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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

18 U.S.C. §924(c)(1) 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 issues are (1) 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, and (2) whether equivocal "legislative history" overrides the doctrine of constitutional doubt set forth in *Jones v. United States,* 526 U.S. 227 (1999), that a statute must be interpreted to avoid possible unconstitutionality under the Fifth and Sixth Amendments.

PARTIES TO PROCEEDING

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JURISDICTION

On August 2, 1996, the Court of Appeals affirmed the convictions under Title 18 U.S.C. on Counts 2 and 3, vacated the sentence on Count 3, and remanded Count 3 for resentencing. The defendants were resentenced on Count 3 and timely appealed. The Court of Appeals affirmed the sentences on June 22, 1999, and denied the petitions for rehearing and rehearing en banc on July 28, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES

Provisions of the following are in the Appendix, 170a: U.S. Const., Amendments V and VI; 18 U.S.C. § 924(c)(1), (3).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

The indictment was filed on August 6, 1993. The jury acquitted all defendants of conspiracy to murder federal agents under 18 U.S.C. § 1117. Defendants were acquitted of aiding and abetting the murder of federal agents (18 U.S.C. §§ 1111(a), 1114, 2), but (except for Craddock) were convicted of the lesser included charge of aiding and abetting manslaughter (Count 2). Defendants were convicted under 18 U.S.C. § 924(c) of using a "firearm" in a conspiracy to commit a federal crime of violence (Count 3). On Count 3, the jury was instructed that guilt was subject to a finding that "the Defendant under consideration" used a firearm. (23 R. 1232, in RE tab 10)

In its sentencing opinion, the district court held that co-conspirators had possessed machineguns and destructive devices, and that this could be attributed to the defendants by sentencing findings. App. 125-26a. It sentenced defendants to consecutive terms of ten years imprisonment on Count 2 and to thirty years imprisonment on Count 3 (except that, in a downward departure, Craddock was sentenced to ten years on Count 3).[1]

United States v. Branch, 91 F.3d 699, 740-41 (5th Cir. 1996) affirmed both convictions but vacated the sentences under § 924(c) and remanded for resentencing. The court explained that *Bailey v. United States*, 516 U.S. 137, 146-50 (1995) held that "use" means "active employment," but the district court had found only "actual or constructive

[1] Craddock was also convicted of possession of an unregistered firearm, 26 U.S.C. § 5861(d), for which he received ten years imprisonment.

possession." (App. 86a) The court held that thirty years could be reimposed if the sentencing court found that "members of the conspiracy actively employed machineguns." (App. 86a)

The dissenting opinion of Judge Schwarzer would have reversed both convictions due to, inter alia, insufficient evidence of individual guilt (App. 98a), and lack of proof that defendants conspired to murder federal agents, an element of the § 924(c) offense.[2] (App. 114a)

The United States opposed the petitions for a writ of certiorari as premature because the sentences were vacated and "it thus remains to be seen whether petitioners will be sentenced" for machineguns. After resentencing, "they will have a further opportunity to contest their sentences in the court of appeals and, if necessary, in this Court." Brief for the U.S. in Opposition, *Castillo v. United States*, No. 96-989, at 22. This Court denied certiorari. App. 142a.

The district court resentenced defendants to thirty years imprisonment on Count 3 (except that Craddock was resentenced to ten years). (App. 169a) On June 22, 1999, the court of appeals affirmed in *United States v. Castillo*, 179 F.3d 321 (App. 144a), and on July 28, 1999, the petitions for rehearing and rehearing en banc were denied. (App. 153a)

Statement of Facts

Mount Carmel, near Waco, Texas, was for 65 years the

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[2] "There is no evidence that any of them [defendants] entered into an agreement to kill federal officers, much less that any did so with premeditation and malice aforethought. . . . Their conviction of the predicate offense rests on nothing more than guilt by association." 91 F.3d at 751-52 (App. 116a).

home of the Branch Davidians, a religious sect originating in Seventh Day Adventism. Vernon Howell, known as David Koresh, was the group's leader. The Bureau of Alcohol, Tobacco and Firearms ("BATF") came to suspect that Koresh violated Chapter 53 of the Internal Revenue Code, which requires registration and taxation of certain firearms. BATF agents refused Koresh's invitation to discuss his firearm purchases (Trial Transcript ["TR"] 4861, 4904) and obtained a search warrant.

Some 115 men, women, and children resided at Mount Carmel. On February 28, 1993, 75 BATF agents armed with pistols, shotguns, and submachineguns, supported by helicopters and snipers, stormed the premises. (TR 1445-49, 3826-29) BATF made no attempt to serve the warrant peaceably or to arrest Koresh off the premises. (TR 1330, 6714, 6718)

Who fired the first shot was disputed. According to Castillo, when the agents arrived, Howell opened the front door and stated, "Wait a minute, there's women and children in here." "All of a sudden, shots were fired at the front door," wounding Howell. (TR at 3053, 3094.) BATF agent Ballesteros told investigators that he thought the first shots were fired by other agents shooting the dogs, but at trial he testified (as did other agents) that persons inside the building fired first. (TR 1315, 1372) A firefight ensued.

A prosecution witness who resided at Mount Carmel testified that she did not hear anyone yell "police" before the first shots were fired, and that no insignia could be seen on the armed men outside, who were dressed in black or dark blue. (TR 4584, 4600) Bullets came from the outside through the walls into the house. (TR 4603) Several residents and four BATF agents were tragically killed during the raid.

The FBI's final assault on April 19, 1993, resulted in an inferno consuming the entire building complex, leaving 75 babies, children, men, and women dead. The nine persons who escaped death were arrested.

The jury found that each defendants carried or used a "firearm." "On remand, the district court found that one or more persons involved in the conspiracy to murder federal agents had actively employed machine guns and other enhancing weapons in the firefight on February 28, 1993, and then applied the *Pinkerton* [*v. United States*, 328 U.S. 640 (1946)] doctrine to attribute the active employment of machine guns and other enhancing weapons to the defendants on February 28, 1993." *Castillo*, 179 F.3d at 325 (App. 148a) Alternatively, the district court found that Branch[3] and Avraam[4] used a machinegun on February 28, and that Castillo and Craddock carried a hand grenade on April 19, *id*., although the jury convicted them of using firearms on February 28.[5] The district court made no finding that the items were carried "in

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[3] The court found that "Branch was wearing civilian clothes," an agent saw a man "dressed in civilian clothes, firing what appeared to be a fully automatic weapon," and thus Branch was the man. App. 167a. Yet at least 69 adults were in the building, and there was no eyewitness identification of Branch.

[4] The court found that a cell-mate "testified that Avraam told him that he had a fully automatic weapon during the gun battle." App. 167a. The actual testimony was that Avraam said that before that date "they were issued guns" and that he had an automatic weapon. (TR 6088-6089)

[5] There was evidence that Castillo carried (but no evidence that he fired) a rifle and a pistol on February 28. (TR 3053) The court states that Castillo had a grenade "on his person" on April 19 (App. 168a), but the grenade was found in a pile of gear which could have belonged to any one of five persons whom an agent saw escaping the fire. (TR 5469)

relation to" the predicate offense. *See* App. 168a. The district court found that "there is no direct evidence that Whitecliff personally used or carried an enhancing weapon." *Id.*

SUMMARY OF ARGUMENT

18 U.S.C. § 924(c) imposes a 5-year sentence for use of a "firearm" in a federal crime of violence, and 30 years for use of a "machinegun" or other enhanced firearm. Defendants were indicted for and found guilty of carrying or using a firearm, not a machinegun. The Court of Appeals erred in holding that the district court may find by a preponderance of evidence that co-conspirators used machineguns and may sentence defendants to 30 years imprisonment.

The statutory text treats a "firearm" and a "machinegun" as elements of the offense *in pari materia.* A conviction for a § 924(c) offense must be based on the charges in an indictment and the verdict of a jury, not on a trial court's sentencing findings.

The Fifth Circuit has decided an important federal question in a way that conflicts with *Jones v. United States*, 526 U.S. 227 (1999), which involved a statute structurally identical to § 924(c). *Jones* held that, under the rule of constitutional doubt, a statute must be interpreted to avoid constitutional problems in regard to the right to notice under the indictment and due process clauses of the Fifth Amendment and the right to jury trial under the Sixth Amendment. Since the provision could be read as either an element or a sentencing factor, it should be interpreted as an element and thus to require that the indictment allege and the jury find the facts necessary for the enhanced sentence.

Castillo brushes *Jones* aside and holds that "legislative

history" distinguishes § 924(c) from the statute in *Jones*. This Court should clarify that "legislative history" does not override the doctrine of constitutional doubt set forth in *Jones*. The Fifth and Sixth Amendments are part of the Constitution, while "legislative history" is not voted on by the Congress, and is often (as here) vague.

The Fifth Circuit is in conflict with the First, Fourth, Sixth, and Ninth Circuits, which have held that, to impose 30 years, the jury must find use of a machinegun. The practice in most circuits is to allege the type of firearm in the indictment and submit the issue to the jury.

The Fifth Circuit's position has the side effect of radically departing from two of this Court's precedents. First, *Bailey v. United States*, 516 U.S. 137 (1995) held that it is a jury function to determine whether a firearm is "used," i.e., actively employed. Implicit in finding "use" is finding what was used. An item a judge finds at sentencing is a machinegun might not have been the "firearm" the jury found to be "used."

Second, under *Pinkerton v. United States*, 328 U.S. 640 (1946), the use of a firearm by a co-conspirator may be attributed to a defendant only under appropriate jury instructions. The Fifth Circuit pushes the envelope by allowing the sentencing court to make this finding.

The Eleventh Circuit and a panel of the First Circuit have agreed with the Fifth, although in regard to firearms which give rise only to ten year sentences. Given the large number of § 924(c) prosecutions and the extreme discrepancy in sentences in the different circuits, this Court should resolve the conflict.

ARGUMENT

I. THE FIFTH CIRCUIT DEPARTED FROM THE RULE OF CONSTITUTIONAL DOUBT PROTECTING FIFTH AND SIXTH AMENDMENT RIGHTS SET FORTH IN *JONES V. UNITED STATES*, 526 U.S. 227 (1999), WHICH MANDATES THE INTERPRETATION THAT THE TYPE OF FIREARM IS AN ELEMENT OF THE OFFENSE

The writ should be granted because the Fifth Circuit decisions conflict with the interpretative rules regarding Fifth and Sixth Amendment rights set forth in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). *Jones* held that, where a statutory provision could be read as an element of the offense or as a sentencing factor, the doctrine of constitutional doubt requires the former reading in order to avoid a possible violation of the rights to notice, due process, and jury trial. The Fifth Circuit held that "legislative history" overrides the jurisprudential tools set forth in *Jones*. This Court should clarify that it does not.

18 U.S.C. §924(c)(1) punishes with five years imprisonment whoever, during a federal crime of violence, "uses or carries a firearm, . . . and if the firearm is a machinegun," imposes thirty years. The defendants were indicted for and found guilty of use of a "firearm." To convict one of "firearm" use, the indictment must make that allegation and the jury must make that finding. It is textually inconsistent to treat the finding of a "machinegun" as not also being an element of the offense.

The Fifth Circuit held that a machinegun or other enhanced firearm is not an element of the offense and thus need

not be alleged in the indictment or found by the jury. *Branch*, 91 F.3d at 738-41 (App. 78-86a); *Castillo*, 179 F.3d at 326-28 (App. 151-55a). Defendants stand sentenced to thirty years based primarily on the district court's sentencing findings that someone in the conspiracy used a machinegun and that defendants are vicariously responsible. App. 122a, 127a (sentencing); App. 166-67a (resentencing).

Jones mandates the interpretation that the types of weapons, including "firearm" and "machinegun," are elements of the offense which must be charged in the indictment and found by the jury. *Jones* concerns the federal carjacking statute, 18 U.S.C. § 2119, which intermixes sentencing and elements provisions. *Jones*, 119 S.Ct. at 1218. The following shows that it is structurally identical to § 924(c):

18 U.S.C. § 2119	18 U.S.C. §924(c)(1)
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.	Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, *shall* . . . [1] be sentenced to imprisonment for five years, and [2] *if* the firearm is a short-barreled rife, short-barreled shotgun to imprisonment for ten years, and [3] *if* the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

(Italics and bracketed numbers added.)

In short: whoever commits act A shall be sentenced to X, and if he also commits act B, shall be sentenced to Y. "A" and "B" are fact elements that must be alleged in the indictment and proven to the jury.

While not alleged in the indictment or jury instructions, serious bodily injury was found by the district court by a preponderance of the evidence, and the defendant was sentenced to 25 years. 119 S.Ct. at 1218. *Jones* notes that "§ 2119 at first glance has a look to it suggesting that the numbered subsections are only sentencing provisions." However, that was a "superficial impression [which] loses clarity when one looks at" the penalty provisions. *Id.* at 1219. *Jones* explains:

> These not only provide for steeply higher penalties, but condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph (e.g., force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit.

Id. With § 924(c), the penalty range increases *sixfold*, i.e., from 5 to 30 years.

The term "shall" separates the carjacking offense and the penalty clauses, yet the enhanced penalty clauses contain elements. *Id*. at 1219. One must consider the "traditional treatment of certain categories of important facts" in particular crimes. *Id*. at 1220. "If a given statute is unclear about treating such a fact as element or penalty aggravator, it makes sense to look at what other statutes have done, on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Id.*

The Gun Control Act has always treated types of weapons, including "firearm" and "machinegun," as elements

of offenses.[6] Most offenses under Title I of the Act concern "firearms." 18 U.S.C. §§ 921(a)(3)(A) ("firearm"), 922 & 924 (offenses). Besides § 924(c), conduct with a "machinegun" (defined at § 921(a)(23)) is made unlawful in §§ 922(a)(4), 924(a)(1)(B) (knowingly transport in commerce); §§ 922(b)(4), 924(a)(1)(D) (willful transfer); §§ 922(o), 924(a)(2) (knowing possession); § 924(n) (conspiracy to violate § 922(c)). In Title II of the Act, the finding of a "machinegun" or other firearm type is an element of every offense. 26 U.S.C. § 5845(a)(6), (b) (definition), § 5861 (prohibited acts).[7]

Where the jury finds beyond a reasonable doubt that an item is a machinegun and that an unlawful act occurred, the maximum imprisonment is 10 years. 18 U.S.C. § 924(a)(2); 26 U.S.C. § 5871. It would be incongruous to believe Congress authorized a judge to find the facts in § 924(c) such as would authorize a 30-year sentence.

The following rule in *Jones* decides the issue here: "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." 119 S.Ct. at 1222. Under the government's construction, "the statute would be open to constitutional doubt in light of a series of cases over the past quarter century, dealing with due process and the guarantee of trial by jury."

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[6] State statutes have also done so. *E.g.*, *State v. Kang*, 84 Haw. 352, 933 P.2d 1386 (App. 1997) (indictment alleging "rifle" insufficient to allow enhanced sentence for "semiautomatic" weapon).

[7] Whether a firearm is a machinegun may be a hotly contested jury issue. *E.g.*, *United States v. Hitt*, 981 F.2d 422, 423 (9th Cir. 1992); *United States v. Staples*, 971 F.2d 608, 613-15 (10th Cir. 1992), *rev'd. on other grounds*, 511 U.S. 600 (1994).

Id.[8]

McMillan v. Pennsylvania, 477 U.S. 79 (1986) held that the fact of visible possession of a firearm may be a sentencing factor if such finding does not trigger a potential sentence outside the range otherwise prescribed.[9] However, "the result might have been different if proof of visible possession had exposed a defendant to a sentence beyond the maximum that the statute otherwise set without reference to that fact."[10] *Jones*, 119 S.Ct. at 1223-24. That recognizes a question under the due process and jury guarantees: "when a jury determination has not been waived, may judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?" *Id.* at 1224.

Jones states the following as "the principle animating our view that the carjacking statute, as construed by the Government, may violate the Constitution":

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[8] *See In re Winship*, 397 U.S. 358, 364 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977). On the historical rule that every fact constituting aggravation of an offense had to be alleged and proven to the jury, *see* M. Knoll & R. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pa., 22 Seattle U.L.Rev. 1057, 1062-81 (1999).

[9] The law in *McMillan* explicitly provided that 5 years shall be added to the sentence for certain crimes if the judge finds, by a preponderance of the evidence, that the person visibly possessed a firearm, which "shall not be an element of the crime." *Id*. at 81 & n. 1, 83.

[10] *McMillan* observed that the 5-year enhancement is far smaller than the 20 and 10 year sentences imposed for the actual offenses, and thus "the statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id*. at 88. The tail wags the dog if § 924(c) is interpreted such that the substantive offense is only 5 years and the "enhancement" is 30 years.

> *[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.* Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty.

Id. at 1224 n. 6 (emphasis added).

Interpretation of the enhancement provisions as mere sentencing factors reduces the jury function to "low-level gatekeeping," i.e., the jury finding of fact necessary for a 15-year sentence opens the door to a judicial finding sufficient for a 25 year sentence. *Id.* at 1224. Here, interpretation of enhanced firearm types as sentencing factors reduces the jury to even lower-level gatekeeping, in that the jury's finding of fact necessary for a 5-year sentence opens the door to a judicial finding triggering a 30-year sentence.

Trial by jury is secure only "so long as this palladium remains sacred and inviolate, not only from all open attacks, . . . but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial . . . ." *Id.* at 1225, quoting 4 Blackstone, *Commentaries* 342-344. The judicial transformation of an offense element into a sentencing factor may be tempting in emotional cases where juries acquit defendants of serious charges. Here, the jury acquitted the defendants of murder charges and convicted them only of manslaughter and the "gun count." The acquittals were nullified when, contrary to every circuit to have considered the issue (see *infra*), the court elevated the "gun count" to an

offense with a penalty equivalent to what one might expect for murder.[11]

Almendarez-Torres v. United States, 523 U.S. 224 (1998) held that recidivism, traditionally a sentencing factor, need not be charged in an indictment for unlawful reentry after deportation. "Unlike virtually any other consideration used to enlarge the possible penalty for an offense, . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 119 S.Ct. at 1227.

An example of recidivism as a sentencing factor cited by *Almendarez-Torres* is 18 U.S.C. § 924(e), which imposes an enhanced sentence for possession of a firearm by a felon with three prior convictions.[12] 118 S.Ct. at 1224. But regarding § 924(c), the majority did not dispute the statement in the dissenting opinion by Justice Scalia (joined by Justices Stevens, Souter, and Ginsburg), that recidivism is an offense element "added to another crime":

> [R]ecidivism is recited in a list of sentence-increasing aggravators that include, for example, . . . use of a

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[11] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) noted:

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge. . . . Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

[12] Recidivism is often an element. To convict for being a felon in possession of a firearm, 18 U.S.C. § 922(g), the jury must find not just the possession but also the felony conviction, which in turn was decided by a prior jury. *Richardson v. United States*, 119 S.Ct. 1707, 1712 (1999).

> firearm that is a machine gun, or a destructive device, or that is equipped with a silencer (18 U.S.C. § 924(c)) . . . . It would do violence to the text to treat recidivism as a mere enhancement while treating the parallel provisions as aggravated offenses, which they obviously are.[13]

Id. at 1239-40 & n. 3. Use of a machinegun is characterized as an "aggravated offense."

Jones, 119 S.Ct. at 1228, concludes with the following holding:

> In sum, the Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions. This is done by construing § 2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

Castillo ignores the jurisprudential analysis set forth in *Jones* and seeks to distinguish *Jones* solely on the basis of legislative history:

> In *Jones*, the legislative history contained conflicting indications of whether Congress intended for 18 U.S.C. § 2119, the statute at issue, to lay out three distinct offenses or a single crime with three maximum penalties. See *Jones*, . . . 119 S. Ct. at 1221 . . . . In

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[13] § 924(c)(1) (second sentence) provided for 20-years in case of a subsequent conviction, but "if the firearm is a machinegun . . ., to life imprisonment without release." The latter parallels the possibility of life imprisonment under the carjacking statute where death results.

> contrast, the legislative history of § 924(c)(1) discloses that Congress consistently referred to the machine gun clause as a penalty and never indicated that it intended to create a new, separate offense for machine guns. See *Branch*, 91 F.3d at 739. Accordingly, we decline to reconsider our prior decision that the type of firearm used or carried is a sentencing enhancement, and not an element of the offense.[14]

179 F.3d at 328 (App. 154-55a). *Castillo* does not even state the constitutional issue at stake in *Jones*.[15]

This Court should clarify that *Jones* did not leave the door open for "legislative history" to override the doctrine of constitutional doubt.[16] As here, the court of appeals in *Jones* held the provisions in question to be mere enhancements based

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[14] *United States v. Matthews*, 178 F.3d 295, 301-02 (5th Cir. 1999) (construing 18 U.S.C. § 521(b), which punishes street gang members) also holds that "legislative history" resolves that a criminal provision is a mere sentence enhancement, precluding a *Jones* analysis.

[15] *Cf. United States v. Nuñez*, 180 F.3d 227, 233 (5th Cir. 1999) ("*Jones* teaches us to avoid encroaching on a defendant's Fifth Amendment rights by construing statutes setting out separate punishments as creating separate, independent criminal offenses"). *Nuñez* held the following weapon component of 18 U.S.C. § 111(b) to be an element of the offense: "Enhanced penalty.--Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon" is subject to 10 years imprisonment.

[16] "While we recognize the possibility that the legislative history of [18 U.S.C.] § 1791 supports the Government's construction, the Supreme Court [in *Jones*] has cautioned against adopting an otherwise reasonable interpretation of a statute which raises serious constitutional questions." *United States v. Allen*, 1999 U.S. App. LEXIS 24268, *13-14 (11th Cir. 1999) (object "intended to be used as a weapon" is element of offense, not sentencing factor).

on legislative history, including committee reports and floor debates referring to "enhanced penalties for an apparently single carjacking offense." 119 S.Ct. at 1218-19.

Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) teaches about the role of "legislative history" in criminal statutes:

> There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear. Moreover, were we to find § 5322(a)'s "willfulness" requirement ambiguous . . ., we would resolve any doubt in favor of the defendant. . . . *Crandon v. United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.")

Similarly, "longstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of . . . legislative history." *Hughey v. United States*, 495 U.S. 411, 422 (1990). This Court has eschewed adoption of "some type of reverse parol evidence rule, where oral statements were elevated above enacted language in determining the meaning of the statute."[17] *Garcia v. United*

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[17] *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) ("the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should"); *id*. at 309 (Scalia, J., concurring) (the fiction that one is presumed to know the law "descends to needless farce when the public is charged even with knowledge of Committee Reports"). "One can hardly imagine an 'implication from legislative history' that is 'unmistakable'—*i.e.*, that demonstrates agreement to a proposition by a majority of both Houses and the President—unless the

States, 469 U.S. 70, 78 (1984).

In no instance did the legislative history state that a "machinegun" is a sentencing factor and not an element, and the use of the term "penalty enhancement" settles nothing. *See Jones,* 119 S.Ct. at 1221 (only "*assuming* that 'penalty enhancement' was meant to be synonymous with 'sentencing factor,'" the Court "find[s] the quoted statements unimpressive").[18] *Branch*, 91 F.3d at 739 (App. 81-83a) cites instances where the provision was said to be an "enhanced penalty for machine gun use in crime," but that hardly implies that the machinegun is not an element. Homicide with malice aforethought results in an "enhanced penalty," but malice is still an element.

The machinegun clause was added by the Firearms Owners' Protection Act (FOPA), P.L. 99-308, 100 Stat. 449, 457 (1986). The House Judiciary Committee report on H.R. 4227 did not suggest that "machinegun" is not an element. H.Rpt. 99-495, 99th Cong., 2d Sess., 2 (1986). "Although [§ 924(c)] is frequently referred to as a penalty enhancement provision it is in reality a separate offense . . . ." *Id.* at 10.

Rep. Volkmer stated that his substitute for H.R. 4227, which would become FOPA, "includes stiff mandatory

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proposition is embodied in statutory text to which those parties have given assent." *Tafflin v. Levitt*, 493 U.S. 455, 472 (1990) (Scalia, J., concurring).

[18] *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) ("nor are we helped by the NFA's legislative history, in which we find nothing to support a conclusion one way or the other . . . . [W]e are left with an ambiguous statute. . . . It is proper, therefore, to apply the rule of lenity."); *id*. at 521 ("that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history" is "particularly inappropriate in determining the meaning of a statute with criminal application.") (Scalia, J., concurring).

sentences for the use of firearms, including machineguns and silencers, in relation to violent or drug trafficking crimes." 132 CONG. REC. H1652 (1986).[19] No one suggested that "firearm" and "machinegun" were not intended to be treated *in pari materia* as offense elements.

Castillo ruled that defendants may not rely on the doctrine of constitutional doubt or the rule of lenity because these arguments were not made in the first appeal. 179 F.3d at 328 (App. 155a). Yet these are interpretative rules, not points of error. *E.g., Thompson/Center Arms*, 504 U.S. at 518 n. 10 ("the rule of lenity, however, is a rule of statutory construction"). Defendants argued from the beginning that the firearm types are elements of the offense.

While *Castillo* also relied on the law of the case, *Jones* is an intervening decision that clarifies the doctrine of constitutional doubt while construing a statute structurally identical to § 924(c). A "Court of Appeals err[s] in adhering to law of the case doctrine despite intervening Supreme Court precedent." *Agostini v. Felton*, 521 U.S. 203, 236 (1997), citing *Davis v. United States*, 417 U.S. 333, 342 (1974). "New rules always have retroactive application to criminal cases on direct review." *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993).

Further, it was plain error not to apply the rule of lenity. Regarding whether the machinegun provision is an element or an enhancement, *Branch* conceded: "The text of § 924(c)

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[19] Rep. Gallo explained that the Volkmer substitute mandates "a 5-year mandatory prison sentence for any person who uses a firearm during commission of a drug trafficking crime; provides a mandatory prison term of 10 years for using a machinegun during commission of a crime . . . ." *Id.* at H1666. *See id*. at H1747 (remarks of Rep. Miller).

forecloses neither of these two competing readings of the statute." 91 F.3d at 739 (App. 81a). "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (Gun Control Act). "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Simpson v. United States*, 435 U.S. 6, 15 (1978) (also holding that "§ 924(c) creates an offense distinct from the underlying federal felony," *id*. at 10).

In sum, *Branch* and *Castillo* are inconsistent with the teachings of *Jones* about how criminal statutes must be interpreted. According to the Fifth Circuit, legislative history (in this case, an ambiguous one) overrides any consideration of the doctrine of constitutional doubt. Serious questions are raised under the Fifth and Sixth Amendments by an interpretation that reduces the jury's role to finding facts that would result in a five year sentence and which in turn authorizes a judge to find facts which result in a thirty year sentence. This Court should resolve the substantial question of whether, applying the *Jones* rules of construction, the firearm type is an element of the offense under § 924(c).

II. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT ON WHETHER, UNDER 18 U.S.C. § 924(C), THE INDICTMENT MUST ALLEGE AND THE JURY MUST FIND USE OF AN ENHANCED FIREARM

The *Branch*/*Castillo* decisions are contrary to the interpretation adopted by the First, Fourth, Sixth, and Ninth Circuits, and a district court in the Second Circuit, which hold the type of weapon to be an element of the offense. Further, the practice in other circuits is to allege the type of firearm in the indictment and submit the issue to the jury. The Eleventh Circuit and a panel of the First Circuit have agreed with the Fifth, although in regard to firearms which give rise only to ten year sentences. Given the large number of § 924(c) prosecutions and the extreme discrepancy in sentences in the different circuits, this Court should resolve the conflict.

In response to the prior petitions for a writ of certiorari, the United States conceded that the decision here conflicts with the rule in other circuits. Brief for the U.S. in Opposition, *Castillo v. United States*, No. 96-989, at 22, citing *United States v. Alerta*, 96 F.3d 1230, 1235 (9th Cir. 1996); *United States v. Melvin*, 27 F.3d 710, 714 (1st Cir. 1994); and *United States v. Sims*, 975 F.2d 1225, 1235-36 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993). The circuit split has deepened since then.

The United States opposed the granting of the writ because the sentences had been vacated and, if defendants were resentenced to five years, the issue would be moot. "After petitioners have been resentenced on Count 3, they will have a further opportunity to contest their sentences . . . in this Court." Brief for the U.S. at 22.

In *Sims*, the first decided case on point, one count alleged use of a machinegun and other counts alleged firearms. The Sixth Circuit held that, to avoid double jeopardy where only one predicate offense exists, multiple § 924(c) counts must be consolidated into one count. 975 F.2d at 1233. *Sims* explained:

> This may be accomplished prior to trial by consolidating those counts into a single section 924(c) count and submitting special interrogatories or a special verdict form to the jury, requiring that if the jury returns a guilty verdict on the gun charge, it must specify which category or categories of weapons it unanimously has found the defendant was using or carrying. Or, it may be accomplished by submitting the separate gun counts to the jury and, should there be more than one conviction, merging those convictions after trial.

Id. at 1235. Thus, the jury must determine whether the defendant used a "firearm" or a "machinegun."[20] *Id.* at 1236.

Sims was followed in *United States v. Martinez*, 7 F.3d 146, 148 n. 1 (9th Cir. 1993), which agreed that where different firearm types are charged, the court should "(1) submit separate counts under section 924(c)(1) to the jury, and, if there is more than one conviction, merge those convictions after the trial, or (2) submit one section 924(c)(1) charge to the jury to specify which weapon or weapons the defendant used or carried." The jury convicted the defendant of one predicate count, one

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[20] The Fifth Circuit initially agreed. Relying on *Sims*, *United States v. Correa-Ventura*, 6 F.3d 1070, 1087 n. 35 (5th Cir. 1993) noted:

> If a firearm violation is asserted, and evidence is introduced as to both shotguns and rifles (with a mandatory 5-year imprisonment penalty) and revolvers with silencing equipment (resulting in a 30-year imprisonment), the jury may well be required to agree on which type of weapon was used in order for the court to assess the appropriate penalty. In that instance, a unanimity instruction as to the class of weapon may be necessary, since the legislature, in amending Section 924(c) to provide varying penalties for certain classified firearms, appears to have indicated its intent that a unanimous verdict be reached with respect to the given class of firearms.

machinegun count, and one firearm count. *Id*. at 147. Since "the jury found that Martinez used or carried both weapons," the counts must be merged and defendant sentenced only for the machinegun. *Id*. at 149.

In *Melvin*, the First Circuit noted that "all parties concede that the jury mistakenly was not asked to identify which of the six firearms at issue in this case--ranging from machine guns to handguns--underlay its guilty verdict . . . ." 27 F.3d at 711. The government agreed that a defendant could be sentenced to 30 years "only if the jury specifically identifies a machine gun or silencer as the firearm supporting the conviction," but argued that the jury "implicitly" found use of machineguns, *id*. at 714, and that "the record" showed such use. *Id*. at 712. The district court found based on a preponderance of the evidence that machineguns were used. *Id*.

Melvin decided that "we may not exclude beyond a reasonable doubt the possibility that the jury rendered a guilty verdict . . . based on a determination that the defendants possessed only a handgun . . . ." *Id*. at 715. The verdict did not establish that defendants used "weapons subject to a term of imprisonment greater than five years." *Id*.

In *United States v. Shepard*, No. 94-5307, 1995 U.S. App. LEXIS 5802, *11 (4th Cir. March 22, 1995), the indictment alleged use of a sawed-off shotgun "and" pistols. "§ 924(c)(1) would require a ten-year mandatory-minimum sentence if Appellants were *convicted* of using or carrying a sawed-off shotgun, while the mandatory-minimum sentence would be five years if Appellants were *convicted* of using or carrying either or both of the pistols." *Id.* at *9-10 (emphasis added). As *Melvin* held, a court could not impose a higher penalty where the "charge alleged two objects with differing penalties in the disjunctive and the jury returned a general

verdict of guilt." *Id.* at *12. But here the jury was instructed with "the conjunctive listing of the weapons." Thus, the jury found that defendants used both firearm types.[21] *Id.*

United States v. Rodriguez, 841 F.Supp. 79, 81 (E.D.N.Y. 1994), *aff'd* 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995), rejected the argument that "the enhanced penalty for use of a firearm equipped with a silencer is not a matter for the jury in determining whether guilt has been proved, but only for the court in sentencing." The court noted about *United States v. Harris*, 959 F.2d 246, 258-59 (D.C.Cir.), *cert. denied*, 506 U.S. 932 (1992):

> The *Harris* jury was asked to decide (1) whether the defendant knowingly possessed and used a firearm, and (2) whether that firearm was, in fact, a machinegun. . . . So too in this case, the jury will have to find . . . that the firearm at issue was equipped with a silencer.

Rodriguez, 841 F.Supp. at 81-82.

United States v. Alerta, 96 F.3d 1230, 1232 (9th Cir. 1996) reversed a 30-year sentence because "the jury did not expressly find that Alerta carried or used a machine gun." The jury instruction charged him with use of "pistols" and "machineguns." *Id.* at 1234. The jury found him guilty but did not specify whether a pistol (which is a "firearm") or a machinegun was used. *Id. Alerta* held:

> It is therefore possible that the jury found only that Alerta used one or more of the weapons that were not machine guns, in which case the requisite consecutive

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[21] *See United States v. Wills*, 88 F.3d 704, 719 (9th Cir. 1996) (defendant "convicted for using a gun during the commission of a bank robbery *and* for using a destructive device" in the same crime properly sentenced only for the count with the highest sentence).

> sentence for Count 5 would be 5 years, not the 30-year sentence that Alerta received. . . .
>
> Because of the immense consequences that follow a determination whether a firearm used in violation of section 924(c)(1) is an ordinary firearm or, at the other extreme, a machine gun, we have stated that a jury finding on that issue is required.

Id. at 1234-35.

Where both "firearms" and "machineguns" are alleged, either separate counts or special interrogatories should be submitted to the jury. Rejecting the argument that the firearm type is not an element of the offense, *Alerta* explained:

> We reject the government's contention, as applied to instances where the government seeks more than the minimum 5-year consecutive sentence. The entire purpose of our requiring a special verdict or separate charges in *Martinez* was that the jury find beyond a reasonable doubt that the defendant used a machine gun. If the 30-year consecutive sentence is to be imposed under section 924(c)(1), the fully automatic character of the firearm must be found by the jury; that is to say, it is an element of the crime.

Id. at 1235.

The jury may well have found only that a "firearm" was involved, the consequence of which *Alerta* stated to be as follows:

> Thus, for all we can know, Alerta may have been sentenced to 30 years without a finding by the jury that he used or carried a machine gun. That we cannot permit, despite the very strong evidence that Alerta used or carried a machinegun. "'[T]he question is not whether guilt may be spelt out of a record, but whether

> guilt has been found by a jury according to the procedure and standards appropriate for criminal trials.'"

Id. at 1236 (citation omitted).[22] *Alerta* has been followed in further decisions.[23]

Identification of firearm type in the indictment and jury instructions is the accepted standard in other circuits. *E.g., United States v. Feinberg*, 98 F.3d 333, 339 (7th Cir. 1996) (destructive device); *United States v. Shuler*, 181 F.3d 1188, 1189 (10th Cir. 1999) (machinegun).

Two circuits have followed *Branch* without offering any original analysis. *United States v. Alborola-Rodriguez*, 153 F.3d 1269, 1271-72 (11th Cir. 1998); *United States v. Shea*, 150 F.3d 44, 51-52 (1st Cir. 1998), *cert. denied*, 142 L.Ed.2d 473 (1998). Because these involved firearm types (a short-barreled shotgun and an assault weapon) with sentences of only 10 years, they do not consider whether a 30-year "sentence enhancement" is "a tail which wags the dog of the substantive offense," *McMillan*, 477 U.S. at 88. *Shea* contradicts the First Circuit's holding in, and does not even cite, *Melvin*, *supra*,

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[22] *Alerta* was remanded for retrial. *Id.* at 1236. Here, defendants were never indicted for a machinegun and thus could not be retried on a new indictment, but could only be resentenced to no more than 5 years.

[23] *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1507 (9th Cir. 1997) ("If the firearm is one that requires more than the five-year mandatory minimum sentence, the nature of the firearm will have been established by the verdict."); *United States v. Perez*, 129 F.3d 1340, 1342 (9th Cir. 1997) (indictment alleged use of pistols with silencers "or" an assault weapon; it was error not to instruct the jury to find firearm type, which "is an element of the offense").

which is binding under the law of the circuit.[24]

The Fifth Circuit's position has the side effect of radically departing from *Bailey v. United States*, 516 U.S. 137, 148 (1995), which held that it is a jury function to determine whether a firearm was used: "The question we face today [is] what *evidence is required to permit a jury to find* that a firearm had been used at all." (Emphasis added). Since the "carry or use" element is a jury issue, by implication *what* is carried or used must also be a jury issue. An item a judge finds at sentencing is a machinegun might not have been the "firearm" the jury found to be "used."

Defendants here disputed the sentencing court's finding that each "either had actual or constructive possession" of machineguns during the 51 day siege. *Branch*, 91 F.3d at 740 (App. 85a). *Branch* held that finding to be inadequate because "§ 924(c) requires more than 'mere possession' . . . . The Government must show 'active employment' of the firearm." *Id.* (App. 86a), citing *Bailey*, 516 U.S. 137-38. *Branch* vacated the sentences and remanded for resentencing with the following directive: "Should the district court find on remand that members of the conspiracy actively employed machineguns, it is free to reimpose the 30-year sentence." *Id*. Yet *Bailey* made clear that whether a firearm was used is a jury question, and

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[24] Two other circuits have suggested in dictum that firearm type is not an element, but in both cases that firearm type was found by the jury. *United States v. Gilliam*, 167 F.3d 628, 638 (D.C. Cir. 1999) (indictment charged and jury found semiautomatic firearm); *United States v. Eads*, 1999 U.S. App. LEXIS 20966, *17-21 (10th Cir. 1999) (agreeing with *Branch-Castillo* that "legislative history" distinguishes *Jones*; jury found machinegun). *Cf. United States v. Davis*, 184 F.3d 366, 1999 U.S. App. LEXIS 15614, *10-12 (4th Cir. 1999) (*Jones* requires interpretation that "great bodily injury" in vehicle offense is an element).

implicit in finding "use" is finding what was used.

Assume a jury finds that a defendant used item X and that X is a "firearm." Assume the jury finds that the defendant possessed but did not carry or use item Y. The jury might also find that item Y is not a machinegun. The jury then renders a general verdict that defendant used a firearm. At sentencing, the judge decides that item Y is a machinegun and, based on the jury verdict that defendant used a firearm, imposes 30 years imprisonment. That cannot be consistent with *Bailey*.

The *Branch* remand, which allowed the sentencing judge to make findings never charged in the indictment or considered by the jury, conflicts with the disposition by other circuits of post-*Bailey* remands. The other circuits focus on whether sufficient evidence existed for the jury to find beyond a reasonable doubt the use or carrying of a firearm, a machinegun, or other weapon as alleged in the indictment.[25]

The Fifth Circuit exacerbates this conflict by authorizing the sentencing court to attribute a co-conspirator's use of an enhanced firearm to a defendant. While *Branch* was silent on the source for this novel doctrine, the district court based it on *Pinkerton v. United States*, 328 U.S. 640 (1946)

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[25] *E.g.*, *United States v. Santos*, 84 F.3d 43, 46-47 & n. 3 (2nd Cir. 1996) (insufficient evidence under *Bailey* to sustain jury verdict under indictment charging use of "firearms," including "handgun which was then equipped with a silencer"); *United States v. Garcia*, 77 F.3d 274, 276-77 (9th Cir. 1996) ("prior to *Bailey*, the jury could have properly inferred that Garcia 'used' the machinegun"); *United States v. Thompson*, 82 F.3d 849, 851-52 (9th Cir. 1996) (improper instruction on "use" of firearm equipped with silencer).

(App. 125-27a), and *Castillo* sanctions this theory.[26] 179 F.3d at 329-30 (App. 158-60a). Yet *Pinkerton* involved responsibility for acts of co-conspirators being found by the jury. 328 U.S. at 645. *See Pereira v. United States*, 347 U.S. 1, 10 n. (1954) (no matter what "the record demonstrates," *Pinkerton* is inapplicable absent jury finding).[27] Here, the jury convicted each defendant under instructions asking if "the Defendant under consideration knowingly used or carried a firearm during and in relation to" the predicate offense. (23 R. 1232, in RE tab 10)

Branch-Castillo push the *Bailey* and *Pinkerton* envelopes outside any limits sanctioned by this Court. The Fifth Circuit's holding creates spinoff conflicts in the circuits on the roles of juries and trial judges and in respect to sentencing rationales for vicarious liability for acts of co-conspirators.

This Court should resolve the circuit conflict. In some circuits, if the indictment alleges and the jury finds use of a "firearm," the sentence is limited to five years, but in other circuits, the trial judge can impose thirty years. Given the large

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[26] Besides *Pinkerton* liability, the district court found that Branch and Avraam used a machinegun on February 28. However, its finding that Castillo and Craddock carried a hand grenade on April 19 (App. 168a) is irrelevant in that the indictment charged them only with using firearms on February 28. *Richardson v. United States*, 119 S.Ct. 1707, 1711 (1999) notes that "we would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday." Nor is it permissible to sentence a defendant for assaulting Y on Wednesday when he was only indicted for and convicted of assaulting X on Tuesday.

[27] Nor does U.S.S.G. § 1B1.3, which provides "the base offense level where the guideline specifies more than one base offense level," authorize sentencing for vicarious liability here. § 2K2.4, the guideline for § 924(c), states that "the term of imprisonment is that required by statute" and does not specify any base offense level.

number of § 924(c) cases prosecuted in the courts, this discrepancy should not continue.

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.

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APPENDIX