

ORIGINAL

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

CAPTION: NATHANIEL JONES, Petitioner v. UNITED STATES

CASE NO: 97-6203 *c. 1*

PLACE: Washington, D.C.

DATE: Monday, October 5, 1998

PAGES: 1-56

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Supreme Court U.S.

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   NATHANIEL JONES,                   :  
4                    Petitioner                   :  
5            v.                                   :   No. 97-6203  
6   UNITED STATES                    :

7   - - - - -X  
8                                   Washington, D.C.

9                                   Monday, October 5, 1998

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   1:00 p.m.

13   APPEARANCES:

14   QUIN DENVIR, ESQ., Sacramento, California; on behalf of  
15                   the Petitioner.

16   EDWARD C. DuMONT, ESQ., Assistant to the Solicitor  
17                   General, Department of Justice, Washington, D.C.; on  
18                   behalf of the Respondent.

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1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 97-6203, Nathaniel Jones v. The United  
5 States.

6 ORAL ARGUMENT OF QUIN DENVIR

7 ON BEHALF OF THE PETITIONER

8 MR. DENVIR: Mr. Chief Justice, and may it  
9 please the Court:

10 The issues presented by Mr. Jones' case are,  
11 first, whether in selecting certain factors to increase  
12 the sentence from carjacking from 15 years maximum to 25  
13 to life, Congress intended those factors be considered  
14 only at the time of sentencing under a reduced standard of  
15 proof, or did they -- Congress intend that they be  
16 elements of an offense which would have to be pled and  
17 proved beyond a reasonable doubt to a jury.

18 We believe that the proper interpretation is  
19 that these are offense elements. If the Court should  
20 decide otherwise, then the Court would have to face the  
21 constitutionality of treating these types of factors only  
22 as sentencing factors.

23 QUESTION: Has the term elements been used or  
24 defined by this Court in a decision, or a series of  
25 decisions, or is it -- is the term we get from the common

1 law which is a summary of what the actus reus is?

2 MR. DENVIR: I don't think it is -- has been  
3 defined. It may have been defined in Winship, when the  
4 Court held that the prosecution had to prove beyond a  
5 reasonable doubt all the facts that constituted the  
6 offense with which -- of which the defendant is charged.  
7 That may have been the closest to a definition, but I  
8 don't think there's any definitive definition, at least  
9 that I'm aware of.

10 QUESTION: And I don't recall that that used the  
11 term elements, although it might have. It's a term that's  
12 been around since the ancient common law, I suppose. I'm  
13 just not sure that we have ever used it as the pivotal  
14 point for decisions or for formulating rules.

15 MR. DENVIR: That may be correct, Your Honor. I  
16 think what -- as I say, the Court talked about facts  
17 necessary to constitute the offense with which someone is  
18 charged.

19 On the other hand, in McMillan for the first  
20 time the Court did use the term sentencing factors, and  
21 that appears to be a term that the Court has said can be  
22 proved at -- to the judge only under reduced standard of  
23 proof and perhaps by a lesser form of evidence that --

24 QUESTION: So in that sense it's almost  
25 conclusory.

1 MR. DENVIR: It's almost -- I think it's the  
2 reverse of the sentencing factor. We've argued it's  
3 either an element of the offense, an element of an  
4 aggravated offense, should be deemed an element of the  
5 offense, but I think the major point we believe is that it  
6 has to be alleged in the indictment and it has to be  
7 proved to a jury beyond a reasonable doubt.

8 QUESTION: Well, the Federal sentencing scheme  
9 has a whole array of factors that the sentencer takes into  
10 consideration after the conviction for the crime, doesn't  
11 it?

12 MR. DENVIR: It does, Your Honor, and --

13 QUESTION: And quantity of drugs being one of  
14 them, and I guess if we were to adopt your position that  
15 would be unconstitutional.

16 MR. DENVIR: Well, Your Honor, I think our  
17 position is that you have to look to the statute and see  
18 whether Congress has identified a particular factor of any  
19 kind, and has used that or made that the basis for an  
20 increased sentencing range.

21 I think a separate question which we don't --

22 QUESTION: So if Congress has spoken to the  
23 issue, then we have to treat it as an element of the  
24 crime?

25 MR. DENVIR: Well, Your Honor, I think the

1 question that the Court posed in Almendarez-Torres was,  
2 what was Congress' intent? Was it intended to be merely a  
3 sentencing factor or not?

4 QUESTION: I'm glad you brought up the case,  
5 because I would have thought that might govern the  
6 resolution of this case.

7 MR. DENVIR: On the statutory question, Your  
8 Honor, I think we have a much different statute and we  
9 have a much stronger argument that these were not meant to  
10 be sentencing factors.

11 On the constitutional question, we don't believe  
12 that Almendarez-Torres resolves that, because we believe  
13 that the Court stressed so strongly in Almendarez-Torres  
14 the fact that what Congress had selected to trigger the  
15 increase in sentence was recidivism, and the Court said in  
16 both the constitutional and statutory parts of it that  
17 recidivism has been as traditional a sentencing factor as  
18 ever, and has been --

19 QUESTION: Well, so has injury to a victim. My  
20 goodness, talk about traditional. I was a trial judge at  
21 one time, and gee, I thought presentence reports  
22 frequently talked about the extent of the injury to the  
23 victim --

24 MR. DENVIR: I think the --

25 QUESTION: -- and that that was a sentencing



1 factor, very traditionally.

2 MR. DENVIR: It has been that, but it has not  
3 been limited to sentencing. I think that was the point  
4 that the Court seemed to make in Almendarez-Torres.

5 QUESTION: Well, so far as the increase in  
6 sentencing is concerned as a result of finding these  
7 factors, this isn't as great as Almendarez-Torres.

8 MR. DENVIR: You mean the amount of the  
9 increase?

10 QUESTION: Yes.

11 MR. DENVIR: Well, it would be if the death had  
12 resulted as a serious bodily injury.

13 QUESTION: Yes, but that were not -- that wasn't  
14 the case here.

15 MR. DENVIR: No, that's correct, but the actual  
16 increase is not as great.

17 But I think, if I could go back to Justice  
18 O'Connor's question, I think --

19 QUESTION: But death, it would be appropriate to  
20 take account of death in determining whether it's a  
21 sentencing factor or an element.

22 MR. DENVIR: Well, we believe, and I believe --

23 QUESTION: I mean, for purposes of interpreting  
24 the statute --

25 MR. DENVIR: That's correct.

1 QUESTION: -- death would be relevant.

2 MR. DENVIR: I don't believe that the Gov -- I  
3 think the Government and we agree that there's no  
4 distinction between serious bodily injury resulting, and  
5 death resulting, at least in terms of interpreting the  
6 statute, that they're either both elements of the offense  
7 or something of that nature, the opposite of a sentencing  
8 factor, or they are sentencing factors.

9 But I think that the key point in Almendarez-  
10 Torres, at least it appeared from what the Court wrote,  
11 was that the recidivism factor of prior convictions had  
12 always been limited to sentencing. It had never been used  
13 as an element of the offense.

14 QUESTION: It has. It's been -- it was an  
15 element of the offense in the possession with -- you know,  
16 felon in possession.

17 MR. DENVIR: Yes, Your Honor. I was going to  
18 say that. That's the only occasion, and I think that what  
19 the opinion --

20 QUESTION: That's pretty important. Sometimes  
21 it was used the one way, sometimes used the other way,  
22 felon in possession.

23 MR. DENVIR: Well, I think that's the only time  
24 it was used, Your Honor, and as I read the opinion, and  
25 the Court made a point that it had never been used as an

1 element of an offense where the conduct was already  
2 illegal. The Court said that twice, made that point,  
3 acknowledged the unusual situation of --

4 QUESTION: In Federal statutes?

5 MR. DENVIR: I'm sorry, Your Honor.

6 QUESTION: Talking about in the Federal criminal  
7 code, or --

8 MR. DENVIR: This was the point that the Court  
9 made, that Congress had not done that.

10 QUESTION: That Congress hadn't done it?

11 MR. DENVIR: Congress had not made recidivism  
12 a -- that was the point the majority made twice, so we  
13 think that that's quite different here, because what you  
14 find is that Congress clearly has made serious bodily  
15 injury an element of several offenses which we have cited,  
16 and in fact that the States, who have traditionally dealt  
17 with robbery, have almost invariably treated serious  
18 bodily injury as an element of the offense, or at least  
19 something that must be pled and proved to the jury beyond  
20 a reasonable doubt.

21 QUESTION: I mean, I think you're absolutely  
22 right. I think that the recidivism is, if you like, the  
23 extreme. It's at the extreme. But now the question is,  
24 all right, do you have a rule that just governs the  
25 extreme, or is it a rule that governs -- maybe in the

1 statutory interpretation this is a fortiori against you  
2 from Almendarez-Torres, that if you reach the  
3 constitutional question, then I guess you have to say,  
4 well, is it an extreme that only recidivism or is it  
5 somewhat less?

6 MR. DENVIR: I think --

7 QUESTION: Which is asking us to narrow  
8 Almendarez-Torres away and make it disappear.

9 MR. DENVIR: No, Your Honor. I think if you  
10 look at In re Winship and you look at Mullaney v. Wilbur  
11 you have the basic idea that a fact which is an element of  
12 the crime, which is necessary to constitute the crime,  
13 must be proved beyond a reasonable doubt.

14 QUESTION: Well, we've come a long way from  
15 Mullaney v. Wilbur.

16 MR. DENVIR: I think that's --

17 QUESTION: Patterson -- yes.

18 MR. DENVIR: I think it has, Your Honor, and as  
19 I understand it the Court in McMillan has said if it is  
20 merely a fact which restrains the sentencer's discretion  
21 within the statutory range, that it need not go to a jury,  
22 and then in Almendarez-Torres the Court said, if it is a  
23 recidivist factor which increases the statutory range, it  
24 need not go to the jury. But --

25 QUESTION: Let me ask you the question, I think

1 in my own mind only -- I'm only speaking for myself, but I  
2 would say that at the heart of this was -- at least the  
3 thought in my own mind that since, let's say 1,000  
4 years -- that's an exaggeration -- a couple of hundred  
5 years, we have statutes that define crimes, and we have  
6 judges that assert punishment under the statute.

7 And when they assert punishment, sometimes it's  
8 a little punishment and sometimes a bigger punishment, and  
9 you can look into it scientifically with the aid of search  
10 and find out what in general bigger or littler turns on,  
11 and when we find that out we find certain factors, like  
12 how much drug there was, like whether a person was hurt,  
13 like whether there was a recidivist, and that turns out to  
14 be true regardless of what the judge says.

15 Now, suddenly, if you decide to write some of  
16 that into law, either in the form of statutory -- of  
17 guidelines or statutes, does that suddenly become  
18 unconstitutional, the effort to regularize what happened  
19 in the past by saying explicitly that those factors that  
20 did, in fact, govern punishment in the past now will be  
21 presumptively, or sometimes in statutes more than  
22 presumptively, grounds for increasing or diminishing a  
23 sentence?

24 What is it about that effort to regularize that  
25 should suddenly constitutionalize procedural requirements

1 that were not there when this very same thing went on  
2 under the cloak of darkness because the judge didn't say  
3 what was going on?

4 MR. DENVIR: Well, Your Honor --

5 QUESTION: That's what in my mind is lying at  
6 the heart of this and, of course, my answer in Almendarez-  
7 Torres is, except in extreme cases the Constitution does  
8 permit Congress and the Commission to regularize what  
9 previously happened silently, or without understanding,  
10 or -- et cetera.

11 That, to be honest, was what my thought was.

12 MR. DENVIR: I understand that, Your Honor, and  
13 I think it partly goes to what is the definition of a  
14 criminal offense and what conduct is ascribed to a  
15 violation of that, and I'd like to give you a example of,  
16 if what you say is correct, what could happen, and I  
17 don't -- this was really -- was envisioned by the  
18 dissenting justices in the Monge case.

19 But we have 18 U.S. Code section 247. It says  
20 that someone who intentionally defaces real property, or  
21 intentionally obstructs a person in the enjoyment of their  
22 religious freedom, is -- shall be punished as in  
23 subsection (d).

24 Subsection (d) says that if death results, or if  
25 the acts include kidnapping or intent to kidnap, you can

1 receive life or death. If bodily injury results, or --  
2 and other things, it can be 40 years. If it's bodily  
3 injury under other circumstances it can be 20 years, and  
4 in any other case, it is 1 year or a fine.

5 Now, the Solicitor General's position is, and I  
6 think the position that would follow from what you've said  
7 is that the jury would only determine whether there was  
8 this intentional defacing real property, or interference  
9 with religious rights, and then -- which would only  
10 trigger a fine or a 1-year sentence, but the judge then  
11 would make all of these critical findings which would  
12 really determine this person's deprivation of liberty --

13 QUESTION: Mr. Denvir, why do you accept Justice  
14 Breyer's hypothesis that this has been uniformly the  
15 practice in the past? Have you ever heard of a hanging  
16 judge?

17 MR. DENVIR: Certainly, Your Honor, and --

18 QUESTION: Which was a judge which would give  
19 the maximum. If you came up before him, you would get the  
20 max, period, and that happened sometimes, didn't it?

21 MR. DENVIR: It certainly did.

22 QUESTION: So when you committed a particular  
23 crime, you knew that you ran a risk of getting the max.

24 MR. DENVIR: That's correct.

25 QUESTION: Absolutely, depending on who -- what

1 judge happened to get your case, and that's not the case  
2 under these statutes, is it?

3 MR. DENVIR: No, it isn't at all, and it raises  
4 the possibility in this case, for instance, if Mr. Jones  
5 had pled guilty to the carjacking as charged, and during  
6 the time between his guilty plea and sentencing the person  
7 had died, he would have just gone from 15 years to in this  
8 case a potential sentence of life imprisonment.

9 But I think the other thing in response to  
10 Justice Breyer's question is, I don't think you can -- you  
11 can really quantify what judges have done in the past,  
12 because judges sometimes don't express all that.

13 But I think the key point is, we've always  
14 thought, at least In re Winship says that, that a jury is  
15 the most reliable determiner of these basic facts as to  
16 what a person did that was wrong, and what exactly will  
17 trigger the potential deprivation of liberty that he or  
18 she faces, and in this particular case, the serious bodily  
19 injury resulting factor, a factor that only arose at the  
20 time of sentencing, in effect increased the sentence that  
21 Mr. Jones was facing by two-thirds.

22 QUESTION: Well, would our system be any better  
23 off if we went -- if we repealed the Sentencing Guidelines  
24 and went back to the situation where the judges didn't say  
25 what they were taking into consideration, but two people



1 would end up in Leavenworth convicted of the same crime,  
2 one was committed for 2 years and the other was committed  
3 for 20 years?

4 When Congress tried to regularize that, have  
5 they made it subject to a lot of constitutional objections  
6 that, as Justice Breyer says, the process wasn't subject  
7 to before because no one explained their reasons?

8 MR. DENVIR: Well, Your Honor, I think that once  
9 again we are not challenging the fact that Congress can  
10 pick out particular factors that will restrict the  
11 sentencing authority's discretion within the statutory  
12 range.

13 What we have here, and which we think is  
14 critical, is, you have the definition of a criminal  
15 offense and the attaching of potential penalties by  
16 Congress, and we think at that point those facts that  
17 trigger that increase, all the way up to death or life,  
18 are facts that should be determined by a jury, because  
19 that's the most reliable way it should be done.

20 QUESTION: But that was Almendarez-Torres.

21 MR. DENVIR: Your Honor --

22 QUESTION: I mean, those were facts that were  
23 not proven in the crime-in-chief, and it increased the  
24 potential maximum sentence.

25 MR. DENVIR: They are facts of that nature, but

1 I think what was pointed out in Almendarez-Torres is that  
2 the fact of a prior conviction first of all is not often  
3 disputed.

4 Number 2, it has been the subject of a prior  
5 proceeding where you had the kind of reliable fact-  
6 finding --

7 QUESTION: Well, neither is it often disputed  
8 whether the victim died or didn't die.

9 MR. DENVIR: Well --

10 QUESTION: I mean, he did or he didn't.

11 MR. DENVIR: Well, it may be as to whether that  
12 death resulted from this crime, and certainly in a case  
13 like we have here there is certainly a substantial  
14 question as to whether this was serious bodily injury as  
15 defined by the statute.

16 But these are traditional components of the  
17 prohibited transaction that juries make factual findings  
18 on under a higher standard because we want that  
19 reliability, we want that public confidence in the  
20 soundness of the decision. That's why the elements of the  
21 crime are ascribed to the jury --

22 QUESTION: But not in a State, for example,  
23 where the sentencing is done by the judge, not the jury.

24 It is typical that a judge is going to be  
25 considering such things as the prior bad acts of the

1 defendant, and the extent of injury to the victim. I  
2 mean, those are traditional.

3 MR. DENVIR: And Your Honor, we have no quarrel  
4 with that, whether it's done under a sentencing guideline-  
5 type scheme, as we have in the Federal courts, or under  
6 another scheme, but the fact of the matter is, we're  
7 talking about the definition of the range of potential  
8 penalties. We're not talking about what determines the  
9 penalty within that range, and I think --

10 QUESTION: It's optional for those judges, isn't  
11 it? I mean, they may, and may perhaps ordinarily do,  
12 impose a significantly higher penalty because of bodily  
13 injury, but they don't have to, do they?

14 MR. DENVIR: They don't have to, and they --

15 QUESTION: And they can still impose the  
16 minimum.

17 MR. DENVIR: Right, and they can determine --

18 QUESTION: Whereas under this law they have no  
19 option. They are bound to impose the greater penalty,  
20 aren't they?

21 MR. DENVIR: They are bound to look at an  
22 increased range of 25 years, based on that finding.

23 QUESTION: Well, so is your position that any  
24 time a judge is bound to make a particular minimum  
25 sentence, that the Constitution requires that to be shown

1 as an element of the crime?

2 MR. DENVIR: Again, Your Honor, I think that's  
3 the McMillan case, and the Court has said that if Congress  
4 or the legislator singles out a factor which will either  
5 control or guide the discretion of the sentencing  
6 authority within the statutory range of punishment, that  
7 that does not raise these concerns, but this is a  
8 different matter.

9 QUESTION: Well, under this statute -- under  
10 this statute if serious bodily injury results then the  
11 defendant will be sentenced to not more than 25 years. It  
12 doesn't fix it at --

13 MR. DENVIR: It does not fix it at 20, but it  
14 exposes him.

15 QUESTION: It just exposes him to a broader  
16 range of discretion by the judge.

17 MR. DENVIR: Based on a factual finding that was  
18 not made by a jury, it was not made beyond a reasonable  
19 doubt, and it was not subject to the traditional  
20 safeguards.

21 QUESTION: The same thing can in essence be true  
22 of a judge who says, well, I'm going to give a higher  
23 sentence because I happen to have determined on a  
24 preponderance that you've been previously convicted, or  
25 because the victim suffered serious injury, or because

1 there was a very large quantity of drugs involved here.

2 MR. DENVIR: That's correct, Your Honor, and the  
3 only case that the Court has decided in that range is the  
4 recidivism question, and the Court selected certain  
5 factors about that that apparently were critical.

6 One was that traditionally recidivism prior  
7 convictions had been limited to sentencing, had not been  
8 used as elements.

9 The second was, they were very seldom disputed.

10 The third thing was that they were easily  
11 verifiable.

12 The fourth thing was that the prior conviction  
13 had been the subject of reliable fact-finding either by a  
14 jury trial or an informed waiver of that trial, and all  
15 those factors are really important.

16 The other thing that the Court cited was the  
17 fact that the defendant could suffer from having that  
18 prior conviction brought before the trier of fact jury,  
19 and that -- as another reason.

20 None of those apply when you're talking about a  
21 particular part of the criminal conduct that has been  
22 singled out.

23 QUESTION: Don't you think the defendant could  
24 suffer by having the fact of serious bodily injury or  
25 death being brought before the jury?

1 MR. DENVIR: Your Honor, first of all, in the  
2 carjacking statute it is likely that will come in anyway,  
3 because the Government will try to use it to show that the  
4 taking was by force or -- force and violence or by  
5 intimidation, so it's already going to go before the jury.

6 If a particular defendant wants to keep that  
7 out, he always has the opportunity to seek a bifurcation  
8 on that issue, or to stipulate to the issue, but we think  
9 the defendant should be able to make the choice as to  
10 whether they will have the jury hear these and make a  
11 reliable fact-finding --

12 QUESTION: If that's true with respect to bodily  
13 injury it's also true of a prior conviction.

14 MR. DENVIR: It is, Your Honor, except for the  
15 fact that that's seldom disputed, and generally it has  
16 been found reliably in the past, where serious bodily  
17 injury is a brand-new issue and should be found under this  
18 higher standard by a more reliable fact-finder.

19 QUESTION: But in the Old Chief case it was  
20 disputed as just what should be the form of presenting the  
21 prior conviction to the jury.

22 MR. DENVIR: That's correct, and there would be  
23 ways, perhaps under Old Chief or by seeking bifurcation,  
24 that a defendant who did not want this information to go  
25 before the jury could keep it out, if the Government was

1 not already seeking to bring it in to show force and  
2 violence or intimidation, which are elements of the  
3 statute.

4 QUESTION: Other than in the death penalty  
5 context, are you aware of any case where elements of the  
6 crime are bifurcated, and where the Constitution requires  
7 two trials?

8 MR. DENVIR: I'm not sure that the Constitution  
9 require, but I think a court would have that -- the  
10 discretion to bifurcate it in the proper case.

11 QUESTION: Would you have special verdicts in  
12 this --

13 QUESTION: They used to do it with some  
14 regularity with respect to recidivism, didn't they?

15 MR. DENVIR: With the prior convictions. In the  
16 States at least they used to routinely bifurcate --

17 QUESTION: Would you have special verdicts under  
18 this statute under your reading?

19 MR. DENVIR: Your Honor, I don't believe it  
20 would require it. I think all it would require that the  
21 fact of serious bodily injury resulting would be added as  
22 to one of the elements that the jury must find in order to  
23 convict the defendant of that particular crime, just like  
24 possession of a weapon.

25 QUESTION: Well, then you submit alternate

1 counts to the jury?

2 MR. DENVIR: It may be possible on any given  
3 case that you could have a lesser-included offense, which  
4 would be the simple case of carjacking, which happens in  
5 bank robbery statutes. We have armed bank robbery. We  
6 have bank robbery. Those are sometimes both submitted to  
7 the jury, and that could happen, I would think, in this  
8 case.

9 QUESTION: I mean, I've never heard of  
10 bifurcating a trial -- maybe it exists -- where it's an  
11 element of the offense, the injury. I mean --

12 MR. DENVIR: Well --

13 QUESTION: You've heard of that? Maybe -- all  
14 right, It might be rare, but that --

15 MR. DENVIR: It has been done --

16 QUESTION: Okay.

17 MR. DENVIR: -- with prior convictions where --

18 QUESTION: Prior convictions, yes.

19 MR. DENVIR: That's correct.

20 QUESTION: -- obviously, if this is an element  
21 of the offense, I don't know how you'd bifurcate it,  
22 but --

23 MR. DENVIR: That --

24 QUESTION: -- maybe you would.

25 My question, which is related to that, is,



1 imagine -- I might be misremembering, but it seems in my  
2 youth in California there was something called the  
3 California Adult Authority, and it was fairly common to  
4 write a criminal statute somewhat analogous to the one we  
5 have here that would have said the following.

6 The penalty for possessing a firearm, blah,  
7 blah, blah -- you know, possessing a firearm presence, is  
8 life, period, up to life, and then it would be up to some  
9 prison authorities to decide whether it was 1 year, 5  
10 years, 10 years -- does that ring a bell --

11 MR. DENVIR: Certainly it does.

12 QUESTION: -- that there were systems like that?  
13 Okay.

14 MR. DENVIR: It's an indeterminate sentencing  
15 law.

16 QUESTION: Now -- now -- an indeterminate  
17 sentencing.

18 Now, Congress in its wisdom afterwards thinks  
19 that's a bad system. It's too subjective. So what we  
20 want to do is regularize it.

21 Now, you've said, suppose I'm in Congress trying  
22 to write this. I think, I want to do the following. I  
23 want to put the person away for life, okay, if he kills  
24 somebody, but if he doesn't, he just has bodily injury, I  
25 think he should only go away for not more than 25 years,

1 and if he doesn't do that I think not more than 10.

2 Now, you've suggested there's a way of writing  
3 that statute where you don't have to prove all those as  
4 elements of the offense, although here you think you do.

5 What's that way of getting my legislative result  
6 where I just want to direct the sentencing authority?

7 MR. DENVIR: I think --

8 QUESTION: How would I write that statute, in  
9 your opinion, that would be different from the way this  
10 one was written?

11 MR. DENVIR: I think -- I think if a statute was  
12 passed which provided that carjacking would control up to  
13 life, and if the statute also said that there was a  
14 determining, unless there was serious bodily injury, it  
15 couldn't be more than 15 years, and something of that  
16 nature, that would raise different questions than are  
17 presented here.

18 The Court in Almendarez-Torres reserved the  
19 question, the question presented there, whether the role  
20 of a particular factor within the statutory authority,  
21 could be so great that it would require greater  
22 constitutional safeguards.

23 QUESTION: I'm -- but what I didn't get, I'm not  
24 thinking of Almendarez-Torres. I'm not thinking of any  
25 case. I only want your opinion.

1 I am a legislator. I want to control sentencing  
2 by statute, as I just said. Now, how do I write that  
3 statute so I'm instructing the sentencer, not so I'm  
4 creating three new offenses? How, in your opinion, do I  
5 write it?

6 You know how I'd write it? I'd write it the way  
7 this one's written, but you have a different opinion of  
8 that, and so I want to know how to do it.

9 MR. DENVIR: I think, as I say, I -- to  
10 accomplish what you wanted, but it raises different  
11 questions in here, than the statute we have here, it could  
12 be provided that carjacking carries up to a life sentence,  
13 and that -- but you cannot sentence for more than 15 years  
14 unless there's serious bodily injury, and you can't go for  
15 more than 25 years unless there is death resulting. That  
16 would be a way to write --

17 QUESTION: That would be okay?

18 MR. DENVIR: No, I don't think that would be  
19 okay. The question was --

20 QUESTION: I thought your answer was going to be  
21 that the legislature can't do that.

22 MR. DENVIR: I don't think they can, Your Honor.

23 QUESTION: The legislature, if it wants to leave  
24 it up to the judges, I mean, that's the price of having  
25 indeterminate sentences and allowing somebody to be

1 sentenced anywhere from 1 year to life. The price is, you  
2 have to leave it up to the judge, but if you want to  
3 exercise control over it, I thought it was your position,  
4 you have to make it an element of the crime.

5 MR. DENVIR: That's our basic position, Your  
6 Honor.

7 QUESTION: All you have to do --

8 MR. DENVIR: I was trying to respond to the  
9 California --

10 QUESTION: All you have to do is say, if you  
11 have an aggravating circumstance of that significance, you  
12 have to have it found by the jury.

13 MR. DENVIR: That --

14 QUESTION: It's a very simple statute to write.  
15 It's a question of whether you want that kind of a statute  
16 that the judge has a rein to make all these findings that  
17 normally are made by juries.

18 MR. DENVIR: Well, our position is, the statute  
19 that's before this Court, which parallels, as I say, this  
20 section 247, takes this -- takes certain factors and says  
21 to a defendant, if those factors are found to be true,  
22 then you will look at an additional 10 years, or perhaps  
23 all the way to life, or now, under the amendments, to  
24 death.

25 We believe that those factors which are

1 components of the crime, the prohibited transaction, must  
2 be alleged in the indictment, must be submitted to a jury,  
3 and must be proved beyond a reasonable doubt.

4 QUESTION: Correct me if I'm wrong, and I may be  
5 wrong. I thought it was more or less an article of faith  
6 for the criminal defense bar that they want general  
7 verdicts so that the jury can consider all of the  
8 circumstances of the crime in one verdict before it makes  
9 its conclusion.

10 Now, you seem to be going contrary to that.

11 MR. DENVIR: No, Your Honor. What we want is,  
12 we want the elements of the offense that have to be proved  
13 in order to deprive our clients of liberty, that they  
14 should be set forth -- presented to a grand jury, set  
15 forth in an indictment, submitted to a jury under a  
16 general instruction as to elements, and proved beyond a  
17 reasonable doubt before our clients face that additional  
18 penalty. That's what we want.

19 QUESTION: It seems to me necessarily you're  
20 going to want special verdicts and/or bifurcated trials.

21 MR. DENVIR: I really don't think special  
22 verdicts are required. I think it's just a question of  
23 including it in the elements of the offense. It may also  
24 then have a lesser included in any given case.

25 But that's done all the time in Federal court.

1 The bank robbery statutes are done that way. In fact, the  
2 Court has a case along those lines coming up about lesser  
3 included.

4 If I could reserve my time.

5 QUESTION: Very well, Mr. Denvir.

6 Mr. DuMont, we'll hear from you.

7 ORAL ARGUMENT OF EDWARD C. DuMONT

8 ON BEHALF OF THE RESPONDENT

9 MR. DuMONT: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 In our view, Congress intended serious bodily  
12 injury to be a sentencing factor, statutory sentencing  
13 factor under section 2119, and nothing in the Constitution  
14 requires that it be treated as an element of the offense.

15 Let me pause for a moment in the language and  
16 structure of the statute. The initial paragraph, section  
17 2119, as it applies here, sets out exactly what you would  
18 expect from a Federal carjacking offense, taking a car  
19 that is moved in commerce, in the person or presence of  
20 another, possessing a firearm, force and violence -- it's  
21 a very standard robbery offense.

22 That initial paragraph ends with the word shall,  
23 followed by a dash, leaving the reader to think, all  
24 right, now I'm going to find out about penalties, and then  
25 you have three numbered clauses that follow that that do

1 deal with penalties. One is for a default penalty of up  
2 to 15 years, and then two progressively higher sentences  
3 that are authorized maximum sentences that are authorized  
4 if certain findings are made.

5 In our view, the natural and plain construction  
6 of that language is that these are statutory sentencing  
7 factors, and that's what the courts below have held.

8 QUESTION: Are there due process limits at all  
9 on what Congress can treat as a sentencing factor as  
10 opposed to an element?

11 MR. DuMONT: The Court has always suggested that  
12 there are such limits, and we don't oppose that. I'm not  
13 aware of any statute that has been struck down on that  
14 ground.

15 I think one reason for that is suggested, in  
16 fact, by Justice Stevens' dissent in McMillan, which is  
17 that there are some real-world constraints here.  
18 Legislatures don't pass statutes that would come very  
19 close to the line of allowing, as the metaphor goes, the  
20 tail of sentencing to wag the dog of the substantive  
21 offense.

22 QUESTION: This one reads pretty much like that  
23 to me, and what about the defacing of property statute  
24 that your colleague suggested?

25 MR. DuMONT: Well, I --

1 QUESTION: It's an offense of defacing property.

2 MR. DuMONT: I think that --

3 QUESTION: If nothing else happens, punished by  
4 1 year. If there's physical injury, 30 years. If there's  
5 a death, life, and whether there's physical injury, or  
6 whether there's death, is taken away from the jury and  
7 your right to jury trial does not exist for those. Is  
8 that a problem?

9 MR. DuMONT: Well, I think first of all that's  
10 in the civil rights sections of the statutes, the statutes  
11 intended to address defacement of religious property for  
12 the reasons of race or creed. It's a very serious  
13 offense. Congress was responding simply to some known  
14 problems.

15 QUESTION: So serious you get 1 year for it.

16 MR. DuMONT: So --

17 QUESTION: Unless somebody dies, in which case  
18 you get life, and you don't get a jury trial as to whether  
19 anybody has died.

20 QUESTION: Yes, and you can commit it by just  
21 throwing a bucket of paint on a wall. That would do it.

22 MR. DuMONT: Well, that's right, but I think the  
23 fundamental question, then -- and there are -- one can  
24 multiply the examples here. The assault statute, for  
25 instance, that is a simple assault, but if someone dies



1 there could be life imprisonment. The examples are there.

2 I think what troubles us about those examples  
3 when we hear them is a notion of proportionality, that it  
4 would be disproportionate to send someone to jail for  
5 life, for instance, when the offense of conviction is  
6 merely a defacement of property or a simple assault.

7 I think that would be an interesting and,  
8 perhaps, difficult sentencing --

9 QUESTION: It's the piling on of, you know, on  
10 top of a 1-year sentence a 20-year sentence. The -- it --  
11 to me it's the disproportion between the sentence that is  
12 piled on and the initial sentence.

13 MR. DuMONT: Well --

14 QUESTION: Which I don't think you have here.

15 MR. DuMONT: We certainly don't have it here,  
16 and I think the question in those cases is always going to  
17 be, well, under a sort of proportionality analysis, could  
18 Congress pass this statute and simply say --

19 QUESTION: It's really an Eighth Amendment  
20 issue, I guess.

21 MR. DuMONT: -- it's defacement of property and  
22 the penalty is life, and as Justice Breyer was suggesting,  
23 leave it up to the judge. Would we have a problem with  
24 that? In individual cases, we might. If a death was  
25 found we might not have a problem with the proportionality

1 there, and I think it really is the same constitutional  
2 analysis.

3 What it is not is a due process problem, with  
4 Congress' being able to define what it intends to be  
5 elements and what it intends to be --

6 QUESTION: Mr. DuMont --

7 QUESTION: Well, in your --

8 QUESTION: -- in the context of this case, let's  
9 take the Rivera situation, where Congress said to the  
10 First Circuit, you got it wrong, and rape is included in  
11 serious bodily injuries, so as you read this statute  
12 carjacking, and there's an allegation that a rape took  
13 place, and that's disputed, and yet the person could be  
14 tried by the jury for the carjacking part, the judge  
15 decides whether the rape occurred or not, and that would  
16 be -- that's the way the statute would work. Do I  
17 understand you correctly?

18 MR. DuMONT: That's right.

19 QUESTION: So you would have by a preponderance  
20 of the evidence 10 years added on for the rape by the  
21 judge.

22 MR. DuMONT: I think that's absolutely right,  
23 and I think it's important to point out that that's  
24 exactly what the result would be if this statute said, as  
25 it might very well, here are the elements, the penalty is

1 life, now go to the guidelines, and Congress has, of  
2 course, mandated that district judges obey the guidelines.

3 QUESTION: It wouldn't necessarily be that. It  
4 would depend on what the sentencing authority decided to  
5 do. If you left it entirely to the judge, he might tack  
6 on 10 years, but he wouldn't have to.

7 If you leave it up to the Sentencing Commission,  
8 they might tack on 10 years, but they don't have to.

9 There's a big difference between Congress  
10 prescribing that you must do it this way, and Congress  
11 taking a chance that somebody, whether it be the  
12 individual judge or the Sentencing Commission, will do it  
13 that way.

14 Isn't that the difference between an element and  
15 something that isn't an element?

16 MR. DuMONT: Well, I think that is the  
17 interesting argument, and our answer to that is no.  
18 Congress can do it either way.

19 To us it does not make sense to say that there  
20 are many options Congress has. It can set a determinate  
21 sentence. It could have said, for every carjacking, the  
22 sentence is 40 years, period. We know from Chapman and  
23 other cases that would be fine. It could say -- no  
24 discretion to anybody.

25 It could say, apparently, carjacking is this,

1 and the penalty is up to life. The judge can do whatever  
2 he wants to and, subject to some very lax appellate check,  
3 there is no -- there's plenary discretion.

4 We also know from any number of recent cases  
5 that Congress can commit this issue to the Sentencing  
6 Commission. It can say, all right, the penalty is life.  
7 The Sentencing Commission now may exercise its discretion  
8 to actually impose quite narrow bounds on the discretion  
9 of the trial judge, and that is perfectly constitutional,  
10 even if the same conduct, for instance, was not charged,  
11 or was charged and the defendant was acquitted.

12 It seems to us quite anomalous to say that as a  
13 constitutional matter Congress may do any of those things,  
14 but what it may not do is direct the exercise of that  
15 discretion, the sentencing discretion itself, in the  
16 statute. That would seem to us a very strange world,  
17 where it can delegate this authority to the Sentencing  
18 Commission, but it can't exercise the authority itself.

19 QUESTION: Can you tell us --

20 QUESTION: There's a world of difference  
21 between --

22 QUESTION: Can you tell us what Congress -- go  
23 ahead.

24 QUESTION: -- world of difference between  
25 letting somebody else do something and requiring that

1 somebody else do something. The latter is lawmaking, and  
2 that's prescribing the elements of the crime. I mean, at  
3 least that that --

4 QUESTION: How does this statute --

5 QUESTION: -- that is open to discussion that  
6 that's prescribing the elements of the crime, but where  
7 you just leave it to the judge you have no control over  
8 it, or the sentencing.

9 QUESTION: How does this statute require it?  
10 I'm confused. I thought it just said, may give up to 25  
11 years.

12 MR. DuMONT: That's absolutely right. This  
13 statute sets some statutory maxima. It says nothing  
14 about -- it's as though you had the guidelines but with  
15 the possibility of downward departure but not the  
16 possibility of upward departure.

17 All Congress has done here, as opposed to a  
18 guidelines system, is to give defendants an absolute  
19 maximum under certain circumstances, whereas under the  
20 guidelines actually they wouldn't have that. They would  
21 have always the possibility the judge would choose to  
22 upward depart, and they could go up to life, so if we're  
23 talking about fundamental fairness to the defendants here,  
24 it seems to us this scheme is much more protective of the  
25 defendant's rights than is a scheme that leaves everything

1 up to the Sentencing Commission or to the sentencing  
2 judge, and it would be surpassingly odd for there to be a  
3 due process problem.

4 QUESTION: May I ask, if the statute said it may  
5 increase -- now it says if the judge makes such finding.  
6 If some third party suggests that this person may have  
7 done this, then the statute, the maximum should go up.

8 I mean, you don't even have proof beyond a  
9 reasonable -- by a preponderance, but just a suspicion  
10 of -- would that be constitutional to allow that to  
11 increase the maximum? Would that raise a due process  
12 question?

13 MR. DuMONT: It's a finding at sentencing, but  
14 by some very low standard.

15 QUESTION: The judge does the sentencing. He  
16 says, if someone reports to the judge that he thinks this  
17 person has injured someone very seriously, the maximum may  
18 be increased to 25 -- a certain amount. Would that be  
19 permissible?

20 MR. DuMONT: I've two answers. I think it might  
21 be a pretty accurate reflection of some things that  
22 happened under an indeterminate system, but as to whether,  
23 if we knew that was what was happening if that would be a  
24 problem --

25 QUESTION: No, it's not an indeterminate system.

1 It increases the maximum. He may do it if certain facts  
2 come to his attention by an ex parte submission, or  
3 something like that.

4 MR. DuMONT: Well, I think the standard of proof  
5 at sentencing can raise a due process question, yes. I  
6 think --

7 QUESTION: You think the standard of  
8 preponderance of evidence is mandated by the Due Process  
9 Clause?

10 In other words, is -- they now require the judge  
11 to make findings. What if they didn't require the finding  
12 and just said, suspicion is enough?

13 MR. DuMONT: All the Court has ever said is --

14 QUESTION: I know we have -- what do you think  
15 about that? Do you think it would raise a due process  
16 concern?

17 MR. DuMONT: I think it would raise some  
18 concerns if you were allowed to sentence on the basis of  
19 suspicion, but on the other hand --

20 QUESTION: The difference between suspicion and  
21 preponderance raises concerns, but the difference between  
22 preponderance and proof beyond a reasonable doubt does  
23 not?

24 MR. DuMONT: Well, and there are cases that say  
25 that clear and convincing evidence is a good place to stop

1 in between.

2 I agree that it's a very difficult place to draw  
3 lines.

4 QUESTION: Is that an open question?

5 MR. DuMONT: That is an open question.

6 QUESTION: I mean, it's an open question whether  
7 this -- whether you have to have, in the sentencing  
8 factor, a preponderance, clear and convincing, beyond  
9 reasonable doubt. This Court's never decided that.

10 MR. DuMONT: This Court has specifically  
11 reserved the question.

12 QUESTION: All right, and so is that a matter of  
13 constitutional law, a matter of guideline law, a matter of  
14 the statutes under the guideline -- what is it a matter  
15 of?

16 MR. DuMONT: It could be any. I mean, accepted  
17 practice under the guidelines is that preponderance is not  
18 only enough, but required. It could be a constitutional  
19 question.

20 QUESTION: In McMillan, didn't we say a  
21 preponderance was enough on the facts of that case?

22 MR. DuMONT: Yes, absolutely, and that's always  
23 been the standard, and that is sufficient, and no one has  
24 tried to go below that, so --

25 QUESTION: You see, my point is that when you



1 use these indeterminate sentencing examples where the  
2 judge had total discretion, the judge then could act on ex  
3 parte submissions that were purely suspicion, and you're  
4 saying that because that was permissible in indeterminate  
5 sentencing, when you have a regular system with  
6 statutorily required increases, you can still follow the  
7 same basic principle.

8 MR. DuMONT: Well --

9 QUESTION: It seems to me it doesn't follow at  
10 all.

11 MR. DuMONT: I think that is the logic of many  
12 of the sentencing cases. I mean, that argument has been  
13 played out in the context of the Sentencing Guidelines,  
14 and the argument has been made that now that we know what  
15 judges are doing under the Sentencing Guidelines there  
16 should be constitutional consequences, but the Court has  
17 rejected that in Watts and Witte, so in our view that  
18 question is settled.

19 QUESTION: Can you tell me, what is your  
20 formulation for what must be submitted to the jury in a  
21 criminal case?

22 MR. DuMONT: Our formulation is that -- and this  
23 is going to be a little unsatisfactory, but our  
24 formulation is that the elements of proof beyond a  
25 reasonable doubt of each of the elements of the offense,

1 as defined by the legislature, must be submitted to the  
2 jury.

3 QUESTION: So you use the term elements, which  
4 is what your adversary uses, and it's just a question of  
5 our parsing the meaning of the term, elements?

6 MR. DuMONT: Well, I think not, because what the  
7 Court has said -- and the case I would point you to in  
8 response to, I believe it was your first question of the  
9 afternoon, is perhaps Patterson v. New York, which does  
10 talk in these terms.

11 It was talking about a background where the  
12 argument had been made much like the argument here, that  
13 anything that -- any factor that we know is going to  
14 substantially increase the sentence must be an element, or  
15 must be proved beyond a reasonable doubt, and the Court  
16 says no, the State here has defined these to be the  
17 elements of murder, I think it was, and that is all that  
18 has to be proved to the jury beyond a reasonable doubt,  
19 and that is our working definition is, what the  
20 legislature defines as an element of the offense necessary  
21 to conviction is an element.

22 Now, the Court has reserved whether there are  
23 situations in which the legislature might go so far,  
24 either in attempting to presume guilt of an element or in  
25 attempting to design a system --

1 QUESTION: How do I know what's an element and  
2 what isn't an element?

3 MR. DuMONT: In the first instance you know it  
4 by looking at the statute and seeing what Congress or the  
5 State legislature has defined as an element, and in  
6 Congress' case that's particularly true, because of course  
7 there's no common law background to fall back on. We have  
8 only the statutory --

9 QUESTION: Only because Congress has never used  
10 the term element. Maybe I'm wrong. Maybe it has, but --

11 MR. DuMONT: Well, it is done against a long  
12 practice, so I think what you have in the elements of  
13 offense is something like you have here. You have a  
14 statute that says, whoever. It lists certain actions or,  
15 and usually a state of mind, then it says shall, and gives  
16 you a set of punishments.

17 I think that's a very good indication that what  
18 comes in between the whoever and the shall is an element  
19 that has to be proved to the jury in order to establish  
20 guilt of the crime.

21 Our submission on that fundamentally is, it is  
22 whatever -- the elements of a crime are what the  
23 legislature says they are, subject to some --

24 QUESTION: Is there any indication that Congress  
25 knew when it was drafting, say, the robbery statute as

1     opposed to the carjacking, that in the one case it was  
2     robbery, the serious bodily injury would go to the jury,  
3     and the other, it would go to the judge?

4             You say it's a matter of what Congress intended.  
5     I read your brief and you say, well, the way the robbery  
6     statute is written, serious bodily injury would go to the  
7     jury, right, but the way the carjacking statute is, it  
8     would go to the judge.

9             Is there any indication that Congress -- it  
10    seems to me it doesn't make a whole lot of sense to  
11    distinguish those two.

12            MR. DuMONT: Well, I think there has been  
13    something of a paradigm shift over the last 40 years if  
14    you want to look at the way statutes have developed, and I  
15    think we think slightly differently and more clearly now  
16    about some of these issues. We are now --

17            QUESTION: No jury trial now, right --

18            MR. DuMONT: We're working on that.

19            QUESTION: -- as opposed to 40 years ago?

20            MR. DuMONT: We're working on that.

21            What you have now, 19 -- 2119 was passed in  
22    1992, well into the guidelines era, so it seems to us very  
23    likely, in fact it seems to us clear that Congress was  
24    thinking in terms of elements of an offense, and then  
25    sentencing factors, jury, judge.

1           The analysis was somewhat less clear, say, 40 or  
2 50 years ago, and I think when you look at something like  
3 the bank robbery statute, all of the cases under those  
4 statutes have always proceeded on the assumption that the  
5 question is, lesser included offense, greater offense,  
6 separate offenses in the double jeopardy sense, or one  
7 offense in the double jeopardy sense.

8           And the conclusion there has been that Congress,  
9 when they set out three separately subdivided offenses,  
10 each starting with the whoever language, each having  
11 elements, each having a shall, each having a separate  
12 penalty, that Congress intended to create three different  
13 penalty -- three different substantive offenses, in the  
14 sense that we are now talking about, and we --

15           QUESTION: There's the question of the age of  
16 the statute, and you're saying, maybe if the bank robbery  
17 statute were passed today it would be just like the  
18 carjacking statute.

19           MR. DuMONT: I think it might be written  
20 differently, that's all, or we would have a different  
21 indication.

22           If it were written the way it is written now, we  
23 would submit it should still be interpreted the way we  
24 would say it is. There are three separate statutory  
25 offenses and the additional elements and aggravated

1 offenses under the bank robbery statute, we've never  
2 argued that they don't have to be proved to the jury. We  
3 think they do.

4 QUESTION: Mr. DuMont, I assume if you have a --  
5 you know, a crime that has a 10-year penalty, 10 years in  
6 prison, now, that's serious enough that you need a jury  
7 trial, I assume. That's all it says, just, you know,  
8 burglary, 10 years.

9 But if you define a crime as defacing a  
10 religious building, or something like that, and provide 10  
11 years for that, and then 20 years, another 10 years for  
12 some other sentencing factor that's put into that, you  
13 don't need a jury, and maybe even 20 years.

14 That's not disproportionate yet, is it? I don't  
15 know at what point you say it becomes disproportionate.  
16 Is increasing it from 10 to 20 disproportionate yet?

17 MR. DuMONT: I --

18 QUESTION: You don't know. And then from 20 to  
19 30 for some other sentencing factor.

20 Why would the people who cared so much about the  
21 right to trial by jury, why would they think it  
22 unimportant that in the one context you should have a jury  
23 determine that you deserve that 10 years, but so long as  
24 Congress phrases it as a sentencing factor, we don't care  
25 about a jury?

1 I mean, I'm trying to come up with some  
2 interpretation of the jury guarantee that makes sense, and  
3 that doesn't make any sense to me.

4 MR. DuMONT: Well, I can appreciate that effort,  
5 but we would be trying to come up -- if we went the other  
6 way, if we went back to a Mullaney system, then it seems  
7 to me we would be trying to come up in a long series of  
8 cases with some limits on this theory of, well then, what  
9 is going to be an element? What increases punishment  
10 sufficiently so we're now going to call it an element?

11 Whereas, it is not only consonant with tradition  
12 but much simpler and clearer to say, Congress defines the  
13 elements of the offense, there are certain, perhaps a  
14 number of checks on that, but if Congress has defined an  
15 offense and then provided for a maximum sentence, as in  
16 this case of life, there's nothing wrong with it then  
17 saying, here are some intermediate stopping points as a  
18 matter of sentencing, and we are directing sentencing  
19 judges, in applying this statute, to stop at those points.

20 QUESTION: Well, you have a constitutional right  
21 to a jury trial to be -- where the jury, not the judge,  
22 determines if a person is a bad man, but if the question  
23 is whether he's a very bad man, that goes to the judge? I  
24 mean, is that where we are?

25 MR. DuMONT: Well, you know, there are always --

1 again, there are other constitutional principles that may  
2 supervene here. There is a vagueness principle, which has  
3 usually served to protect us from crimes that either don't  
4 give notice of what they prohibit, or are invitations to  
5 arbitrary enforcement.

6 So if I understand the question, that it's like  
7 Justice Scalia's hypothetical in his dissent in Monge,  
8 that we're talking about a -- it is unlawful to willfully  
9 cause injury, knowingly cause injury to another, and  
10 everything else is a sentencing factor, it seems to me  
11 that would be quite vulnerable to challenge on vagueness  
12 grounds.

13 It's not, it seems to me, very vulnerable to  
14 challenge on the ground that the legislature doesn't have  
15 the right to make knowingly causing injury to another a  
16 criminal offense.

17 QUESTION: But you're opponent is arguing --

18 QUESTION: I guess we're trying to ask for the  
19 rationale of the jury trial or guarantee, and then to  
20 square it with the results that we're asked to reach here.

21 MR. DuMONT: Well, I think the jury trial  
22 guarantee is a central guarantee which ensures that once  
23 Congress has defined an offense, you may not be punished  
24 for that offense until a jury of your peers has found that  
25 you have in fact engaged in conduct which satisfies each



1 of the elements of that offense.

2 I know that may not be satisfactory. I don't  
3 know any other way, any other terminology to --

4 QUESTION: But you made the point, and your  
5 opponent made the same point, that one of the things at  
6 stake here is the notice. Your notice in the indictment  
7 need not specify that which will subject him to the much  
8 longer penalty, the bodily injury, for example.

9 MR. DuMONT: Well, that's right, and that's  
10 exactly what would be true -- I --

11 QUESTION: It seems to me that you --

12 MR. DuMONT: -- hate to keep coming back to  
13 this, but it is exactly what would be true if Congress had  
14 instead given less guidance in the statute, and had simply  
15 set a high maximum, which would have been perfectly  
16 appropriate for a very serious, violent crime like this,  
17 and then you'd have a lot of guidelines, mandatory  
18 guidelines under the Sentencing Commission's rules --

19 QUESTION: But, see, there are three things at  
20 issue. There's the fair notice issue, which is very  
21 important, there's who shall make the decision if the  
22 person normally wants a jury, and by what standard of  
23 proof, and in your view, none of those is constitutionally  
24 mandated.

25 MR. DuMONT: Well, I think fair notice -- fair

1 notice of what you've been charged with and what the  
2 Government has to prove to convict you is certainly  
3 mandated, but here they --

4 QUESTION: No, but all you have to be -- you  
5 don't have to be -- give notice that they claim you caused  
6 serious bodily harm. You don't have to give that notice.

7 MR. DuMONT: No, nor do you have to give notice  
8 of any other sentencing factor in any normal case.

9 I mean, if you have a kidnapping statute, and  
10 the range on the statute is zero to life, the Government  
11 is under no obligation to give notice about particular  
12 things that might urge the judge at sentencing. It's  
13 never been part of our traditions that that is a right  
14 that you can invoke at the indictment stage, so I don't  
15 know what the difference is here simply because Congress  
16 has made certain sentencing factors more obvious on the  
17 face of the statute.

18 In fact, you've given more notice to the  
19 defendant, because the defendant was there at the crime  
20 and presumably knows whether there was a question of  
21 bodily injury or death, and therefore has more notice on  
22 the face of the statute of what the possible intermediate  
23 sentence is.

24 QUESTION: The defendant's attorney certainly  
25 has notice that this is going to be a factor considered at

1 sentencing in a way that he might not at the other -- in  
2 the old type of hearing.

3 MR. DuMONT: That's absolutely right, and there  
4 was no question here of any lack of notice at any stage of  
5 the --

6 QUESTION: How can you assume the defendant  
7 always knows what the Government thinks happened? Maybe  
8 it didn't happen the way the Government thought it did.  
9 Maybe there wasn't in fact serious bodily injury, he was  
10 injured by somebody else.

11 I mean, the whole system is that you give the  
12 defendant notice of what the charges are so he can decide  
13 what to defend.

14 You're saying he committed the crime, therefore  
15 he knows what the Government's going to charge.

16 MR. DuMONT: Well, at sentencing --

17 QUESTION: That's what you said.

18 MR. DuMONT: At sentencing the whole principle  
19 is that you know in advance if -- under the current system  
20 you actually know in advance, much more than you  
21 traditionally did, what the factors that are relevant are  
22 going to be and, in this instance, a question of serious  
23 bodily injury did arise between indictment and the  
24 sentencing, and the defendant had notice of that at  
25 sentencing, there was a sentencing proceeding in which the

1 defendant was free to contest that, and the judge made a  
2 finding.

3 So in terms of whether there has been due  
4 process here in any normal sense, I think there has been.

5 QUESTION: In the facts of this very case, the  
6 magistrate judge told him he was facing 15 years, and it  
7 was a little confused because, do I understand correctly  
8 he was not the one who actually administered the blow, it  
9 was his codefendant?

10 MR. DuMONT: I believe that's correct.

11 QUESTION: So here was a magistrate judge who  
12 didn't accurately notify the defendant of what he faced.  
13 The magistrate judge says, it's 15 years.

14 MR. DuMONT: That's true, and I misspoke. There  
15 was that notice issue. It seems to me that's a notice  
16 issue that went out of the case at the time the defendant  
17 decided to go to trial.

18 If there had been a guilty plea, for instance,  
19 based in important part on that misinformation, that would  
20 have been a good ground, perhaps, for vacating the plea if  
21 it later turned out to have been wrong, but I don't know  
22 under what principle a defendant who was misinformed at  
23 the arraignment but then had counsel and was presumably  
24 aware of the contents of the statute, and went to trial  
25 and got a jury trial on all the elements of the offense, I

1 don't -- I think that notice issue simply washes out of  
2 the case.

3 QUESTION: So ultimately there's no notice. I  
4 mean, notice isn't the problem. The defendant always gets  
5 notice either before the trial or before the sentencing.

6 MR. DuMONT: That's right. That's right.

7 QUESTION: All right. So if we call it a  
8 sentencing factor, the defendant gains one thing and loses  
9 two. He gains the right not to have it proved in the  
10 middle of his trial. He loses the ability to have it --  
11 the right to have it proved before a jury beyond a  
12 reasonable doubt.

13 I think that's the practicalities of it, and if  
14 that's so, the question becomes, does Congress have  
15 authority to pick and choose which things it wants to make  
16 elements, and which things it wants to make sentencing  
17 factors.

18 MR. DuMONT: Correct.

19 QUESTION: And everybody seems to think there's  
20 some limit on that, and I take it you don't have a clear  
21 idea of how to phrase what that limit is. If you did,  
22 that's what I'm driving towards.

23 MR. DuMONT: Well, the Court has given a variety  
24 of clues along the way. It certainly has clearly stated  
25 that a State or a legislature cannot define something as

1 an element of the offense and then presume that it exists.  
2 If you are going to define something as an element of the  
3 offense, then you have to send it to the jury. That's one  
4 thing the Court has said.

5 There is a question of fundamental fairness.  
6 There might be circumstances under which fundamental  
7 fairness would require, says the Court, that something be  
8 treated as an element. That is what the Court has said,  
9 and I cannot give you a good answer on how to give more  
10 content to that, except that we will probably know that we  
11 have a serious issue when one arises.

12 I don't think that any such issue arises under  
13 this statute, because here we have a very serious, very  
14 violent offense, defined in wholly conventional terms.

15 If you look at this, it is a robbery offense all  
16 the way up until the word shall. There is nothing  
17 unconventional about that offense, except perhaps that  
18 Congress added the element of possessing a firearm, which  
19 is an additional protection, and what you have below the  
20 shall are extremely conventional sentencing factors.

21 Here's a basic sentence we think is appropriate.  
22 If, however, there's victim harm that rises to a serious  
23 bodily injury, then it's more serious. If there's victim  
24 harm that goes to death, it's very serious.

25 There's nothing in that whole structure that we

1 think remotely challenges whatever constitutional limits  
2 there may be on how Congress can define offenses, and  
3 that's, I'm afraid, the best I can do for you.

4 QUESTION: Mm-hmm, thanks.

5 MR. DuMONT: If the Court has no further  
6 questions, thank you.

7 QUESTION: Thank you, Mr. DuMont.

8 Mr. Denvir, you have 3 minutes remaining.

9 REBUTTAL ARGUMENT OF QUIN DENVIR

10 ON BEHALF OF THE PETITIONER

11 MR. DENVIR: Thank you, Your Honor. I would  
12 like to address quickly, if I could, the statutory  
13 question, which we believe this statute should be  
14 construed as not setting forth sentencing factors.

15 The Government's position is that, to identify  
16 three offenses in the text of the section, the statute's  
17 three penalty clauses would have to be read as alternative  
18 completions for the offense definition begun in the  
19 initial paragraph, and each completed alternative, taken  
20 as a whole, would then be read to define a separate  
21 criminal offense.

22 We believe that's exactly what happened there,  
23 that if you take everything before the dash, you do not  
24 have a criminal offense. It does not say it's unlawful,  
25 it does not say it is prohibited, it does not say it will

1 be punished in a certain way.

2 It is only when you go past the dash to 1, 2,  
3 and 3 that you get alternative completions to that -- to  
4 the introductory part, alternative offenses.

5 But if the Court should not rule in our favor on  
6 the statutory construction question, on the constitutional  
7 question, I'd like to make one more try, if I could, on  
8 what I -- what we believe is required.

9 It appears that what the legislature does in  
10 enacting a criminal offense is, it tells the citizenry  
11 that if you engage in particular conduct, then you will be  
12 sentenced -- you will potentially face a particular  
13 sentence, a certain loss of liberty, and then we know that  
14 behind that, behind the Constitution is the idea that  
15 those facts, that to establish that conduct which leads to  
16 that loss of liberty is something that goes to a jury and  
17 is proved beyond a reasonable doubt.

18 We think that what the Court should hold is, if  
19 there's any fact that the legislature singles out from a  
20 transaction, from the citizen's conduct, whether it is an  
21 action, whether it is a mental state, or whether it's a  
22 result, that should be treated as an element of the  
23 offense, and it ought to go to a jury.

24 A jury trial is not something that has to be  
25 avoided. A jury is -- under our jurisprudence is supposed



1 to be the most reliable determiner of that, and we would  
2 have a higher -- this -- the whole idea is kind of, if we  
3 can hide these as sentencing factors, we won't let a jury  
4 deal with them.

5 That seems to me contrary to our Constitution,  
6 to the values that we have in proof beyond a reasonable  
7 doubt and jury trials, and I think what I've suggested to  
8 you would fit very easy. All it means is that there would  
9 be a different definition given to the jury and they would  
10 play their traditional role of making factual findings  
11 about the defendant that subjects that defendant to a  
12 particular punishment.

13 I think that that is -- that seems to me that's  
14 consonant with our Constitution and with those valued  
15 principles, and this trying to somehow say we can treat it  
16 differently, we can call it a sentencing factor, we can go  
17 over the standard, we can get the jury out of it, just is  
18 contrary to what we think criminal offenses are and what  
19 they mean to our citizens.

20 They should know, if you do this, you will have  
21 a right to have a jury determine it, and if you -- and if  
22 they find that you've engaged in that conduct, then you  
23 could be sentenced in this particular way.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Denvir.  
25 The case is submitted.

1                   (Whereupon, at 1:55 p.m., the case in the above-  
2 entitled matter was submitted.)  
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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NATHANIEL JONES, Petitioner v. UNITED STATES  
CASE NO: 97-6203

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BY Donna Maria Federico

(REPORTER)