation is to look at the language of the section and ask, what did Congress intend and it seems to us that, looking at the language and the structure of the statute, Congress intended there to be two essential elements of this offense.

QUESTION: Mr. Robinson, may I ask you, what was the position of the Department of Justice on this, or was it up to each U.S. Attorney to decide whether they were going to treat this as something that should be alleged in

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the indictment and put to the jury?

MR. ROBINSON: There was no mandate from Main Justice to the U.S. Attorneys to charge this in a particular way prior to the Jones decision.

QUESTION: And was there a variety of approaches among U.S. Attorneys?

MR. ROBINSON: Yes, leading to the split that's been mentioned in the circuits for how this has been handled.

QUESTION: Isn't there any coordinating mechanism in the Justice Department for deciding what -- you know, we have a single Federal statute which presumably means the same thing in all the districts of the United States, and --

MR. ROBINSON: Right. Well, having been --

QUESTION: -- Main Justice doesn't try to figure out what it means?

MR. ROBINSON: Oh, we certainly try to figure out what these mean and provide advice, but having been both a United States Attorney and now at Main Justice, United States Attorneys' Offices have a fair amount of ability to frame these things, and there was no mandate that they be charged in a particular way.

Some guidance obviously is available through the Department, and particularly in connection with the Jones

case, obviously this issue has been focused on by Main Justice, and communication with the United States Attorney's Office.

QUESTION: Not the -- can you think of -- I'm -- we're all obviously struggling with the way to approach these cases, but I -- and thinking of looking at the underlying crime and asking, faced with ambiguous statutory structure and language, is there a tradition, a tradition of using this kind of factor as a sentencing factor in respect to the underlying crime, or is there legislative history, or does it put the defense in some kind of impossible situation, i.e., to have to prove, for example, I didn't do it, but nonetheless it was just a -- you see -- you have my point.

MR. ROBINSON: Yes.

QUESTION: Are any of those things in your favor?

MR. ROBINSON: I think so. I mean, it seems to me that, much like the Court identified in McMillan, it seems to me where visible possession of a firearm in connection with a violent crime, a violent felony was considered to be an appropriate sentencing factor, it seems to me the gradation, the dangerousness of the means, the instrumentality, is often considered by the courts.

QUESTION: The underlying crime here is not the

crime of violence or drugs.

MR. ROBINSON: Well, the --

QUESTION: The underlying crime here is this new statutory invention, called possessing a gun in relation to, or during the crime of violence.

MR. ROBINSON: Well, but remember, Justice Breyer, one of the elements of this crime is proving beyond a reasonable doubt the commission of a violent crime, and all of its elements. That's part -- if you don't -- if the Government does not prove, in this case conspiracy to murder Federal agents, it as not made out the elements of the crime. On top --

QUESTION: Is that a separate trial, or are all of these taken up in the same indictment, same trial?

MR. ROBINSON: Taken up in one trial, in which the Government must prove first that the defendants conspired to murder Federal agents, as charged in count 3, and in addition, the other element, requiring that the Government prove that the defendants, in doing so, in relation to that crime of violence carried or used a firearm.

Those are the two essential elements, and if that happens, it's our view that the structure, language, and architecture of the statute makes out a completed offense, and now we're talking about sentencing, and the

instrumentality --

QUESTION: Well, counsel for petitioner says yes, that's a completed offense. It's the 5-year offense.

MR. ROBINSON: That's the completed offense that subjects the petitioner to 5 years and, if the judge finds a machinegun, first to 10, and then moved up for purposes in 1988 to 30 years, and in the meantime --

QUESTION: It doesn't say if the judge finds. It doesn't say that.

MR. ROBINSON: No, it -- no, we're -- it's our position, shall be sentenced to imprisonment. It uses the word, sentenced, and it seems to us that if you look at the language of the statute, its structure, and ask what are the elements necessary to make up --

QUESTION: But the language of the statute doesn't even require preponderance of the evidence. What if he had -- just had probable cause? Couldn't he still say, I think this is right, and --

MR. ROBINSON: I think that that would problematic. Judges I think have to find --

QUESTION: Why would it be problematic? In most sentencing factors the judge just -- he can act on less than a preponderance of the evidence if he's persuaded by the parole officer or the presentence report. Isn't that enough, normally?

MR. ROBINSON: I would think that often it -- oftentimes it can be. I think the Court has indicated, and we're certainly not arguing that there should be a lesser standard than a preponderance standard for the judge, the same standard that's used in the sentencing guidelines to make sentencing determinations, very similar in many respects to the kind of sentencing consideration we're talking about here.

QUESTION: But you know, you're putting stress on the fact that the statute says, and if it is a machinegun, shall be sentenced to, and if it is a rifle, shall be sentenced to. That doesn't carry any water, because it says that with regard to the basic, what you say is the basic underlying crime as well. It nowhere says, it is criminal to use, to carry a firearm in the commission of these offenses. It says that if you do it, you will be sentenced to 5 years.

MR. ROBINSON: Right.

QUESTION: And then the same language is applied to the 10-year acceleration and to the 30-year. Why aren't they all parallel?

MR. ROBINSON: Well --

QUESTION: It's the same as in Jones. It's really the same --

MR. ROBINSON: Well, when you say it's the same

as in Jones, Your Honor, in Jones, even the Jones majority looked at the carjacking statute, which admittedly has a similar structure and said, it has the look of sorting these things to sentencing factors, and then the Court I think, and the reason why I think the distinction between the carjacking statute and the reentry statute is critical in deciding how to come out in this case, is taking a look at the means or instrumentality -- type of firearm here -- and saying, in our view it's very different to the kinds of things that were involved in Jones, which included serious bodily injury or death, on the one hand.

And also it seems to us there was a much stronger tradition of treating those kinds of things as necessarily elements of aggravated robbery, which is not the case -- there's no long tradition of treating means or instrumentalities, firearm type, as an element of the crime.

And then finally the legislative history, it seems to us, is also very supportive. The way in which this evolved, as well as the language used during the course of the debates, indicates that when these amendments were added, the amendments that were added in '86 and '88 and '94, those were added adding increases to the sentence in addition to putting in an additional type of dangerous firearm, namely a short-barreled shotgun or

rifle, indicating congressional intent to treat the type of firearm, namely the means or instrumentalities of committing the underlying offense, as, in fact, sentencing considerations rather than elements.

QUESTION: Is there a difference between the legislative history in respect to these add-on -- the machinegun from what the legislative history was when they created the basic crime? That is, it seemed to me that in both places what they say in effect is, we're going to be sure that people who have these guns when they commit crimes will be in prison for a long time, and if the first creates a separate crime, why doesn't the second, third, and fourth? Is there a qualitative difference in the legislative history in respect to those things?

MR. ROBINSON: Well, certainly there's references to this as increasing prison terms, increasing punishment. There's no indication in the legislative history that there was any intent to create multiple, separate offenses under these statutes.

And I think the other thing that's important is that, unlike the Jones case, where I think you cannot easily say that serious bodily injury or death was subsumed within any elements found by the jury, here we have jury findings of the use and carrying of a firearm, any firearm, including these, in the commission of a

violent crime.

And so what the judge is doing, and here on the same record in which there was strong evidence of the use of machineguns and destructive devices, making a finding of the type of sort of firearms being used --

QUESTION: But you can say the same thing about, say, a case where there's been a homicide, and there was evidence that a jury could have found manslaughter or could have found second degree murder, or could have found first degree murder. You wouldn't say, well, we'll just let the judge pick and choose people, and one gets 10 years and the other gets executed.

MR. ROBINSON: Well, as a -- the fact of the matter is, though, that in the context -- as the Court said in McMillan, that as the -- the type or means of instrumentality of the commission of the crime is a traditional sentencing consideration for determining how much punishment should be imposed after the jury has found guilt beyond a reasonable doubt on the basis of core elements that are clearly -- stand on their own bottom as an offense, namely, the predicate crime of violence and the using and carrying of firearm.

It isn't as if Congress said we're going to leave the whole question of the firearm to the judge. The jury had to find the use and carrying of firearms to

commit the predicate offense.

QUESTION: No, but isn't it also --

QUESTION: Mr. Robinson, you recognized in your brief that if Apprendi is interpreted -- if the Court there should hold that the -- increasing the maximum is a matter that can't be determined by the judge but must be determined by the jury and beyond a reasonable doubt, you recognize that that would impact on this case even though Mr. Halbrook clarified three times that he didn't make that constitutional argument, but I was confused by what you said should happen.

You said something about, in the event that Apprendi should determine that an increase in the maximum must go -- must be a question to the jury, then what follows in this case?

MR. ROBINSON: Well, I think that if that were to be the case, then -- and if the Court were to limit the exception, if it should, to recidivism in Almendarez-Torres, it would make -- the Court would have -- be confronted with a situation in which this sentence enhancement would be constitutionally problematic.

If footnote 6 in the Jones opinion is adopted as a new principle of constitutional law, this would seem to me to be problematic with respect to it.

QUESTION: And the consequence of that would be

to invalidate the entire conviction?

MR. ROBINSON: No, I think not. I certainly agree with Mr. Halbrook that it wouldn't invalidate the conviction. It would have a -- an impact on the sentence, and obviously we think that then the question would be, if this was an element -- if the Court were to determine this was an element, read 924(c) as requiring this to be an element, then it seems to me what would have to happen is that there would be a remand for a determination of whether the failure to charge this element in this case was harmless error.

QUESTION: Well, could the Court make it an element if Congress has, as you said, written a statute in which it is not an element but a sentencing factor? I mean, do we have the power, by finding that a sentencing factor would be unconstitutional, to convert it from a sentencing factor to an element?

MR. ROBINSON: I would say in the first instance my answer would be no, you don't have that power, except you do have the power to interpret a statute to avoid an unconstitutional result, and if it was clear --

QUESTION: That is -- I think that assumes a different premise from Justice Scalia's question. I -- we can do that if we think there is some leeway --

MR. ROBINSON: Yes.

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QUESTION: -- if we think there is some question about it, but if we conclude without any doubt that it was intended to be an element, then I think we're simply stuck and the statute to that extent is unconstitutional, don't you?

MR. ROBINSON: Well, I think that if the Court were to decide on Apprendi broadly, the Court could take a look at 924(c) and address this issue, but --

QUESTION: You would change your argument in that --

MR. ROBINSON: Probably. The --

QUESTION: As a rule of statutory interpretation, what would you think of saying that where the statute leaves it open to real doubt, and where you can't find much help in tradition or history, and where a significant amount of years turns on it, you should assume that it's meant to be an element at least where it's not going to cause serious problems for trying a case for the defense.

MR. ROBINSON: Well, we think that it is the Court's obligation to determine the intent of Congress.

QUESTION: I know, and so I'm hypothesizing that it's pretty tough, because the statute itself doesn't tell you, the history turns out to be somewhat ambiguous, you can't appeal to tradition, and there's no particular

problem created for the defense in -- you know, as there might be in the drug statutes, for example.

Why not follow that approach?

MR. ROBINSON: Well, I mean, we think that the -- that the doctrine of -- that the doctrine of constitutional doubt, if that's what we're talking about here --

QUESTION: No.

MR. ROBINSON: No.

QUESTION: I'm just saying straight, and I'd say straight, other things being equal, Congress probably intends juries to consider these factual matters where a significant number of years turns on it, other things being equal. The statute doesn't tell you, the language doesn't, history doesn't, and there's no particular problem with trying the case.

MR. ROBINSON: Well, obviously, we don't think that's the case here. We think that the statute does make this a sentencing element, and as a -- if the Court were to make that determination, it would have to make that finding, and the principle that you're suggesting, Your Honor, it seems to me does dive pretty heavily into guessing, perhaps, what was intended, and -- but if the -- if your -- if the question is, in the case I just can't figure it out one way or the other which way it ought to

go, I ought to put it on the offense side, I understand that that's one approach that could be taken.

In our view, fairly interpreted, Congress did intend the type of firearm used to commit the predicate offense here, the conspiracy to murder Federal agents under section 924(c), to be a sentencing factor for the court and not an offense element to be decided by the jury. We believe that the decision of the Fifth Circuit upholding the petitioner's sentences in this case should be affirmed.

QUESTION: Thank you, Mr. Robinson.

Mr. Halbrook, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF STEPHEN P. HALBROOK

ON BEHALF OF THE PETITIONERS

MR. HALBROOK: If the Court may please, I'd like to return to an earlier question by Justice Breyer about why, if firearm is an offense element, that the other types of firearms are not, or why wouldn't you argue that all of these are sentencing enhancements.

I'd like to direct the Court's attention to the second sentence in the statute which refers to a second or subsequent conviction under this subsection. That was, of course, dealt with in the Deal case, so the second sentence calls the first sentence, refers to being convicted under the first sentence, and that's a statutory

provision, and if you want to talk about legislative history, when in 1986 Congressman Volkmer introduced this statute he said that this imposes mandatory sentences for firearms including machineguns, so you get that term, mandatory sentencing, used a lot.

In fact, you even have that in '68, when Congressman Poff first introduced that amendment on the House floor for the 1968 legislation, so the fact that it's a mandatory sentence doesn't tell you anything about whether it's simply that the facts that gave rise to that sentence constitutes an element versus a mere sentencing enhancement.

And if we look very briefly at the Almendarez-Torres situation, here we have something that is going to be in evidence. It's not like it's prejudicial. The gun has to be in evidence, or there has to be evidence about the gun. It's something that one would not say you want to avoid prejudice when possible. It's got to be part of the evidence. It's something that's contested frequently, where the recidivism is not, and once again it's a traditional element of various offenses.

Whether it be use of a firearm in a crime, or unregistered firearm, or carrying a concealed weapon, this goes back to common law and early State practice that types of firearms are offense elements.

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So for all of these reasons we ask the Court to remand the case for resentencing in --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Halbrook.

MR. HALBROOK: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 10:59 a.m., the case in the above-entitled matter was submitted.)

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