Nos. 00-1256, 00-8464 and 00-8634

In the Supreme Court of the United States

JOSUE G. REYES-HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN ALEXIS MOJICA-BAEZ, PETITIONER

v.

UNITED STATES OF AMERICA

JOSE RAMOS-CARTAGENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

JOHN C. KEENEY
Acting Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in reopening the government's case after petitioners moved for judgments of acquittal in order to allow the government to present evidence that deposits of the banks petitioners robbed were federally insured.

2. Whether the court of appeals should have accorded petitioners relief, under the plain-error standard, from the ten-year sentences imposed on them under 18 U.S.C. 924(c)(1) (1994), because there was no allegation in the indictment and no finding by the jury that petitioners used semiautomatic assault weapons during and in relation to their crimes of violence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

In the Supreme Court of the United States

No. 00-1256

JOSUE G. REYES-HERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 00-8464

JOHN ALEXIS MOJICA-BAEZ, PETITIONER

v.

UNITED STATES OF AMERICA

No. 00-8634

JOSE RAMOS-CARTAGENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (00-8634 Pet. App. 12-51, 53-55[1]) is reported at 229 F.3d 292.

[1] Unless otherwise noted, we cite to the appendix to the petition in No. 00-8634, which includes both the original slip opinion

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2000. A petition for rehearing was denied on November 2, 2000 (Pet. App. 52). The petition for a writ of certiorari in No. 00-8464 was filed on January 30, 2001, and the petitions in Nos. 00-1256 and 00-8634 were filed on January 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, each petitioner was convicted of two counts of armed robbery of money and checks belonging to a federally insured bank, in violation of 18 U.S.C. 2113(a) and (d); one count of assault with intent to rob money belonging to the United States by use of a dangerous weapon, in violation of 18 U.S.C. 2114(a); one count of entering a vehicle containing interstate shipments of money and checks with intent to commit larceny, in violation of 18 U.S.C. 2117; and one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) (1994). Petitioner Reyes-Hernandez was sentenced to 308 months' imprisonment, to be followed by five years of supervised release. Petitioner Mojica-Baez was sentenced to 330 months' imprisonment, to be followed by five years of supervised release. Petitioner Ramos-Cartagena was sentenced to 355 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed.

(Pet. App. 12-51) and an "Errata Sheet" issued by the court (*id.* at 53-55). The appendix in No. 00-1256 does not incorporate the changes directed by the errata sheet, and the appendix in No. 00-8464 incorporates them incorrectly (and misnumbers the footnotes).

1. On May 13, 1997, petitioners and co-defendant Nelson Cartagena-Merced robbed the armored car depot of Loomis, Fargo & Co. in Ponce, Puerto Rico. Three of the robbers, who were armed with rifles and disguised in security guard uniforms, took the Loomis Fargo guards captive as the guards returned to the depot in their armored vehicles after their daily collection runs. The fourth robber stood watch outside with a walkie-talkie. The robbers escaped with $5.5 million, which included money and checks collected from two federally insured banks, Banco Popular and Banco Santander, and from a United States Postal Service branch. Pet. App. 15-17; Gov't C.A. Br. 13-16.

During the robbery, the robbers threatened the guards and boasted how powerful their weapons were. The guards heard the robbers say that "[t]his AK-47 that I have here can actually punch through 12 guys," "[t]his thing can even go through cement," and "[t]his is an AK-47, and if I shoot you with this, I'll rip you up." One guard recognized a weapon as an AK-47, and another guard described the firearms carried by the robbers as "assault weapons, big weapons." Pet. App. 17, 40; Gov't C.A. Br. 14; Gov't Supp. C.A. Br. 11.

Based upon information from a confidential informant, FBI agents obtained search warrants for petitioners' houses. In petitioner Mojica-Baez's house, the agents found AK-47 ammunition and part of the barrel of an AR-15 assault rifle. In petitioner Ramos-Cartagena's house, the agents found AK-47 ammunition and a photograph of Ramos-Cartagena holding an AK-47. At trial, an FBI agent testified that an AK-47 round is capable of penetrating cement, and that an AK-47 can operate as either a semiautomatic or a fully automatic weapon. Pet. App. 19-20, 40; Gov't C.A. Br. 17; Gov't Supp. C.A. Br. 11.

2. Counts 1 and 2 of the indictment charged petitioners with armed robbery of money and checks belonging to federally insured banks, in violation of 18 U.S.C. 2113(a) and (d). Count 1 identified the bank as "Banco Popular, a bank insured by the Federal [Deposit Insurance] Corporation" (FDIC), and Count 2 identified the bank as "Banco Santander, a bank insured by the Federal [Deposit Insurance] Corporation." Pet. App. 1-2. After the government rested its case at trial, petitioners moved for judgments of acquittal with respect to those two counts on the ground that the government had failed to prove, as an element required by 18 U.S.C. 2113, that the banks were insured by the FDIC. In response, the government asked the district court to reopen the case to allow it to present such evidence or, alternatively, to take judicial notice that both banks were federally insured. Pet. App. 21-22; Gov't C.A. Br. 22-23.

The district court indicated its inclination to reopen the case and proposed that the parties stipulate to the fact that the two banks were federally insured. Petitioners and the government entered into the stipulation, without prejudice to petitioners' right to raise the issue on appeal, and the stipulation was read to the jury. Pet. App. 22; Gov't C.A. Br. 23-24.

3. Count 5 of the indictment charged that petitioners "use[d] and carr[ied] a firearm, as defined in Title 18, *United States Code*, Section 921(a)(3), during and in relation to a crime of violence * * *, specifically robbery of property belonging to a bank * * *," in violation of 18 U.S.C. 924(c)(1) (1994). Pet. App. 4. At trial, the district court instructed the jury:

> For you to find the defendants guilty of this crime you must be convinced that the Government has

> proven each of these things beyond a reasonable doubt.
>
> First, that the defendants committed the crime of armed or aggravated bank robbery.
>
> And that, second, during and in relation to the commission of that crime the defendants knowingly used or carried firearms. The word knowingly means that act was voluntary and intentional and not because of mistake or accident.
>
> I totally forgot to define a firearm in the [written] charge, but I will define it for you now. A firearm is any typical weapon referred to as a firearm, as long as it's capable of expelling a projectile.

Gov't Supp. C.A. Br. 9-10; Pet. App. 78. The jury found all three petitioners guilty.

At the sentencing hearing of petitioner Reyes-Hernandez, the district court found that the firearms used during the robbery were semiautomatic assault weapons and, therefore, that petitioners were subject to mandatory consecutive ten-year sentences on Count 5 under 18 U.S.C. 924(c)(1) (1994).[2] 10/28/98 Tr. 6-10;

---

[2] At the time of petitioners' offenses, 18 U.S.C. 924(c)(1) (1994) provided in pertinent part:

> Whoever, during and in relation to any crime of violence * * * uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence * * * be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped

Gov't Supp. C.A. Br. 12-14. Petitioner Reyes-Hernandez objected to the ten-year sentence on the ground that the evidence at trial was insufficient to show that the firearms were semiautomatic assault weapons. 10/28/98 Tr. 6-10; Pet. App. 37-39 & n.8. The court overruled the objection:

> The weight of the evidence is that—the evidence is that the individuals who robbed that facility had assault rifles with them of AK-47 type. That type. And that is enough for me to rely on and say that the penalty has to be a consecutive, fixed term of ten years.

10/28/98 Tr. 9. The court sentenced petitioner Reyes-Hernandez to a ten-year sentence on Count 5, to run consecutively to his 188-month sentence on the other counts. The court similarly sentenced petitioners Mojica-Baez and Ramos-Cartagena to ten-year sentences on Count 5, to run consecutively to their respective 210-month and 235-month sentences on the other counts. Gov't Supp. C.A. Br. 13-14.

4. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. 12-51, 53-55.[3] As

---

> with a firearm silencer or firearm muffler, to imprisonment for thirty years.

The term "semiautomatic assault weapon" was defined in 18 U.S.C. 921(a)(30)(A)(i) (1994) to include:

> (A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as—
>
> (i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models)[.]

[3] The court addressed and rejected several claims that petitioners do not renew in this Court. See Pet. App. 12-26. The court also affirmed the conviction of petitioners' co-defendant Rodolfo

relevant here, the court rejected the claim by petitioners Reyes-Hernandez and Ramos-Cartagena that they were entitled to acquittal on the bank robbery counts, because the district court indicated its willingness to reopen the government's case to allow proof that Banco Popular and Banco Santander were insured by the FDIC, and urged the parties to enter into a stipulation on that point. *Id.* at 21-22. The court of appeals concluded that "[t]here was no serious dispute that the banks were federally insured, and the government's lapse was recognized in time." *Id.* at 22. The court likewise rejected petitioner Ramos-Cartagena's claim that he was entitled to acquittal on the assault count because the evidence was insufficient to show that they robbed money belonging to the United States Postal Service. *Id.* at 23.

While petitioners' appeals were pending, this Court held in *Castillo* v. *United States*, 530 U.S. 120, 131 (2000), that "Congress intended the firearm type-related words it used in [18 U.S.C. 924(c)(1) (1988 & Supp. V 1993)] to refer to an element of a separate, aggravated crime." As a result, under that version of the statute, "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt" in order for a defendant to receive a sentence in excess of the five-year term provided in the statute for using or carrying any "firearm." *Id.* at 123.[4]

Landa-Rivera, but vacated his sentence and remanded for resentencing. *Id.* at 49-51, 55.

[4] The version of Section 924(c) at issue in *Castillo* did not include semiautomatic assault weapons among the types of firearms requiring a ten-year consecutive sentence. See 530 U.S. at 131-132 (appendix to opinion). Congress added semiautomatic assault weapons to the list of firearms meriting a ten-year sentence in 1994. Violent Crime Control and Law Enforcement Act of

The court of appeals directed the parties to file supplemental briefs in this case addressing the effect of *Castillo* on petitioners' sentences. Pet. App. 15, 38. It then considered the effect of *Castillo*, as well as of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which was announced after the parties' supplemental briefs were filed, see Pet. App. 38, 54, taking note that no claim based on the legal theories of those cases had been raised at sentencing.[5]

1994, Pub. L. No. 103-322, § 110102(c), 108 Stat. 1998. That amendment did not change the structure of the statute, however, in any way that affects the applicability of *Castillo*'s analysis in this case. See Gov't Supp. C.A. Br. 17 (acknowledging that *Castillo* applies to this case).

The court of appeals' discussion incorrectly refers to the version of Section 924(c)(1) in effect at the time of appeal, rather than the version in effect at the time of petitioners' offenses (May 13, 1997), and under which they were convicted and sentenced. See Pet. App. 26 (quoting later version); *id.* at 40-41, 46 (referring to subsection (B) of Section 924(c)(1), which did not exist under earlier version). Congress substantially revised Section 924(c) effective November 13, 1998, in ways that affect any *Castillo* analysis (for example, by changing mandatory fixed sentences to mandatory minimum sentences, with an implicit statutory maximum of life imprisonment for any violation). Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469; see 18 U.S.C. 924(c)(1) (Supp. V 1999) (prescribing sentences of "not less than" specified numbers of years, depending on various circumstances). The court's references to the later version of Section 924(c) do not, however, affect the analysis in the court's opinion, which proceeds on the basis that, in light of *Castillo*, firearm type was an element of the Section 924(c) offense for which petitioners were sentenced.

[5] The government's supplemental brief, without undertaking a plain-error analysis, concluded that petitioners' sentences should be vacated and the case remanded so they could be sentenced to five-year terms on their Section 924(c) convictions. Gov't Supp. C.A. Br. 19.

In its decision, the court concluded that claims under *Castillo* were subject to review only for plain error, because "[t]he only objections at sentencing regarding the § 924(c)(1) conviction did not encompass *Castillo*'s distinction between sentencing factors and elements," and "the arguments in the initial briefs on appeal [were not] addressed to this point." Pet. App. 38-39. The court observed (*id.* at 39) that "[p]lain error review requires four showings: that there was error; that it was plain; that the error affected substantial rights; and that the error seriously affected the fairness, integrity or public reputation of judicial proceedings." The government acknowledged that, under *Castillo*, firearm type should have been charged in the indictment and proved to the jury before it was used to enhance petitioners' sentences, see Gov't Supp. C.A. Br. 16-17, and the court held that the threshold requirements for relief were met because "there was error, and it was plain, at least by the time of argument on the direct appeal." Pet. App. 39 (citing *Johnson* v. *United States*, 520 U.S. 461, 468 (1997)). The court noted, however, that there was uncontradicted trial evidence showing that petitioners used an AK-47 assault weapon during their robbery. *Id.* at 40; see also *id.* at 49 ("There is no question that the petit jury in this case would have found that [petitioners] used at least one AK-47."). In light of that evidence, the court explained, petitioners were not entitled to relief from the trial court's error in not submitting the question of firearm type to the jury, because petitioners had not shown that the error affected their substantial rights (by changing the outcome of the proceeding) or resulted in any "miscarriage of justice." *Id.* at 39-40.

The court then considered the error in imposing enhanced sentences when firearm type had not been

alleged in the indictment. Pet. App. 40-49, 54-55.[6] The court rejected petitioners' argument that "such indictment errors are not subject to harmless or plain error analysis." *Id.* at 41. The court agreed with petitioners that Rule 12(b)(2) of the Federal Rules of Criminal Procedure allows a defendant to raise certain indictment claims for the first time on appeal, Pet. App. 43, and that the indictment in this case was arguably deficient, *id.* at 43-44, but it held that the error in this case was "not of [the same] dimension" as the sorts of "structural error" that have been held to require reversal without any showing of prejudice, *id.* at 44-45. The court noted, moreover, that "the integrity of the judicial system" was not implicated, because "[t]he reason the indictment in this case did not specify that a semiautomatic assault weapon or AK-47 had been used in the robbery was that circuit precedent at the time did not require it." *Id.* at 45; see *id.* at 45-46 ("It is one thing to vacate a conviction or sentence where the prosecutor failed to indict in accordance with the current state of the law. It is quite another thing to vacate a conviction or sentence based on an indictment that was entirely proper at the time.").

The court acknowledged that "[t]here are some serious harms * * * that can emerge from flawed indictments." Pet. App. 46. It emphasized, however, that petitioners "[had] not argued on appeal that they lacked fair notice" of the charges against them, and it distinguished cases addressing different indictment

---

[6] The court noted at the outset of its discussion of this point that "*Castillo* and *Apprendi* are trial-error cases and do not tell us what to do [with] claims of indictment error based on their holdings, particularly where the issue was not raised at trial." Pet. App. 54.

issues. *Id.* at 46-47, 54-55 & n.1. The court found guidance, instead, in this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which "held that a jury instruction 'that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence' and is, therefore, subject to harmless error review." Pet. App. 47 (quoting *Neder*, 527 U.S. at 9). The court reasoned that the distinction between "the failure to submit an element of an offense to the petit jury" and the "failure to present an element to the grand jury to secure an indictment" was not significant "where the indictment provided the defendant with fair notice of the charges against him." *Ibid.* The court also concluded that the omission of an allegation of weapon type in the indictment in this case "did not necessarily render the indictment unfair or make it an unreliable vehicle with which to commence the proceedings in this case." *Id.* at 49. The court accordingly declined to require resentencing or reindictment in this case. See *id.* at 41 n.9, 49, 51.

ARGUMENT

1. Petitioners Reyes-Hernandez (00-1256 Pet. 4-6) and Ramos-Cartagena (00-8634 Pet. 7-11) contend that the district court erred in denying their motions for judgments of acquittal because the government initially failed to present evidence that the two bank victims, Banco Popular and Banco Santander, were insured by the FDIC. When petitioners properly raised that issue in their motions, however, the district court indicated its willingness to reopen the government's case, and the parties then stipulated that the two banks were federally insured. The government's omission was therefore

promptly corrected, and petitioners have no just cause for complaint.

A district court has discretion to reopen the government's case to allow correction of such an omission. See, *e.g.*, *United States* v. *Rouse*, 111 F.3d 561, 573 (8th Cir.), cert. denied, 522 U.S. 905 (1997); *United States* v. *Leslie*, 103 F.3d 1093, 1104 (2d Cir.), cert. denied, 520 U.S. 1220 (1997); *United States* v. *Blankenship*, 775 F.2d 735, 740-741 (6th Cir. 1985); *United States* v. *Hinderman*, 625 F.2d 994, 996 (10th Cir. 1980); cf. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971) ("[A] motion to reopen to submit additional proof is addressed to [the trial judge's] sound discretion."). Petitioners cite no decision holding to the contrary. To the extent that petitioners contend that the district court abused its discretion in allowing a limited reopening in this case, that fact-bound claim was properly rejected by the court of appeals, Pet. App. 21-22, and does not warrant review by this Court.[7]

2. Petitioners contend (00-1256 Pet. 7-9; 00-8464 Pet. 4-14; 00-8634 Pet. 11-26) that the ten-year sentences imposed by the district court under 18 U.S.C. 924(c)(1) (1994) are invalid under *Castillo* v. *United States*, 530 U.S. 120 (2000), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). In *Castillo* the Court held, as a matter of statutory construction, that Section 924(c)(1), as in effect before its amendment in 1998, created a base offense involving the use or carrying of any firearm and

---

[7] Petitioner Reyes-Hernandez also appears to argue (00-1256 Pet. 5) that the government failed to prove that the guards whom petitioners assaulted had charge of money belonging to the United States or that any vehicle they entered contained an interstate shipment. The court of appeals expressly rejected the ownership argument, Pet. App. 23, and neither claim presents a legal issue that merits review by this Court.

"separate, aggravated crime[s]" involving the use or carrying of certain specified firearms, such as machine-guns. 530 U.S. at 131; see *id.* at 121, 123-124. In *Apprendi* the Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

a. Under the version of Section 924(c)(1) in effect at the time of petitioners' offenses, the penalty authorized for using or carrying any firearm during and in relation to a crime of violence was five years' imprisonment. 18 U.S.C. 924(c)(1) (1994). *Castillo* held that in order to impose the ten-year sentence authorized in Section 924(c)(1) for violations involving certain types of firearms, "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt." 530 U.S. at 123. In this case, petitioners were sentenced above the five-year maximum sentence authorized for the base offense, but the indictment did not allege that petitioners used or carried a semiautomatic assault weapon, and the jury was not asked to find that the offense involved such a weapon. Imposition of the ten-year sentences was therefore error, both under *Castillo* and under *Apprendi*.

Petitioners did not raise claims of the sort upheld in *Castillo* and *Apprendi* at trial, at sentencing in the district court, or in their initial briefs in the court of appeals. See Pet. App. 38 & n.8. Those claims may therefore be reviewed, at most, for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Olano*, 507 U.S. 725 (1993). At least with respect to *Apprendi*'s constitutional holding,

the error in imposing an enhanced sentence on the basis of a finding made only by the district court at sentencing is "plain," in that it became "clear" or "obvious" after this Court's decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 (when "the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"); see also Pet. App. 39 (concluding that *Castillo* error was "plain"). Even with respect to a "plain" error, however, petitioners are not entitled to relief unless they can also demonstrate that the error both "affect[ed] substantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *Olano*, 507 U.S. at 732).

b. The court of appeals correctly held that petitioners could not make those showings with respect to the district court's failure to submit the question of firearm type to the jury. Pet. App. 39-40. In *Johnson*, 520 U.S. at 470, this Court held that where the evidence that would have supported a finding on an element of an offense was "overwhelming" and "essentially uncontroverted," failure to submit that element to the jury did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Since *Apprendi*, courts of appeals have applied the same principle in conducting plain-error review of cases in which the jury was not asked to find a fact necessary to support the imposition of an enhanced sentence under the federal drug statutes. See, *e.g.*, *United States* v. *Mietus*, 237 F.3d 866, 875 (7th Cir. 2001) (no serious effect on fairness, and therefore no relief for plain *Apprendi* error, where evidence as to drug quantity was overwhelming); *United States* v. *Keeling*, 235 F.3d 533, 539-540 (10th Cir. 2000) (same). And this Court relied in

part on *Johnson* in deciding *Neder* v. *United States*, 527 U.S. 1, 9, 17 (1999), in which the Court held that "where a reviewing court concludes beyond a reasonable doubt that [an] omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, [an] erroneous instruction [omitting a requirement that the jury find that element] is properly found to be harmless."

In this case, the undisputed trial evidence showed that petitioners used AK-47 assault rifles during their robbery, and the court of appeals concluded that there was "no question" that the jury, if it had been asked to do so, "would have found that [petitioners] used at least one AK-47." Pet. App. 49; see *id.* at 40 (recounting evidence on point). The court correctly held that, in light of that conclusion, petitioners could not establish any entitlement to relief under the plain-error standard "simply by showing that an element of an offense was not submitted to the jury." *Id.* at 39.

c. The court of appeals also correctly held that the plain-error standard applies to petitioners' claim that their enhanced sentences should be vacated because the aggravating factor justifying those sentences was not alleged in the indictment.[8] As this Court made clear in

---

[8] There is no question after *Castillo* that firearm type was an element of an aggravated offense under former Section 924(c)(1), and that use of a semiautomatic assault weapon should therefore have been alleged in the indictment as a predicate to imposing ten-year sentences on petitioners. See 530 U.S. at 123. The constitutional holding in *Apprendi*, by contrast, arose out of a state prosecution, and this Court did not hold that any fact that might increase the statutory maximum penalty for a crime must be alleged in a federal indictment. See 530 U.S. at 477 n.3. Because the federal right to grand-jury indictment does not extend to state

Johnson, 520 U.S. at 466, all claimed errors in federal criminal trials, regardless of their nature or seriousness, are subject to the plain-error rules set out in Rule 52(b) of the Federal Rules of Criminal Procedure when the defendant does not make a timely objection to the alleged error in the district court.[9] "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as in civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Indeed, even a conclusion that a particular type of error is "structural," or "so serious as to defy *harmless*-error analysis," suggests only that such errors may always "affec[t] substantial rights," thus satisfying the third of the four requirements for plain-error relief. See *Johnson*, 520 U.S. at 468-469 (emphasis added). Under the fourth requirement, a prejudicial error (including a "structural" one) that would clearly be grounds for relief if properly preserved is *not* a proper ground for relief if it was *not* preserved, unless it also "seriously affect[s] the fairness, integrity or

---

prosecutions, uniform application of *Apprendi*'s principles would not dictate any particular form in which constitutionally adequate notice must be provided.

[9] In *United States* v. *Vonn*, cert. granted, No. 00-973 (Feb. 26, 2001), one of the questions presented is whether a district court's deviation from the advice required by Rule 11(c)(3) of the Federal Rules of Criminal Procedure is subject to plain-error, rather than harmless-error, review on appeal when the defendant fails to preserve the claim of error in the district court. Because this case involves a claim of sentencing error rather than a guilty plea followed by a claim of Rule 11 error, *Vonn* has no bearing on this case.

public reputation of judicial proceedings." *Id.* at 469-470 (quoting *Olano*, 507 U.S. at 736).

The provisions of Rule 12(b) do not vary the analysis with respect to indictment errors like the one claimed here. That Rule provides in the main that a defendant "must" raise *before trial* all "[d]efenses and objections based on defects in the indictment." Fed. R. Crim. P. 12(b)(2). It provides a narrow exception for claims that the indictment "fails to show jurisdiction in the court or to charge an offense," which "shall be noticed by the court at any time during the pendency of the proceedings." *Ibid.* Petitioners cannot claim that the district court lacked jurisdiction to try them under the indictment in this case, or that the indictment "fails * * * to charge an offense." See Pet. App. 41 n.9. They claim only that the indictment did not allege a particular aggravating fact concerning the offense, and that in light of that failure they should have been sentenced for the base offense, not the aggravated offense. Petitioners' failure to raise any such claim at sentencing, see *id.* at 38 & n.8, requires that appellate consideration be limited to review for plain error, as required by Rule 52(b).[10]

---

[10] Some courts have suggested that Rule 12(b)(2) applies to a claim that the indictment charged a lesser offense (rather than no offense), and allows a court to consider such a claim de novo whenever it is first raised. See *United States* v. *Gama-Bastidas*, 222 F.3d 779, 785 & nn.3, 4 (10th Cir. 2000) (claim that indictment charged misdemeanor possession of cocaine, rather than the felony of possession of cocaine with the intent to distribute it); *United States* v. *Fitzgerald*, 89 F.3d 218, 221 n.1 (5th Cir.), cert. denied, 519 U.S. 987 (1996). But nothing in the Rule requires that such an objection be reviewed de novo, no matter when raised. See *United States* v. *Stein*, 233 F.3d 6, 22 (1st Cir. 2000); *United States* v. *Perez*, 67 F.3d 1371, 1376 (9th Cir. 1995) (applying plain-error review to a challenge to the adequacy of an indictment), opinion

In *Johnson* the Court held that failure to submit an element of an offense to the petit jury was "plain" error, which the Court assumed had "affec[ted] substantial rights" (and might be "structural"). 520 U.S. at 467-469. The Court then held that the error did not justify relief when raised for the first time on appeal, because existence of the element had been "essentially uncontroverted at trial" (the defendant had made only a passing objection to the sufficiency of the evidence), and the evidence supporting its existence was "overwhelming." *Id.* at 470. Later, in *Neder*, the Court held that the same error was not, in fact, "structural," because it would not "*necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." 527 U.S. at 9. Even a preserved claim was therefore subject to *harmless*-error analysis—and the error was harmless where it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 18.

The court of appeals relied on *Johnson* and *Neder* to hold that petitioners were not entitled to relief, under the circumstances here, from enhanced sentences based on an aggravating factor that was omitted from the indictment. See Pet. App. 45-49. As the court noted (*id.* at 45-46), at the time of indictment, circuit precedent did not require an allegation of weapon type as a predicate for later enhancement of a defendant's sentence. Petitioners did not object when the government sought such enhancement at sentencing, or complain then or on appeal that they lacked fair notice of that possibility. *Id.* at 46-47. The trial evidence concerning

---

withdrawn in part on other grounds, 116 F.3d 840 (1997); *United States* v. *Murphy*, 762 F.2d 1151, 1155 (1st Cir. 1985).

petitioners' use of AK-47 assault weapons was, as in *Johnson*, "essentially uncontroverted." 520 U.S. at 470; compare *id.* at 470 n.2 with Pet. App. 38 n.8; see Pet. App. 40 (reviewing evidence, and noting that petitioners' briefs on appeal did not "address the key question: whether, given the evidence actually introduced as to the weapons used, there was any prejudice from the failure to have submitted the question to the jury"). And the court of appeals, having reviewed that evidence (Pet. App. 40), was persuaded that there was "no question that the petit jury in this case would have found that [petitioners] used at least one AK-47." *Id.* at 49. Under those circumstances, the court concluded (*id.* at 45), plain-error relief was not necessary to "safeguard[] fair trials," to "vindicat[e] compelling constitutional policies," or to preserve "the integrity of the judicial system." On the basis of those conclusions, the court properly denied plain-error relief under *Johnson*. See also *United States* v. *Nance*, 236 F.3d 820, 825-826 (7th Cir. 2000) (refusing relief for plain *Apprendi* error in not alleging or proving drug quantity, where it was clear that defendant would have received the same enhanced sentence even if there had been "a properly worded indictment and a properly instructed jury," because "i[f] th[e] jury was going to convict [the defendant] at all—which it plainly did—there is simply no way on this record that it could have failed to find" that the offense involved an enhancing quantity of drugs); *United States* v. *Pease*, 240 F.3d 938, 943-944 (11th Cir. 2001) (same, where defendant admitted in plea agreement and colloquy that he dealt in more than required threshold quantity of drugs); *United States* v. *Wright*, No. 00-1034 (8th Cir. Apr. 27, 2001), slip op. 2-3 (where defendant was sentenced for carjacking resulting in serious bodily injury, in violation of 18 U.S.C.

2119(2), without an allegation of such injury in the indictment (see *Jones* v. *United States*, 526 U.S. 227 (1999)), court remands for harmless-error analysis, stating that "testimony by [the victim] at resentencing might provide overwhelming evidence that she in fact suffered serious bodily injury, making the defect in Wright's indictment harmless error").

d. The court of appeals' holding does not conflict with *Stirone* v. *United States*, 361 U.S. 212 (1960), in which the proof and instructions at trial might have allowed the petit jury to find the existence of a jurisdictional element on a ground never considered by the grand jury. The petit jury's findings concerning petitioners' offenses confirmed all the allegations of the grand jury, and those allegations were by themselves fully sufficient to charge an offense against the United States. The error in this case occurred when the district court sentenced petitioners for an aggravated form of that offense (notably, the "same offense" under the standard normally used for purposes of Double Jeopardy analysis, see *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)), where the aggravating fact was not considered an element of a separate offense at the time of indictment, trial, or sentencing, and therefore was not included in the indictment or submitted to the jury. The question presented here, moreover, is not whether imposing that sentence was error. Cf. *United States* v. *Miller*, 471 U.S. 130, 140-145 (1985) (reaffirming *Ex parte Bain*, 121 U.S. 1 (1887), to the extent it held that "a defendant cannot be convicted of an offense different from that which was included in the indictment," 471 U.S. at 142). Nor is it whether such an error may be held harmless when a proper objection is made. Cf. *Stirone*, 361 U.S. at 217-218. The question here is whether petitioners' unpreserved claim of error

entitled them to relief, on appeal, under the plain-error standard. *Stirone* did not address such an issue.

For much the same reasons this case is also unlike *United States* v. *Prentiss*, 206 F.3d 960 (2000), in which a panel of the Tenth Circuit held that an indictment for violation of a federal law extended to Indian country under 18 U.S.C. 1152 must, as a jurisdictional matter, allege that the crime was committed by an Indian against a non-Indian (or vice versa), and (206 F.3d at 974-977) that absence of such an allegation from the indictment could not be harmless error. See Pet. App. 42-43 (discussing *Prentiss*). In any event, the Tenth Circuit has granted rehearing en banc to reconsider the *Prentiss* panel's conclusions. See Order of June 19, 2000, No. 98-2040 (10th Cir.) (reargued Sept. 26, 2000).

The decision in this case does conflict with the Second Circuit's decision in *United States* v. *Tran*, 234 F.3d 798 (2000), which sustained a claim very similar to that advanced by petitioners, in a case also involving enhanced sentences under 18 U.S.C. 924(c)(1) (1994).[11] See 00-1256 Pet. 9; 00-8464 Pet. 7-8. *Tran* held that "plain error review is inappropriate where [a] defect in the indictment is jurisdictional," 234 F.3d at 806, and concluded that "the district court did not have jurisdiction to enter a conviction or impose a sentence for an offense not charged in the indictment, namely, the 'separate, aggravated crime' of using or carrying a short-barreled rifle," *id.* at 808 (quoting *Castillo*, 530 U.S. at 131). That conflict does not, however, warrant review in this case.

---

[11] Like petitioners, the defendants in *Tran* were convicted and sentenced under the pre-1998 version of Section 924(c)(1). See 234 F.3d at 802 n.1.

Although the United States did not seek en banc rehearing in *Tran*, we have suggested to the Second Circuit in a different case that *Tran*'s errors warrant en banc correction. See Gov't Supp. Reply Br. 13-18, *United States* v. *Greer*, No. 99-1072(L) (2d Cir.) (filed Mar. 2, 2001). Recently, the Second Circuit sua sponte ordered en banc rehearing in *United States* v. *Thomas*, No. 98-1051, 2000 WL 33281680 (2d Cir. Apr. 20, 2001), which this Court remanded to the court of appeals for reconsideration in light of *Apprendi*. See 121 S. Ct. 749 (2001). The court's order, which is reprinted as an appendix to this brief, indicates that the court will consider whether an enhanced sentence imposed on defendant Thomas under 21 U.S.C. 841(b), in the absence of any allegation of drug quantity in the indictment and any finding concerning quantity by the petit jury, should be allowed to stand in light of *Apprendi* and *Tran*. App., *infra*, 2a. The order specifies that the parties are to address, among other issues, the following question: "Should this Court's analysis in the instant case be governed or influenced by [*Tran*], and, if so, is *Tran*'s reasoning sound?" *Id.* at 5a. It is, accordingly, not clear whether *Tran*'s holdings will continue to stand as controlling authority in conflict with the decision below.

The decision below is also in significant tension with the decision of the Tenth Circuit in *United States* v. *Jackson*, 240 F.3d 1245, 1247-1249 (2001), which holds that plain-error review does not apply to a defendant's challenge to her sentence where the indictment did not include any allegation concerning drug quantity, and the sentence exceeds the maximum authorized by statute without a quantity finding. The Tenth Circuit, however, has recently called for a response to the government's petition for rehearing or rehearing en

banc in *Jackson*.[12] We note, further, that the precise question presented by petitioners is likely to arise as well in a case now pending in the Eleventh Circuit, which that court has sua sponte ordered reheard in light of this Court's decision in *Castillo*. See *United States* v. *Riley*, 232 F.3d 844, vacating in part, 211 F.3d 1207 (2000), cert. denied, 121 S. Ct. 880 (2001).

In view of these continuing developments in the lower courts, the question petitioners seek to present is not yet ripe for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

MAY 2001

[12] As noted above, the same court is also reconsidering en banc the panel's holding in *Prentiss*.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

NO. 98-1051

UNITED STATES OF AMERICA, APPELLEE

v.

RAMSE THOMAS, a/k/a ROCK, DEFENDANT-APPELLANT

[Filed: Apr. 20, 2001]

MEMORANDUM AND ORDER

BEFORE:

WALKER, Chief Judge, KEARSE, JACOBS, LEVAL, CALABRESI, CABRANES, PARKER, STRAUB, POOLER, SACK, SOTOMAYOR, and KATZMANN, Circuit Judges

On remand from the United States Supreme Court, *see Thomas v. United States*, 121 S. Ct. 749 (2001), defendant Ramse Thomas argues that the sentence imposed by the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*), pursuant to 21 U.S.C. § 841(b)(1)(A), is unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

A poll of the judges in regular active service having been requested and taken and a majority of the active judges of the court having voted to rehear the appeal in banc, **IT IS HEREBY ORDERED** that the appeal be reheard in banc since this case raises questions of exceptional importance that will affect the administration of criminal justice in our Circuit, *see* Fed. R. App. P. 35(a). The in banc panel will consist of the active judges of the court. *See* 28 U.S.C. § 46(c). It is being convened to consider whether, following the Supreme Court's decision in *Apprendi v. New Jersey*, and our decision in *United States v. Tran*, 234 F.3d 798 (2d Cir. 2000), the district court was empowered to impose an enhanced sentence on Thomas based on its findings concerning the quantity of drugs involved in his offense.

The facts and proceedings relevant to the instant appeal are as follows: In 1994, a grand jury in the Northern District of New York returned an indictment charging, *inter alia*, that Thomas and others "did knowingly, willfully and unlawfully combine, conspire, confederate and agree among themselves and with others, to possess with intent to distribute and to distribute a quantity of cocaine, a Schedule II controlled substance and a quantity of cocaine base, also known as 'crack' cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, § 841(a)(1). In violation of Title 21, United States Code, § 846." The indictment nowhere alleges that the charged crimes involved any particular quantity of drugs.

Thomas and his co-defendants were convicted, following a jury trial, on February 27, 1995. *See United States v. Thomas*, 116 F.3d 606, 612 (2d Cir. 1997).

They appealed, and we vacated their convictions and remanded the case for retrial based on the District Court's improper dismissal of a juror. *See id.* at 625. In January 1998, following a second jury trial, Thomas was again convicted of the conspiracy charge. *See United States v. Thomas*, 204 F.3d 381, 382 (2d Cir. 2000) ("*Thomas II*").

In conformity with standard practices adopted by district courts following the promulgation of the U.S. Sentencing Guidelines, the Presentence Investigation Report on Thomas prepared by the U.S. Probation Office recommended that the sentencing judge enter the following findings regarding the quantities of narcotics attributable to Thomas: 24.479 kilograms of cocaine and 1.826 kilograms of crack cocaine. After considering the record before it, the district judge found Thomas responsible for 12.9 kilograms of cocaine and 1.2 kilograms of crack cocaine. Under 21 U.S.C. § 841(b)(1)(A), these quantities resulted in a sentencing range of ten years' to life imprisonment. (By contrast, had the judge not made findings concerning drug quantity, or had he found that the amount involved was less than 500 grams of cocaine and 5 grams of crack cocaine, he could have imposed a sentence no higher than the statutory maximum of twenty years' imprisonment for an offense involving either an unspecified quantity of cocaine or crack cocaine, or quantities less than those set forth in 21 U.S.C. § 841(b)(1)(A)-(B). *Compare* 21 U.S.C. § 841(b)(1)(C) *with* § 841(b)(1)(A) *and* § 841(b)(1)(B).). Applying the Sentencing Guidelines, the sentencing judge identified a range of 292 to 365 months' imprisonment. On January 15, 1998, he sentenced Thomas principally to 292 months' imprisonment.

In a second appeal to this Court, Thomas and two of his co-defendants argued, *inter alia*, that *Jones v. United States*, 526 U.S. 227 (1999), mandated the reversal of their convictions because it rendered the quantity of drugs involved in their crimes an issue of fact that increased the maximum penalty for their crimes and, therefore, had to be submitted to a jury and proved beyond a reasonable doubt. *See Thomas II*, 204 F.3d at 383. Our opinion, filed on February 14, 2000, rejected this argument. *See id.* at 384. We held that *Jones* applied only to the particular car-jacking statute interpreted in the case and did not, generally, "rewrite the law regarding what facts must be determined by a jury rather than a judge." *Id.* at 384. We thus joined every other Circuit that had considered the question in holding that, after *Jones*, drug quantity remained a sentencing factor to be determined by the district judge, not an element of the offense to be proved by the prosecutor and found by the jury. *See id.* (collecting cases from other Circuits).

Following our decision in *Thomas II*, the Supreme Court, on June 26, 2000, decided *Apprendi*, which held that "[o]ther than the fact of a prior conviction, *any fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S. Ct. at 2362-63 (emphasis added). The Supreme Court then granted Thomas's petition for a writ of certiorari and remanded this case to us for further consideration in light of *Apprendi*. *See Thomas v. United States*, 121 S. Ct. 749 (2001).

In a related development, on November 11, 2000, a panel of this Court in *United States v. Tran*, 234 F.3d

798 (2d Cir. 2000), held that the government's failure to include in the indictment an element of the sentenced offense is jurisdictional error and thus not subject to plain error review. Tran had been indicted for, and pleaded guilty to, being a felon in possession of a firearm, in violation of 18 U.S.C. § 924(c). He was sentenced, on the other hand, for being a felon in possession of a sawed-off shotgun, which carries a higher sentence than the maximum applicable for being a felon in possession of a firearm *simpliciter*.

The parties are requested to address the following questions in their briefs:

(1) Does drug quantity under 21 U.S.C. § 841, when it increases a defendant's sentence above a statutory maximum, constitute an element of the offense under the analysis used in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Castillo v. United States*, 530 U.S. 120 (2000), and *Carter v. United States*, 530 U.S. 255 (2000), such that it must be alleged in the indictment?

(2) Assuming that an indictment's failure to allege drug quantity is error, under what circumstances is that error subject to harmless or plain error review?

(3) Should this Court's analysis in the instant case be governed or influenced by *United States v. Tran*, 234 F.3d 798 (2d Cir. 2000), and, if so, is *Tran*'s reasoning sound?

The Court is mindful that the parties' responses to these questions may affect other cases that raise questions not directly before the Court in the instant

appeal—for example, cases involving pleas of guilty, stipulations by the parties to the amount of drugs involved, or whether the issue arises on direct or habeas review. Accordingly, the Court encourages consideration in the briefs of any such significant and foreseeable effects of this case.

The appellant's brief shall be filed by May 14, 2001, the appellee's brief shall be filed by June 4, 2001, and the appellant's reply brief shall be filed by June 15, 2001. Oral argument will be held on Wednesday, June 27, 2001 at 1:30 p.m. in the Ninth Floor Courtroom of the United States Courthouse, 500 Pearl Street, New York, New York.

We request that the United States Attorneys in the six districts of the Second Circuit submit a single, joint brief on behalf of the government, because of the importance of the answers to the questions presented to the administration of criminal justice throughout the Circuit. We invite consideration of this appeal as well by the Solicitor General of the United States, to whom a copy of this order shall be delivered. We also invite amicus curiae briefing from the New York Council of Defense Lawyers, the Federal Bar Council, and the Association of the Bar of the City of New York, or their respective committees on criminal law. Joint amicus briefs may be filed. All amicus curiae briefs must be filed no later than June 4, 2001. Appellee may reply to any arguments raised in such briefs by June 15, 2001.

FOR THE COURT,
Roseann B. MacKechnie, Clerk of Court
By: /s/ ROSEANN B. MACKECHNIE