IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

JAIME CASTILLO, BRAD EUGENE BRANCH, RENOS LENNY AVRAAM, GRAEME LEONARD CRADDOCK, KEVIN A. WHITECLIFF,

*Petitioner*s

v.

UNITED STATES OF AMERICA,

Respondent

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

REPLY BRIEF FOR THE PETITIONERS

STEPHEN P. HALBROOK*
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Counsel for Jaime Castillo

**Counsel of Record*
[Additional counsel listed on inside cover.]

John F. Carroll
111 West Olmos
San Antonio, Texas 78212
(210) 829-7183
Counsel for Petitioner Renos Avraam

Richard G. Ferguson
P.O. Drawer 7695
Waco, Texas 76714
(254) 772-5525
Counsel for Petitioner Brad Eugene Branch

Stanley Rentz
506 Franklin Avenue
Waco, Texas 76701-2111
(254) 755-7023
Counsel for Petitioner Graeme Leonard Craddock

Steven R. Rosen
440 Louisiana, Suite 2100
Houston, Texas 77002
(713) 227-2900
Counsel for Petitioner Kevin A. Whitecliff

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTION

STATUTES

ARGUMENT

This petition concerns two issues arising out of 18 U.S.C. §924(c)(1), which punishes with five years imprisonment whoever, during a federal crime of violence, "uses or carries a firearm, . . . and if the firearm is a machinegun, or a destructive device," with thirty years. The first issue is whether the firearm type is an element of the offense which must be alleged in the indictment and found by the jury beyond a reasonable doubt, or is a sentencing factor to be found by the judge by a preponderance of evidence. Despite a circuit conflict, the government claims that this issue is not important because the statute has allegedly been amended to clarify that the type of weapon is a mere sentencing factor. To the contrary, the structure of the amended statute is no different than the original language or than that of the law at issue in *Jones v. United States,* 526 U.S. 227 (1999). The issue at bar will recur significantly.

The second issue raised is whether equivocal "legislative history" overrides the doctrine of constitutional doubt, under which here the statute must be interpreted to avoid possible unconstitutionality under the Fifth and Sixth Amendments. The government makes no response to the argument concerning this issue, despite its key jurisprudential significance, other than to exaggerate the primacy of legislative history over the doctrine of constitutional doubt. Since the Fifth Circuit's holding represents a trend in statutory construction that is being applied to criminal statutes, the Court should clarify the role of that doctrine vis-à-vis legislative history.

Petitioners differ from the government in their respective renditions of the facts (compare Petition 3-6 with

Brief for the United States in Opposition ["US Brief"] 2-6), but these differences are irrelevant to the issue here.[1] The government cites the district court's finding that Branch, Castillo, Craddock, and Avraam–but not Whitecliff–personally carried or used "enhancing weapons" (US Brief 12), but disregards that Castillo and Craddock allegedly did so on April 19, not on February 12, the date on which the indictment was based. The "evidence" against Branch and Avraam was tenuous at best. However, the only facts essential to the issue before the Court are that defendants were indicted for, and the jury found them guilty of, use of firearms, not machineguns or destructive devices.

The government claims that a "straightforward analysis" of § 924(c) indicates that the type of firearm is a mere sentencing factor, not an element of the offense. (US Brief 15) For this it quotes from two cases, neither of which considered that issue. *United States v. Rodriquez-Moreno*, 526 U.S. 275, 280 (1999) is cited for the proposition that § 924(c) has "two distinct elements– . . . the 'using and carrying' of a gun and the commission of a [crime of violence or drug-trafficking crime]." As petitioners discussed (Petition 28-29), part of finding "use or carrying" is finding *what* was used or carried. In *Rodriquez-Moreno*, it was just "a gun," but that case did not involve other weapon types. The government does not dispute that "firearm" as defined in § 921(a) is an element of the offense. "Machinegun," "destructive device," and "silencer," also as

---

[1] The government points to machinegun fire on February 28 (US Brief 8-9), but it is noteworthy that BATF agents were firing MP5 submachineguns with two-shot bursts. *United States v. Branch*, 91 F.3d 699, 720 (5th Cir. 1996); App. 30a. As to machineguns that may have been found on the premises after April 19, no evidence was introduced as to whether any had been fired or when they were converted into machineguns.

defined in § 921(a), are equally elements of the offense.

The government quotes *Bailey v. United States*, 516 U.S. 137, 142-43 (1995) for the proposition that § 924(c) requires specified penalties if the defendant uses or carries a firearm in a predicate offense. This does not remotely speak to the issue at hand.

Petitioners demonstrated that the structure of § 924(c) is identical to that of the carjacking statute which was the subject of *Jones*. Petition 10 (side-by-side comparison). The government is silent about this comparison or about the exact nature of the structure of § 924(c). Citation to the above cases is the only basis for its assertion that "a straightforward analysis of the statutory language and structure" of § 924(c) indicates that the type of weapon is not a element of the offense. (US Brief 15) The government presents neither a "straightforward" analysis nor any "analysis" at all.

The government next appeals to the allegedly "distinctive legislative history" of § 924(c) (US Brief 15-16), but does not venture to cite one iota of such history. Instead, it cites three cases which rotely relied on *Branch* for the alleged "legislative history" of § 924(c).[2] Of far more significance is the government's silence over the fundamental issue of whether alleged "legislative history" overrides the doctrine of constitutional doubt, which was the underlying premise of *United States v. Castillo*, 179 F.3d 321, 328 (5th Cir. 1999);

---

[2] *United States v. Eads*, 191 F.3d 1206, 1214 (10th Cir. 1999), petition for cert. pending, No. 99-6907 (filed Nov. 1, 1999) is cited, but the comment is dictum, for the jury found a machinegun in that case. *United States v. Alborola-Rodriguez*, 153 F.3d 1269, 1271-72 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 1809 (1999), involved a weapon which resulted only in a ten-year sentence, and thus did not consider the full ramifications of what is at stake here.

App. 154-55a. That is particularly important here, because the statute's structure is identical with the statute in *Jones*. Does the government mean to suggest that two structurally-identical statutes are subject to opposite interpretations because of what a member of Congress inserted into the record or ambiguous language in a committee report that no one may have read? Are citizens subject to the criminal law as written, or as "construed" post hoc by a court's opinion of the "legislative history"?

The government intimates that the doctrine of constitutional doubt should never be considered until *after* the legislative history is consulted and then only if the legislative history fails to resolve the meaning. US Brief 16 n. 8. It observes that *Jones* discussed constitutional doubt "after" reviewing the language and history of the statute and comparable federal and state statutes.[3] The language of the statute must always be reviewed first,[4] but nothing in *Jones* suggests that the Fifth and Sixth Amendments are not even to be considered if a court can find a remark from a member of Congress by which to put a gloss on a statute not evident from

[3] The government is silent regarding comparable statutes here. As petitioners demonstrated, the nature of a weapon as a firearm, machinegun, or other type has always been an element of the offense in Titles I and II of the Gun Control Act. Petition 11-12. The same could be said for state law. *E.g.*, Tex. Penal Code Ann. § 46.05 (prohibition on possession of a machinegun).

[4] The government cites *United States v. Jones*, 194 F.3d 1178, 1185-86 (10th Cir. 1999), but it found that "Congressional intent is evident from the plain language" of the statute, without referring to legislative history.

the statute's words.[5]

While conceding that *United States v. Alerta*, 96 F.3d 1230, 1235 (9th Cir. 1996) reaches a contrary result, the government seeks to minimize the conclusion drawn by other circuits that the type of weapon is an element of the offense. (US Brief 17 n. 9) However, it fails to distinguish those cases.

The first case was *United States v. Sims*, 975 F.2d 1225, 1235-36 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993), which opined that, where only one predicate offense exists, multiple § 924(c) counts must be consolidated into one count. The court held that the jury must be given special interrogatories or a special verdict form to determine the type of weapon, or separate weapon counts must be given to the jury, and the offenses must then be merged.

The government disingenuously claims that *United States v. Melvin*, 27 F.3d 710, 715 n. 9 (1st Cir. 1994) "explicitly reserved the question at issue here." US Brief 17 n. 9. That note brushed aside the government's contention with the comment: "Our conclusion that the jury's verdict was ambiguous makes it unnecessary to consider these other questions." *Id*. That footnote was attached to the following paragraph:

> We therefore conclude that the jury's verdict fails to establish, beyond a reasonable doubt, that the jurors found that the defendants violated § 924(c) through use of weapons subject to a term of imprisonment greater than five years. Consequently,

---

[5] Nothing in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) implies that "legislative history" mechanically overrides the doctrine of constitutional doubt. The opinion relied on the statutory text and the fact that recidivism is traditionally a sentencing factor.

we affirm the district court's 60-month sentence . . . . 27 F.3d at 715. *Melvin* clearly saw the type of weapon as a jury question. Without even citing this circuit precedent, the First Circuit ruled to the contrary in *United States v. Shea*, 150 F.3d 44, 51-52 (1st Cir. 1998), *cert. denied*, 142 L.Ed.2d 473 (1998).[6]

The circuit conflict does not warrant resolution, according to the government, because § 924(c) has been amended in a manner "which now makes clear" that the firearm type is a sentencing factor, not an element. US Brief 17. No attempt is made to compare or contrast the old and new versions. Indeed, § 924(c) as amended, for all pertinent purposes, remains structurally the same as the old version. Just as the statute in *Jones*[7] and the previous version of § 924(c) are structurally the same (see Petition 10), the *Jones* statute and new § 924(c) are the same, as the following shows:

---

[6] *See also United States v. Shepard*, No. 94-5307, 1995 U.S. App. LEXIS 5802, *11-12 (4th Cir. March 22, 1995) (jury convicted defendants of enhanced weapons); *United States v. Rodriguez*, 841 F.Supp. 79, 81-82 (E.D.N.Y. 1994) (weapon type is element), *aff'd* 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995).

[7] It is noteworthy that *Jones* reviewed an older version of a statute that had been amended twice before the Court resolved the case. 119 S.Ct. at 1218 & n. 1.

18 U.S.C. § 2119	*18 U.S.C. §924(c)(1) (new)*
Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, *shall* (1) be fined under this title or imprisoned not more than 15 years, or both, (2) *if* serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both, and (3) *if* death results, be fined under this title or imprisoned for any number of years up to life, or both.	(A) . . . [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm . . . *shall* . . .-- (i) be sentenced to a term of imprisonment of not less than 5 years; . . . (B) *If* the firearm possessed by a person convicted of a violation of this subsection . . . (ii) is a machinegun . . ., the person shall be sentenced to a term of imprisonment of not less than 30 years. (C) In the case of a second or subsequent conviction under this subsection, the person shall - . . . (ii) *if* the firearm involved is a machinegun . . ., be sentenced to imprisonment for life.

(Italics added.)

Thus, in old and new § 924(c) and in the carjacking law, a person who commits an act "shall" be punished according to

a given sentence, and "if" certain aggravating facts are proven, such person "shall" be punished with an enhanced sentence. Those aggravating facts are elements of the offense. The government's assertion that the meaning of the older version of § 924(c) has "no prospective importance" (US Brief 18) is based on the faulty premise that the statute's structure changed. It did not, and the issue retains continued vitality.

Petitioners demonstrated that the Fifth Circuit's transformation of an element into a sentencing factor had the side effect of disrupting the rule in *Pinkerton v. United States*, 328 U.S. 640, 645 (1946), under which the jury decides whether a defendant is responsible for the acts of co-conspirators. Turning *Pinkerton* upside down, the Fifth Circuit held that petitioners, who were not charged with enhanced weapons and who the jury found individually used or carried "firearms," could be sentenced as if they were so convicted based on sentencing findings. *See* Petition 29-30.

To excuse this revolution in *Pinkerton* jurisprudence, the government makes claims about what "the record" shows.[8] US Brief 18 n. 11. This argument was rejected as long ago as *Pereira v. United States*, 347 U.S. 1, 10 n. (1954) (no matter what "the record demonstrates," *Pinkerton* is inapplicable absent jury finding). In order to complete its conversion of an element into a sentencing factor, the Fifth Circuit has transformed *Pinkerton* from a doctrine about what juries might

---

[8] The government claims that this *Pinkerton* revolution made a difference only regarding Whitecliff's sentence. US Brief 18 n. 11. To the contrary, if the jury convicts under an individual-responsibility instruction, the acts of other parties cannot be attributed to a defendant, no matter what "the record" supposedly shows. The Fifth Circuit previously agreed with this universal rule. *E.g.*, *United States v. Dean*, 59 F.3d 1479, 1490 n. 18 (5th Cir. 1995), *cert. denied* 116 S.Ct. 748 (1996).

find if properly instructed into a doctrine in which the sentencing judge usurps that traditional jury power.

The Court has granted review in *Apprendi v. New Jersey*, No. 99-478 (cert. granted Nov. 29, 1999), concerning a state law that provided that "the court shall . . . sentence a person who has been convicted of a crime, ... to an extended term if it finds, by a preponderance of the evidence," that the defendant acted with racial bias. N.J.S.A. § 2C:44-3. The Court could dispose of the case under the First Amendment without addressing whether allowing the judge instead of the jury to determine the existence of a biased purpose violates due process.

To the extent it further clarifies the notice and jury trial requirements of the Fifth and Sixth Amendments, the Court's disposition of *Apprendi* may well shed light on how the case at bar should be resolved. Since the highest court of the state has decided that the law empowers the judge to find biased purpose, *New Jersey v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999), the issue before this Court is whether the law is unconstitutional, not whether it can be construed to avoid unconstitutionality.

No need exists to consider whether § 924(c) is unconstitutional, for the Fifth Circuit's reading is hardly necessary.[9] All of the circuits to speak held the weapon type to be an element until the decision in *Branch*, which conceded: "The text of § 924(c) forecloses neither of these two competing

---

[9] The government's argument that petitioners waived such claim (US Brief 19) is thus moot. The government does not claim that petitioners have waived raising the doctrine of constitutional doubt. Petitioners have from the beginning argued that weapon type is an element of the offense, and constitutional doubt is merely an interpretative doctrine, not a substantive ground of error.

readings of the statute." 91 F.3d at 739 (App. 81a). Since it "is susceptible of two constructions," *Jones*, 119 S.Ct. at 1222, § 924(c) may easily be construed to avoid an unconstitutional result by recognizing weapon type as an element of the offense.[10]

If the Court is undecided about whether to grant review now pending a decision in *Apprendi*, it would be prudent to hold this petition in anticipation of further light that decision might shed. The government asserts that review of this case should be rejected before *Apprendi* is decided (US Brief 20), but presents no reason for haste. In any event, this case raises issues that *Apprendi* will not resolve, *i.e.*, the circuit conflict over § 924(c) and whether "legislative history" overrides the doctrine of constitutional doubt as a methodology of statutory construction.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

---

[10] It is unclear why the government argues at length about the plain error standards for raising a constitutional claim. US Brief 19-20. Its citation of cases where "evidence of guilt was overwhelming" and where the jury was not charged on an element of the offense (*id*. at 20 n. 13) bears no relation to this case, for the defendants here were never even charged with, much less found guilty of, use of enhanced weapons.

STEPHEN P. HALBROOK*
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Counsel for Petitioner Jaime Castillo

*Counsel of Record

John F. Carroll
111 West Olmos
San Antonio, Texas 78212
(210) 829-7183
Counsel for Petitioner Renos Avraam

Richard G. Ferguson
P.O. Drawer 7695
Waco, Texas 76714
(254) 772-5525
Counsel for Petitioner Brad Eugene Branch

Stanley Rentz
506 Franklin Avenue
Waco, Texas 76701-2111
(254) 755-7023
Counsel for Petitioner Graeme Leonard Craddock

Steven R. Rosen
440 Louisiana, Suite 2100
Houston, Texas 77002
(713) 227-2900
Counsel for Petitioner Kevin A. Whitecliff