No. 08-1569

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN O'BRIEN AND ARTHUR BURGESS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 924(c)(1) of Title 18 of the United States Code provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (*viz.*, using or carrying a firearm during and in relation to an underlying offense, or possessing the firearm in furtherance of that offense) is carried out. The question presented is whether the sentence enhancement to a 30-year minimum when the firearm is a machinegun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by the preponderance of the evidence.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 542 F.3d 921.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2008. A petition for rehearing was denied on January 26, 2009 (App., *infra*, 19a-20a). On April 15, 2009, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including May 26, 2009. On May 13, 2009, Justice Souter further

extended the time to June 25, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Title 18 of the United States Code, Section 924(c)(1), provides:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
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> (i) be sentenced to a term of imprisonment of not less than 5 years;
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> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
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> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the

person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

STATEMENT

Following guilty pleas in the United States District Court for the District of Massachusetts, respondents were convicted of conspiring to affect commerce by robbery, in violation of 18 U.S.C. 1951; attempting to affect commerce by robbery, in violation of 18 U.S.C. 1951; and

using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c)(1). Respondent Burgess additionally was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). O'Brien Judgment 1; Burgess Judgment 1. Respondent O'Brien was sentenced to 180 months of imprisonment, including a 102-month consecutive term on the Section 924(c)(1) conviction, to be followed by three years of supervised release. Gov't C.A. App. 238. Burgess was sentenced as an armed career criminal (see 18 U.S.C. 924(e)) to 264 months of imprisonment, including an 84-month consecutive term on the Section 924(c)(1) conviction, to be followed by three years of supervised release. Gov't C.A. App. 237, 240. The district court declined to increase the sentences under Section 924(c)(1)(B)(ii) because the firearm used, carried, and possessed was a machinegun. The government appealed the district court's refusal to impose the higher mandatory minimum term of imprisonment. The court of appeals affirmed. App., *infra*, 1a-13a.

1. Since its enactment in 1968, 18 U.S.C. 924(c) has made it a criminal offense for an individual to use or carry a firearm during the commission of certain federal crimes. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 233. In 1986, Congress provided for higher fixed mandatory sentences when the firearm has certain characteristics (*e.g.*, is a machinegun or has a silencer). See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(C)-(E), 100 Stat. 457. In *Castillo* v. *United States*, 530 U.S. 120, 123-131 (2000), this Court interpreted that version of Section 924(c)(1), stating that the type of firearm was not a sentencing factor for the

judge, but rather an element of a "separate crime." The Court therefore held that "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt." *Id.* at 123.

In 1998, Congress entirely replaced Section 924(c)(1).[1] Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469. The new provision describes the offense in Subparagraph (A): using or carrying a firearm during and in relation to certain crimes, or possessing a firearm in furtherance of such crimes. The provision then separately lists in Clauses (A)(ii)-(iii), (B)(i)-(ii) and (C)(i)-(ii) circumstances affecting the sentence. Under the current version of the statute, Congress did not limit the sentencing judge to a defined maximum (as the pre-1998 statute did in prescribing determinate sentences). The new statute instead provides an escalating series of mandatory *minimum* sentences. Under the terms of the new statute, enhanced penalties apply when the firearm is "brandished" or "discharged" (18 U.S.C. 924(c)(1)(A)(ii)-(iii)), which this Court has since recognized to be sentencing factors. See *Harris* v. *United States*, 536 U.S. 545, 552-556 (2002) (brandishing); *Dean* v. *United States*, 129 S. Ct. 1849, 1854 (2009) (discharge). Enhanced penalties also apply when the firearm has particularly dangerous characteristics, 18 U.S.C. 924(c)(1)(B), and when the defendant has previously been convicted under Section 924(c), 18 U.S.C. 924(c)(1)(C). For example, as relevant here, 18 U.S.C. 924(c)(1)(B)(ii) specifies a 30-year minimum term of imprisonment "[i]f the firearm possessed by a

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[1] Although decided after enactment of the current version of Section 924(c)(1), *Castillo* interpreted the pre-1998 version. See *Castillo*, 530 U.S. at 121, 125.

person convicted of a violation of [Section 924(c)] * * * is a machinegun."

2. a. Respondents, along with co-defendants Dennis Quirk, Jason Owens, and Patrick Lacey, conspired and attempted to rob a Loomis-Fargo armored car as it made a scheduled delivery of cash to a bank located on a busy street in the North End of Boston, Massachusetts. Respondents and Quirk hid inside a minivan—O'Brien armed with a semi-automatic Sig-Sauer pistol, Burgess with a semi-automatic AK-47 assault rifle, and Quirk with a fully automatic Cobray machine pistol. The targeted armored car carried almost $2 million in cash, and contrary to usual practice, it had two guards instead of one. As one guard unloaded boxes of coins from the opened rear door of the armored car, the other guard stood near a bag containing about $275,000 in cash that was placed on the pavement. When one of the robbers exited the minivan with a weapon pointed at the closest guard, that guard dropped to the pavement as ordered, but the second guard used the truck as cover to run down the sidewalk to a nearby restaurant. The robbers' failure to control the second guard caused them to abort the robbery and flee the scene without taking any money. Co-defendant Lacey helped respondents and Quirk get away, and co-defendant Owens provided his apartment as a rendezvous for the robbers. Gov't C.A. App. 176-179, 236; Gov't Supp. C.A. App. 6-9, 49-53.

Authorities quickly located the robbers based on tips and other information. The evening of the attempted robbery, officers executed a search warrant at Owens's residence and in his room found the three firearms, each loaded: the semi-automatic Sig-Sauer with eight rounds of ammunition, the semi-automatic AK-47 with two banana clips holding 50 rounds, and the fully automatic

Cobray with a loaded magazine and a spare holding 48 rounds (some of them hollow point bullets, designed to spread out upon impact to maximize injury). Each gun had a round of ammunition in the chamber. Law enforcement officers also recovered bulletproof vests from the room. Gov't C.A. App. 179-180; Gov't Supp. C.A. App. 9, 52-53.

b. On July 20, 2005, a grand jury sitting in the District of Massachusetts returned an indictment charging respondents, along with some of the co-defendants, with various robbery and gun charges. Indictment 1-8. As relevant here, Count 3 charged respondents with using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c) and 18 U.S.C. 2. Count 3 listed the three firearms—the Cobray, the AK-47, and the Sig-Sauer—but did not identify the Cobray, which functioned in fully automatic mode, as a machinegun. Indictment 5; Gov't Supp. C.A. App. 9, 53. On February 21, 2007, a grand jury returned a second superseding indictment adding a Count 4, which charged respondents, based on the presence of the Cobray pistol, with using and carrying a machinegun during and in relation to, and possessing a machinegun in furtherance of, a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and (B)(ii) and 18 U.S.C. 2. Second Superseding Indictment 6. The Cobray pistol remained charged in Count 3 without an assertion that it was a machinegun. *Id*. at 5.

Respondents moved to strike the reference to the Cobray pistol from Count 3 on the theory that the type of weapon used is an element of a Section 924(c)(1) offense and therefore properly charged only in a separate count, as it was in Count 4. Doc. 189. The government

responded that Section 924(c)(1)(B)'s firearm-type provisions are sentencing factors for the court to determine under a preponderance standard in the event of a conviction on the offense described in Section 924(c)(1)(A), which was charged in Count 3; the government therefore argued that Count 4 was not required by Section 924(c)(1) and should be disimssed. Doc. 204, at 2-3. At the same time, the government conceded that if the type of firearm is an offense element, the government could not prove this element beyond a reasonable doubt and the court should dismiss Count 4 on this basis. In particular, the government said it could not prove, as it assumed would be necessary, that respondents knew of the Cobray pistol's fully automatic action. *Id.* at 3-4.[2]

The district court held that the government was required to charge and prove to the jury that the Cobray pistol was a machinegun to trigger the mandatory minimum sentence under Section 924(c)(1)(B)(ii). App., *infra*, 15a-18a. Accordingly, the government asked the district court to dismiss Count 4, consistent with its prior concession. *Id.* at 4a, 18a; Gov't C.A. App. 142. Upon the dismissal of that count, respondents pleaded guilty to the remaining charges against them, including Count 3. Each respondent acknowledged that he was liable for the three firearms listed in Count 3, including the Cobray pistol. *Id.* at 142-143, 172-173.

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[2] The correctness of the government's legal concession that if firearm characteristics are an element of the offense, the government would have to prove respondents' knowledge of the characteristics, is not a question presented here. No count before this Court charges the machinegun as an element, and the availability of the increased minimum sentence therefore rises or falls on whether the machinegun determination is a sentencing factor for the judge.

At sentencing, the district court found, without opposition, that respondents had brandished a firearm while violating Section 924(c), calling for a mandatory minimum sentence of seven years to be served consecutively to the sentences imposed on the other counts, pursuant to Section 924(c)(1)(A)(ii). Gov't C.A. App. 188-189, 209-211, 236-238. The court again rejected the government's argument that respondents were instead subject to a 30-year mandatory minimum consecutive sentence under Section 924(c)(1)(B)(ii) based on their possession of a machinegun. *Id.* at 192. The district court sentenced O'Brien to 180 months of imprisonment, including a consecutive 102-month term on the Section 924(c) charge. *Id.* at 238. As an armed career criminal, Burgess was sentenced to an aggregate 264 months of imprisonment, including a consecutive 84-month term on the Section 924(c) charge. *Id.* at 237.

c. The government appealed. A panel of the First Circuit held, "albeit with some misgivings," that Section 924(c)(1) requires the characteristics of the firearm to be found "by the jury as an element of the crime." App., *infra*, 1a-2a. The court observed that "[r]ead in a vacuum, the language of section 924(c) indicates that the 'offense' (carrying a five year minimum sentence) is the carriage, use or possession of a firearm during a drug or violent felony—all elements for the jury," whereas the "type of firearm—which merely raised the mandatory minimum —pose[s] [a] sentencing issue[] to be resolved by the judge." *Id.* at 5a. The panel further observed that such a reading "would comport with the statute's structure as well." *Ibid.* (citing *Harris*, 536 U.S. at 552-553). Nevertheless, the panel concluded that the Court's decision in *Castillo*—which interpreted the earlier and different version of Section 924(c)(1)—was "close to

binding" in the absence of "a clearer or more dramatic change in language or legislative history." *Id.* at 10a. The panel thus held that firearm characteristics are offense elements that must be decided by the jury, although it "concede[d] that, if we were writing on a clean slate, the statute's language would be a powerful argument" for the contrary conclusion. *Ibid*.

The court of appeals recognized its decision deepened an existing split among the circuits, but believed that only this Court had the prerogative to "reconsider[] or narrowly distinguish[]" *Castillo* in light of the new version of Section 924(c)(1). App., *infra*, 10a; see *id.* at 4a-5a & n.2. The court of appeals denied the government's petition for rehearing en banc. *Id.* at 19a-20a.

REASONS FOR GRANTING THE PETITION

The court of appeals has interpreted the firearm characteristics listed in 18 U.S.C. 924(c)(1)(B) as offense elements that must be charged in the indictment and proved to the jury, rather than as sentencing factors for the district court to determine. That ruling is contrary to the statute's text and structure and conflicts with this Court's reasoning in *Castillo* v. *United States*, 530 U.S. 120, 124-131 (2000), and *Harris* v. *United States*, 536 U.S. 545, 552-556 (2002). The ruling also widens and entrenches an existing circuit split. While the court of appeals' ruling accords with a ruling from one other circuit, six courts of appeals have held that the firearm characteristics in 18 U.S.C. 924(c)(1)(B) are sentencing factors. Because the question presented is an important and recurring one in federal prosecutions and is outcome-determinative in this case, the Court's review is warranted.

A. The Court Of Appeals' Decision Widens And Entrenches An Existing Conflict Among The Circuits

As the court of appeals acknowledged (App., *infra*, 4a-5a & n.2), the question presented here is the subject of a significant circuit conflict.

Six courts of appeals have held that Section 924(c)(1)(B), referring to various types of particularly dangerous weapons, sets forth sentencing factors that increase the minimum sentence for the crime defined in Section 924(c)(1)(A), rather than setting forth the elements of a distinct criminal offense. Accordingly, these circuits have held that the firearm's characteristics need not be charged in the indictment or found by a jury beyond a reasonable doubt. See *United States* v. *Cassell*, 530 F.3d 1009, 1017 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1038 (2009); *United States* v. *Harrison*, 272 F.3d 220, 225-226 (4th Cir. 2001), cert. denied, 537 U.S. 839 (2002); *United States* v. *Sandoval*, 241 F.3d 549, 550-552 (7th Cir.), cert. denied, 534 U.S. 1057 (2001); *United States* v. *Gamboa*, 439 F.3d 796, 810-812 (8th Cir.), cert. denied, 549 U.S. 1042 (2006); *United States* v. *Avery*, 295 F.3d 1158, 1171-1172 (10th Cir.), cert. denied, 537 U.S. 1024 (2002); *United States* v. *Ciszkowski*, 492 F.3d 1264, 1268-1269 (11th Cir. 2007); see also *United States* v. *Dixon*, 273 F.3d 636, 640 n.2 (5th Cir. 2001) (dicta), cert. denied, 537 U.S. 829 (2002).

These courts have generally applied the analysis in this Court's opinion in *Harris*, which interpreted the new version of Section 924(c) to provide that whether the firearm is "brandished," 18 U.S.C. 924(c)(1)(A)(ii), is a sentencing factor, not an offense element. 536 U.S. at 552-556. The courts of appeals have reasoned that this Court's analysis in *Harris* of the structural and textual aspects of Section 924(c)(1)(A) "applies with equal force

to the factors listed in [Section] 924(c)(1)(B)." *Gamboa*, 439 F.3d at 811.

Two circuits, in contrast, have held that the firearm characteristics in 18 U.S.C. 924(c)(1)(B) are elements of aggravated offenses, and so must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. See App., *infra*, 1a-13a; *United States* v. *Harris*, 397 F.3d 404, 412, 414 (6th Cir. 2005). In its opinion in *Harris*, the Sixth Circuit acknowledged that the structure of the statute indicates that the firearm characteristics are sentencing factors. The court held, however, that the length of the prescribed minimum sentences and a (perceived) tradition of treating firearm characteristics as offense elements provided "compelling evidence to the contrary." *Id.* at 413 (citation omitted).[3]

More importantly, the split is now entrenched. Before the decision below, a prospect existed that the Sixth Circuit would correct its jurisprudence and join the otherwise unanimous view that Section 924(c)(1)(B) states sentencing factors. But now, the First Circuit has

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[3] In addition, the Sixth Circuit relied on Sentencing Guidelines § 2K2.4(b), which sets the advisory Guidelines sentence for Section 924(c) offenses as equal to the Section 924(c) mandatory minimum sentence (absent an upward departure). Based on this equivalence, the Sixth Circuit held that interpreting the firearm characteristics as sentencing factors "would [present] a serious constitutional problem because of its potential conflict with *Booker*'s Sixth Amendment holding." *Harris*, 397 F.3d at 413 (citing *United States* v. *Booker*, 543 U.S. 220, 226-229, 244 (2004)). Apart from the Sixth Circuit, no court of appeals has found *Booker* to justify reading Section 924(c)(1)(B)(i) and (ii) as offense elements. See, *e.g.*, *Cassell*, 530 F.3d at 1017; *Ciszkowski*, 492 F.3d at 1268; *Gamboa*, 439 F.3d at 811. Moreover, the Sixth Circuit has since held that *Booker* did not overrule this Court's decision in *Harris*. See *United States* v. *Thompson*, 515 F.3d 556, 564-565 (2008).

joined the Sixth Circuit, and both have rejected the government's petitions for rehearing. App., *infra*, 19a-20a; *United States* v. *Harris*, No. 03-6207 (6th Cir. June 8, 2005). Accordingly, this Court's intervention is necessary to resolve the conflict.

B. The Court Of Appeals' Ruling Is Incorrect

Contrary to the decision below, the firearm characteristics in Section 924(c)(1)(B) are not offense elements, but sentencing factors. The court of appeals' reliance on this Court's decision in *Castillo* for a contrary interpretation is misplaced. In *Castillo*, this Court construed a prior version of Section 924(c)(1), holding that firearm characteristics were elements of a "separate crime" and therefore "the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt." 530 U.S. at 123-131. But the version of Section 924(c)(1) under which respondents were convicted differs fundamentally from the older version that *Castillo* construed, and under *Castillo*'s own logic the statute now states sentencing factors. Indeed, this Court in *Harris* has already read a parallel provision of the current version of Section 924(c)(1) to state sentencing factors, rather than offense elements. On a similar analysis, the text, structure, and effect of the current statute reveal Congress's intent to establish sentencing factors in Section 924(c)(1)(B) that, when proved to the court by a preponderance of the evidence, trigger the specified mandatory minimum sentence for the "single offense" defined in Section 924(c)(1)(A). *Harris*, 536 U.S. at 556.

1. The statute's text compels the conclusion that the firearm characteristics are sentencing factors. The opening phrase of Section 924(c)(1)(B) makes clear that

the enhancements for certain firearm characteristics apply to "a person *convicted of a violation* of this subsection." 18 U.S.C. 924(c)(1)(B) (emphasis added). "Convicted of" refers to a finding of guilt, which necessarily precedes sentencing. Cf. *Deal* v. *United States*, 508 U.S. 129, 132 (1993) ("In the context of [Section] 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury."). Unlike the "neutral" and essentially indeterminate language of the prior version of Section 924(c), see *Castillo*, 530 U.S. at 124, the new language signifies Congress's intent that the mandatory minimum sentences specified in the clauses that follow apply only *after* the defendant has been convicted of the Section 924(c)(1)(A) offense.

2. The statute's structure reinforces this conclusion. The prior version of Section 924(c)(1) consisted of a single paragraph comprising a lengthy, unbroken sentence describing the offense, followed by separate sentences about recidivist sentencing, probation and consecutive sentencing, and parole.[4] This Court explained in *Cas-*

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[4] The version of Section 924(c)(1) at issue in *Castillo* provided:

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, shall * * * be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or a firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this sub-

tillo that Congress "placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence, not broken up by dashes or separated into subsections," which "strongly suggest[ed] that the basic job of the entire first sentence is the definition of crimes and the role of the remaining three [sentences] is the description of factors" relevant to sentencing. 530 U.S. at 124-125.

The current version of Section 924(c)(1) is arranged very differently: it contains an initial sentence defining the prohibited conduct and then contains a dash, followed by separate subsections that describe factors bearing on the length of the sentence. In *Harris*, the Court explained that the new structure pointed in the opposite direction from *Castillo*: "Federal laws usually list all offense elements 'in a single sentence' and separate the sentencing factors 'into subsections.'" *Harris*, 536 U.S. at 552 (quoting *Castillo*, 530 U.S. at 125). "When a statute has this sort of structure"—which, the Court noted, Section 924(c)(1) does—"we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors." *Id.* at 553. The Court echoed that observation in *Dean* v. *United States*, 129 S. Ct. 1849 (2009), stating that: "The principal paragraph [of Section 924(c)(1)] defines a complete offense and the subsections 'explain how defendants are

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section run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

Castillo, 530 U.S. at 131-132 (Appendix to Opinion of the Court) (quoting 18 U.S.C. 924(c)(1) (Supp. V 1993) (footnote omitted)).

to "be sentenced."'" *Id.* at 1853 (quoting *Harris*, 536 U.S. at 552).

The same analysis applies here. Clauses (B)(i) and (ii), which identify firearm characteristics, are structurally indistinguishable from Clauses (A)(ii)-(iii), which identify ways in which the firearm was used (brandishing and discharge, respectively). This Court held in *Harris* and *Dean* that brandishing and discharge are sentencing factors. See *Harris*, 536 U.S. at 552-556; *Dean*, 129 S. Ct. at 1854. Similarly, and for the same reasons, the clauses under Subparagraph (B) set forth sentencing factors. Indeed, Subparagraph (B) is surrounded by sentencing provisions. The unanimous view of the courts of appeals to consider the question is that the recidivist sentencing rules in Clauses (C)(i) and (ii) are also sentencing factors.[5] And Clauses (D)(i) and (ii) obviously pertain to sentencing by prohibiting the imposition of probation and providing for a consecutive sentence. Within this context, Clauses (B)(i) and (ii) are most naturally read as sentencing factors.

3. The effect that Clauses (B)(i) and (ii) have on sentencing confirms the conclusion that they state sentencing factors. Unlike the firearm-type provisions in the

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[5] See *United States* v. *Rivera-Rivera*, 555 F.3d 277, 290-292 (1st Cir. 2009); *United States* v. *Mejia*, 545 F.3d 179, 207-208 (2d Cir. 2008); *United States* v. *Williams*, 65 Fed. Appx. 819, 823 (3d Cir.), cert. denied, 540 U.S. 932 (2003); *United States* v. *Cristobal*, 293 F.3d 134, 147-148 (4th Cir.), cert. denied, 537 U.S. 963 (2002); *United States* v. *Smith*, 296 F.3d 344, 348-349 (5th Cir.), cert. denied, 537 U.S. 1012 (2002), and 538 U.S. 935 (2003); *United States* v. *Davis*, 306 F.3d 398, 411-412 (6th Cir. 2002), cert. denied, 537 U.S. 1208 (2003); *United States* v. *Hatcher*, 501 F.3d 931, 934-935 (8th Cir. 2007), cert. denied, 128 S. Ct. 1133 (2008); *United States* v. *Madrid*, 222 Fed. Appx. 721, 736 (10th Cir. 2007) (per curiam); *United States* v. *Woodruff*, 296 F.3d 1041, 1049-1050 (11th Cir. 2002), cert. denied, 537 U.S. 1114 (2003).

prior version of Section 924(c)(1) considered in *Castillo*, the current firearm-type provisions do not increase the statutory maximum sentence. For *any* violation of the current statute, the implied maximum term is life imprisonment. See, *e.g.*, 18 U.S.C. 924(c)(1)(A)(i) (requiring a sentence "of not less than 5 years" for a base offense); 924(c)(1)(B)(i) (requiring a sentence "of not less than 10 years" when the firearm possessed is a semiautomatic assault weapon); see also *Harris*, 536 U.S. at 574 (Thomas, J., dissenting) (referring to "the statutory maximum of life imprisonment for any violation of [Section] 924(c)(1)(A)"). The firearm-type provisions "alter only the minimum" sentence that may be imposed. *Id.* at 554. This Court's reasoning in *Harris* thus applies here as well: By "constrain[ing], rather than extend-[ing], the sentencing judge's discretion," the provisions "have an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate." *Ibid.*[6] In sum, the princi

[6] For similar reasons, reading the firearm characteristics as sentencing factors poses no constitutional concerns. The Constitution requires that any fact other than a prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). But a fact that increases a statutory minimum sentence within the range already authorized may be found by the sentencing judge by a preponderance of the evidence. *Harris*, 536 U.S. at 568. The firearm-type provisions at issue here, like the brandishing and discharge provisions at issue in *Harris*, do not "alter[] the maximum penalty for the crime committed" and instead "operate[] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 87-88 (1986). This fact, too, differentiates *Castillo*, in which the involvement of a machinegun increased the maximum sentence beyond that otherwise authorized. See *Castillo*, 530 U.S. at 124 ("[O]ur decision in *Jones* [v. *United States*, 526 U.S. 227 (1999)]

pal indicia of Congressional intent to which this Court looked in both *Castillo* and *Harris* point unequivocally toward treating the firearm characteristics in Section 924(c)(1)(B) as sentencing factors.

C. The Question Presented Is Of Substantial Importance, And This Case Is A Good Vehicle For Its Resolution

1. This case presents an issue of significant importance to the administration of federal criminal justice. The enhanced mandatory minimum sentences provided by Section 924(c)(1)(B)(i) and (ii) are important law-enforcement tools because they target particularly dangerous and threatening firearms—assault rifles, machineguns, sawed-off rifles and shotguns, bombs, grenades, missiles, mines, and the like. These weapons are of grave and particular concern because they can inflict enormous harm in a very short time, and many have no legitimate purpose outside the military and law enforcement. Cf. *United States* v. *Freed*, 401 U.S. 601, 609 (1971) ("[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons.") (footnote omitted). Section 924(c)(1) implements Congress's evident judgment that these firearms are so dangerous, so threatening, and so often illegitimate that when used to facilitate a drug trafficking crime or a crime of violence, an enhanced sentence is appropriate.

The First and Sixth Circuits' view undermines this statutory provision by increasing, beyond what Congress provided for or intended, the burden the govern-

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concluded, in a similar situation [to the one addressed in *Castillo*], that treating facts that lead to an increase in the maximum sentence as a sentencing factor would give rise to significant constitutional questions.").

ment must carry to trigger the mandatory minimum sentences in Section 924(c)(1)(B). That increased burden would be particularly acute if the consequence of treating firearm characteristics as an offense element is to require the government to prove the defendant's knowledge of those characteristics, as some courts (and the government in this case) have assumed. Compare *Ciszkowski*, 492 F.3d at 1268 (firearm characteristics are sentencing factors, and the government need not prove a defendant's knowledge of those characteristics); *Gamboa*, 439 F.3d at 812 (same), with Gov't C.A. App. 142 (government's concession below that if firearm characteristics are offense elements, the government would need to prove respondents' knowledge of the characteristics); App., *infra*, 8a (decision below implying that it would require proof of defendant's knowledge); *United States* v. *Hoosier*, 442 F.3d 939, 944 (6th Cir. 2006) (describing indictment alleging "knowing possession of an SKS assault rifle"). As in this case, knowledge of firearm characteristics may be difficult to establish, leading to sentences below what Congress gave every sign of wanting for use of highly dangerous weapons.

Because the split in the circuits is over a mandatory minimum sentence, it frequently results in widely varying sentences. For example, respondent O'Brien was sentenced to a 15-year prison term, but in most other circuits, he would have faced at least a 30-year term for his crimes. Likewise, respondent Burgess (an armed career offender subject to 18 U.S.C. 924(e)) was sentenced to consecutive 15-year and 7-year statutory minimum prison terms, but in most other circuits he would have faced at least a 45-year total term. Such significant disparities should not occur simply because of the circuit in which a prosecution takes place.

2. This case is a good vehicle for resolving the question presented. The government preserved the issue for appeal at multiple points in the record. See Doc. 204; Gov't C.A. App. 142, 192. The case arises cleanly on direct review, not on review for plain error (as in *Harrison*, 272 F.3d at 224) or in the form of a claim of ineffective assistance of counsel (as in *Cassell*, 530 F.3d at 1011-1012). Moreover, this Court's decision would be outcome-determinative. Affirming the decision below would end the matter, because the government has conceded in this case that if the firearm characteristics are elements, it must—but cannot—prove to a jury that respondents knew the Cobray pistol had fully automatic action. Conversely, reversing the decision below would lead to resentencing, at which the government's laboratory testing showing the Cobray pistol's fully automatic action, see Gov't Supp. C.A. App. 9, 53, likely would be uncontroverted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General
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JUNE 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2312

UNITED STATES OF AMERICA, APPELLANT

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,
DEFENDANTS-APPELLEES

Sept. 23, 2008

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Mark L. Wolf, *U.S. District Judge*]

Before BOUDIN and DYK,[*] Circuit Judges, and DOMÍNGUEZ,[**] District Judge.

BOUDIN, Circuit Judge.

The question posed by this appeal is whether, under a statute forbidding the carrying and use of guns in connection with a federal crime, the nature of the weapon is to be found by the judge as a sentencing matter or by the jury as an element of the crime. Most circuits have

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[*] Of the Federal Circuit, sitting by designation.

[**] Of the District of Puerto Rico, sitting by designation.

said the former; believing ourselves largely constrained by a Supreme Court decision interpreting a prior version of the statute, we reach the opposite result, albeit with some misgivings.

The facts can be easily summarized. On the morning of June 16, 2005, defendants Martin O'Brien and Arthur Burgess, along with a third confederate Dennis Quirk, prepared to rob a Loomis-Fargo armored car. Between them, they carried three weapons: a Sig-Sauer pistol (O'Brien), a semi-automatic AK-47 assault rifle (Burgess), and a fully automatic Cobray pistol (Quirk). Part way into the robbery a guard escaped and the defendants fled but were later caught and indicted.

Counts one and two of the indictment alleged Hobbs Act violations for attempted robbery and conspiracy to affect interstate commerce, 18 U.S.C. § 1951 (2000); count three charged the defendants with using or carrying a firearm in furtherance of a crime of violence, *id.* § 924(c); count four charged defendants with using a machine-gun in furtherance of a crime of violence, *id.* § 924(c); and counts five and six charged some defendants as felons in possession of firearms, *id.* § 922(g). The Cobray pistol, which had been modified to operate as a fully automatic weapon, was listed both in count three as one of three firearms and in count four as the machine-gun.[1]

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[1] Although the definitional section governing section 924(c) does not separately define machine-gun, the term has been widely taken to mean a fully automatic weapon that fires continuously with a single pull on the trigger. *See, e.g.*, 26 U.S.C. § 5845 (2000). A semi-automatic, by contrast, chambers a new round automatically but requires a new pull on the trigger to fire.

The language of section 924(c) is set forth in full in an addendum to this decision along with a prior version of the same statute. Although section 924 as a whole is captioned "Penalties" and is a companion to section 922 captioned "Unlawful Acts," section 924 is elaborate, lengthy and far from homogenous in character. Subsection (a) sets penalties for specific violations of section 922; subsection (b) creates an offense for transporting weapons. Our main concern is with subsection (c).

Section 924(c) provides that anyone who in relation to a crime of violence or drug trafficking "uses or carries a firearm," or "possesses" one "in furtherance of" the crime, must be sentenced to at least five years imprisonment. 18 U.S.C. § 924(c)(1)(A). It then hikes the minimum if the firearm is "brandished" (seven years), *id.* § 924(c)(1)(A)(ii), or discharged (ten years), *id.* § 924(c)(1)(A)(iii), or if the firearm is a short-barreled rifle or shotgun (ten years), *id.* § 924(c)(1)(B)(i), or is a machine-gun or destructive device or is equipped with a silencer or muffler (thirty years), *id.* § 924(c)(1)(B)(ii).

The defendants moved to strike the specific reference to the Cobray pistol from count three on the ground that possession of a machine-gun is an element of a crime, properly charged as a separate offense in count four. The government objected, insisting that the machine-gun provision set forth a sentencing factor. It said that it did not seek punishment on both counts but had included count four only as a precaution in case the machine-gun reference were struck from count three.

At the pretrial conference, the district court ruled that machine-gun possession was an element of a crime rather than a sentencing enhancement. It relied on *Castillo* v. *United States*, 530 U.S. 120 (2000), a decision

construing an earlier version of the statute that was supplanted by the present law in 1998. *Id.* at 125. The district court dismissed count four at the government's behest, and the defendants then pled guilty to the remaining counts.

The dismissal of count four came about because the government concluded that it could not prove beyond a reasonable doubt the defendants' knowledge that the Cobray had been modified to operate automatically. However, at sentencing the government again urged the thirty year mandatory minimum on the ground that the district court could find the necessary facts as to possession of a machine-gun by a preponderance of the evidence and without requiring the defendants to know that the weapon was automatic. The district judge refused, adhering to his earlier view of the statute.

Accordingly, although the defendants had pled guilty under count three to using or carrying a firearm in connection with a crime of violence, the fact that the Cobray pistol had tested as an automatic weapon was not enough to trigger the thirty year minimum. Two of the defendants (O'Brien and Burgess) ended up with sentences below thirty years; the third had yet to be sentenced when the briefs were filed. Arguing that the thirty year provision was a mandatory sentencing factor, the government now appeals.

Construing section 924(c) is a question of law to be considered *de novo*. *Berhe* v. *Gonzales*, 464 F.3d 74, 80 (1st Cir. 2006). Six circuits support the government's view and only one, *United States* v. *Harris*, 397 F.3d 404, 406, 412-14 (6th Cir. 2005), supports the defen-

dants.[2] But the Supreme Court, glossing an earlier version of section 924(c), found that the machine-gun provision created an element of the offense to be submitted to the jury. *Castillo*, 530 U.S. at 121, 123, 131. At the time, the new version (at issue in our case) had already been enacted but did not govern *Castillo* itself and was not interpreted by the Court.

Ordinarily, Congress can decide whether a fact is an element of the offense or pertains merely to sentencing. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998). Read in a vacuum, the language of section 924(c) indicates that the "offense" (carrying a five year minimum sentence) is the carriage, use or possession of a firearm during a drug or violent felony—all elements for the jury—while the brandishing or discharge and the type of firearm—which merely raised the mandatory minimum—pose sentencing issues to be resolved by the judge.

This would comport with the statute's structure as well.[3] According to the Supreme Court in *Harris* v. *United States*:

> Federal laws usually list all offense elements "in a single sentence" and separate the sentencing factors "into subsections." . . . When a statute has this sort

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[2] *United States* v. *Cassell*, 530 F.3d 1009, 1016-17 (D.C. Cir. 2008); *United States* v. *Ciszkowski*, 492 F.3d 1264, 1268 (11th Cir. 2007); *United States* v. *Gamboa*, 439 F.3d 796, 811 (8th Cir. 2006); *United States* v. *Avery*, 295 F.3d 1158, 1169-71 (10th Cir. 2002); *United States* v. *Harrison*, 272 F.3d 220, 225-26 (4th Cir. 2001); and *United States* v. *Sandoval*, 241 F.3d 549, 550 (7th Cir. 2001).

[3] Indeed, the *Castillo* Court acknowledged that the structure of the amended statute supported reading the machine-gun provision as a sentencing factor. *Castillo*, 530 U.S. at 125.

> of structure, we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors.

536 U.S. 545, 552-53 (2002) (citation omitted). The current version of section 924(c) follows just this pattern. The first sentence (down to the semi-colon) sets forth the elements that the jury should find and the corresponding five year minimum sentence; then, the subsequent subparagraphs increase the mandatory minimum under various circumstances, which could readily be established at sentencing.

At present, no constitutional bar exists to such an allocation of tasks by Congress. In the face of escalating maximum sentences, the Supreme Court has ruled that the Sixth Amendment requires that any fact increasing the statutory *maximum* sentence be submitted to the jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). But it has not extended this prescription to facts that create or enlarge a statutory *minimum* sentence, which is what concerns us here. *See McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Harris*, 536 U.S. at 557-568 (reaffirming *McMillan*).

However, in sentencing it is imprudent to read Congress' language in a vacuum. The Supreme Court's innovative constitutional precedents, bringing the Sixth Amendment to bear on maximum sentences and (more famously) on the sentencing guidelines, *e.g.*, *United States v. Booker*, 543 U.S. 220 (2005); *Blakely* v. *Washington*, 542 U.S. 296 (2004), has been paralleled in statutory construction. There, the Court has developed unique policy and historical tests that complement, and sometimes work to modify, the most straightforward reading of language and structure.

These tests consider, along with legislative language and intent, the severity of punishment and how the fact has been historically treated. Two leading cases are *Jones* v. *United States*, 526 U.S. 227 (1999) ("serious bodily injury" resulting from a carjacking, 18 U.S.C. § 2119, is an element of the crime) and *Castillo* itself. Several times the outcome, as in both of these cases, has been to require courts to treat facts specified in the substantive statutes as elements of the offense rather than sentencing factors even though bare statutory language might seem to point the other way.[4]

Although in this new algorithm congressional language and other evidences of intent remain important, *Harris*, 536 U.S. at 552, there is a further complication: Congress in enacting complex criminal statutes rarely considers explicitly whether some designated fact should be deemed an element or a sentencing factor—a distinction, after all, primarily of concern to courts in administering the statutes. Exceptions are relatively few. *E.g.*, 18 U.S.C. § 3593(b) (factors bearing on imposition of death sentence).

As for the Court's own criteria, they are not easily applied or balanced against each other. For example, the Court tells us—seemingly as a policy consideration—that a significantly longer prison term points toward treating the triggering fact as an element of the crime; this very circumstance was cited in *Castillo* as one factor supporting the result. 530 U.S. at 131. A

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[4] The same policy and historical factors have also sometimes led the Court to the opposite result. *See Almendarez-Torres*, 523 U.S. at 229-47 (recidivism provision of 8 U.S.C. § 1326(b)(2) is a sentencing factor); *Harris*, 536 U.S. at 552-56 (brandishing provision of section 924(c) is a sentencing factor).

thirty-year minimum is indeed long; but only a five-year increase would result if a short-barreled rifle were the weapon, and *both* provisions are phrased in exactly the same terms and in structurally parallel provisions. *Compare* 18 U.S.C. § 924(c)(1)(B)(i), *with id.* § 924(c)(1)(B)(ii).

The Court has also asked whether treating a fact as an element was "traditional" and whether doing so would "complicate a trial or risk unfairness." *Castillo*, 530 U.S. at 126-28. Discerning a "tradition" in this sphere is far from easy: until the 1980s, sentencing was largely unstructured; but *Castillo* said that firearm type is traditionally an element of the offense—a judgment unaffected by the rephrasing of the statute. Nor has the restructuring made it less feasible to ask the jury to determine the nature of the weapon or defendant's knowledge of it.

In all events, a starker reality informs our choice in this case. Whatever uncertainty may attend the Court's criteria and the pattern formed by its precedents, one thing is clear: in *Castillo* the Supreme Court found that the machine-gun provision in the pre-1998 version of section 924(c) created an element of the crime to be tried by a jury. The language used in this earlier version was slightly more favorable to the defendants than the current version but not markedly so, nor was the original language so clear that it preordained the Court's result.

Prior to the 1998 amendment, the language defined the crime in the same language used now, prescribed a fixed sentence of five years, and—after listing other facts leading to fixed terms—said that the penalty "if the firearm is a machinegun . . . [is] imprisonment for

thirty years." 18 U.S.C. § 924(c)(1) (1997). The current version merely breaks what was a single run-on sentence into subparagraphs (one for each additional fact), converts the fixed-term sentences of the earlier version into minimum sentences, and moves the verb to the end of each subparagraph, to wit:

> (B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> . . .
>
> (ii) is a machinegun . . . , the person shall be sentenced to a term of imprisonment of not less than 30 years.

There is no evidence that the breaking up of the sentence into the present subdivisions or recasting of language was anything more than the current trend—probably for ease of reading—to convert lengthy sentences in criminal statutes into subsections in the fashion of the tax code. In fact, the stated objective of rewriting section 924(c) was another issue entirely.[5] Nothing in the legislative history that we could find says anything about the element versus sentencing factor distinction.

The only explicit substantive difference between the earlier version and the new one is the conversion of the

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[5] The debates and hearings focus on Congress' aim to criminalize "mere" possession of firearms after the Supreme Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), which had held that "use" of a firearm required the government to show active employment of the weapon. *See, e.g.*, *Examining the Bailey Decision's Effect on Certain Prosecutions of Violent and Drug Trafficking Crimes: Hearing Before the Committee on the Judiciary of the United States Senate*, 104th Cong. (1996).

numerical figures from fixed-term sentences to mandatory minimums. The government says that mandatory minimums are traditionally associated with sentencing. But so are prescribed sentences (as in the prior version) and maximum sentences (which are components of most criminal statutes). It would be a different matter if Congress had explained the change as one aimed at *Castillo* itself; but *Castillo* was decided after the new statute had been passed.

Absent a clearer or more dramatic change in language or legislative history expressing a specific intent to assign judge or jury functions, we think that *Castillo* is close to binding. True, the Court in *Castillo* declined to decide our case, only saying that the new version could not be used to impute a meaning to the old. 530 U.S. at 125. But most of the reasoning offered in *Castillo* applies with almost equal force to the new statute. If Castillo is to be reconsidered or narrowly distinguished, this is customarily the Court's "prerogative." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997).

We recognize that six circuits have reached a different outcome and concede that, if we were writing on a clean slate, the statute's language would be a powerful argument for the government's result. The problem is that the *prior* statutory language also favored the government. Yet a unanimous Supreme Court found persuasive contrary arguments of policy and tradition, which have not in the least been altered by the statute's revision.

Affirmed.

ADDENDUM

Before the statute was restructured, the pertinent part of 924(c) read as follows:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, 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 with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. (FOOTNOTE 1) Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

Following revision in 1998, the relevant language now reads:

> (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2312

UNITED STATES OF AMERICA, APPELLANT

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,
DEFENDANTS-APPELLEES

Entered: Sept. 23, 2008

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc: Mr. Feeley, Ms. Hill, Ms. Chaitowitz, Ms. Feldman-Rumpler, Ms. O'Connell, Mr Lang & Mr. Richardson.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 1:05-cr-10183-MLW

UNITED STATES OF AMERICA

v.

DENNIS QUIRK AND MARTIN O'BRIEN AND
ARTHUR BURGESS

Monday, Apr. 2, 2007

PLEA HEARING

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* * * * *

THE COURT: Okay. Well, let's get to that point.

All right. As I told you earlier this morning, with regard to the 18 United States Code Section 924(c)(1)(b)(2) question, I've decided that proving a machine gun, as required by that statutory provision, is an element of the offense, not a sentencing factor. Essentially, I agree with the reasoning of the Sixth Circuit in ***Harris***, 397 F.3rd 404. I respectfully disagree with the reasoning of the Seventh Circuit in ***Sandoval***, 241 F.3rd 549, which found that the Section 924(c)(1)(b)(1) requirement of a semiautomatic assault weapon was a sentencing factor.

My analysis is not inconsistent with the cases which find that the factual issues identified in Section 924(c)(1)(a) are sentencing factors. Those are cases like ***Pounds***, 230 F.3rd at 1370 and 1319, in which the Eleventh Circuit found that the discharge of a weapon was a sentencing factor, or ***Barton***, 257 F.3rd 443, a Fifth Circuit case finding that brandishing is a sentencing factor.

As the Supreme Court explained in ***Castillo***, 530 U.S. 120 at 126, the way a gun is used, such as brandishing, is a traditional sentencing factor. The Supreme Court also stated, in ***Castillo***, however, that the nature of the weapon, including the distinction between a pistol and a machine gun, is usually a substantive matter and the nature of the weapon is therefore traditionally an element of the offense.

My analysis is consistent with this traditional treatment of the nature of the weapon as an element of the offense, but does not rely exclusively on it. ***Castillo*** was decided in 2000, however, it interpreted a pre1998 version of Section 924(c) which had "brandishing" and "the nature of the weapon" in the same subsection. The 1998 amendment puts factors relating to the way the weapon was used in Section 924(c)(1)(a) and issues concerning the nature of the weapon in Section 924(c)(1)(b). ***Castillo*** explains the considerations for analysis in deciding whether a machine gun is an element of the offense or a sentencing factor. I note that the Sixth Circuit in ***Harris*** considered all of the factors discussed in ***Castillo***, the Seventh Circuit in ***Sandoval*** did not.

Pursuant to ***Castillo***, I've looked first at the language of the statute. It does not clearly resolve the issue of whether a machine gun—that proving a machine gun is an element of the offense or a sentencing factor.

The structure of the statute favors the conclusion that "machine gun" is an element, not a sentencing factor. If it were only a sentencing factor, it could and should have been listed under Section 924(c)(1)(a) with the traditional sentencing factors like "brandishing." Instead, including "machine gun" in Section 924(c)(1)(b) manifests an understanding of the traditional distinction between the way a weapon is used and the nature of the weapon itself.

As the Supreme Court stated in ***Castillo***, "Congress legislates against a backdrop of traditional treatment of certain categories of important facts." (Phone rings.) "The manner in which a crime is carried out, such as whether the weapon was brandished, is a traditional sentencing factor. However, the distinction between weapons, for example, between pistols and machine guns, is, according to the Supreme Court, typically substantive because it relates to the heart of the crime at issue. Asking a jury to decide if the defendant used or carried a machine gun would merely complicate a trial or risk unfairness." Indeed, in this case, the government has been willing to have the issue of whether the weapon in dispute was a machine gun put to the jury even if it is a sentencing factor.

I assume, however, that a special verdict form could address the problem of uncertainty discussed in ***Castillo***. When as here the defendants are charged with using several weapons, the First Circuit approved the use of such a special verdict form with interrogatories in ***Melvin***, 27 F.3d 710 at 716. However, as in ***Castillo***, at Page 131, the length and severity of the added mandatory sentence, 30 years if it's a machine gun as opposed to 5 years, weighs in favor of finding that a machine gun

is an element of the offense. The rule of lenity, as the Supreme Court explains, reinforces this conclusion.

Therefore, I find that "machine gun" is an element of the offense. The government acknowledges that if "machine gun" is an element of the offense, it must prove a defendant knew it was a machine gun. The government acknowledges it cannot prove that required knowledge. Therefore, the Government has previously told me it would request that I dismiss Count 4 if I find that a machine gun is an element of the offense rather than a sentencing factor, and I will grant such a motion momentarily.

Once again, I note that if the First Circuit or the—I guess I'll stop right there.

In the circumstances, does the government request that Count 4 be dismissed and will it accept the plea to the remaining—

MR. FEELEY: Yes, it does. Your Honor, we'll file an electronic version of a dismissal requesting leave of court on the basis of—

THE COURT: Well—and, in fact, we've been through this. I'll accept the oral motion. It can be memorialized in writing. But I'm allowing the motion now. So Count 4 is dismissed with regard to each of the three defendants. * * *

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-2312

UNITED STATES, APPELLANT

v.

MARTIN O'BRIEN AND ARTHUR BURGESS,
DEFENDANTS-APPELLEES

Entered: Jan. 26, 2009

ORDER OF COURT

Before: LYNCH, Chief Judge, TORRUELLA, BOUDIN, LIPEZ, DOMINGUEZ[*], DYK[**], HOWARD Circuit Judges.

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it

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[*] Of the U.S. District Court of Puerto Rico sitting by designation.

[**] Of the U.S. Court of Appeals for the Federal Circuit sitting by designation.

is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc:

Dina Michael Chaitowitz
Timothy Q. Feeley
Leslie Feldman-Rumpler
James Francis Lang
Timothy Patrick O' Connell
Robert Edward Richardson