No. 08-1569

IN THE SUPREME COURT OF THE UNTIED STATES

UNITED STATES OF AMERICA,
PETITIONER

V.

MARTIN O'BRIEN AND ARTHUR BURGESS
RESPONDENTS

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

OPPOSITION OF RESPONDENT MARTIN O'BRIEN TO THE PETITION FOR A WRIT OF CERTIORARI

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August 24, 2009

QUESTION PRESENTED

Whether Petitioner fails to present an issue, that the language in 18 U.S.C. §924(c) as amended in 1998 is sufficient to remove a firearm type provision from being an element of a crime that must be charged in an indictment
and either admitted by the defendant or proved to a jury beyond a reasonable doubt, and make it a sentencing factor that may be found by a judge by the preponderance of the evidence, precluding the rights of the respondent under the Fifth and Sixth amendments to the Constitution of the United States.

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PROCEDURAL HISTORY

On September 23, 2008, the judgment of the First Circuit Court of Appeals was entered upholding the ruling in the United States District Court for the District of Massachusetts that the Firearm Type Provision, contained in 18 U.S.C. §§924(c)(1)(B)(ii), relating to a machinegun, was an element of a separate offense and had to be either admitted to by the defendant or proved to a jury beyond a reasonable doubt. A petition for rehearing en banc was denied on January 26, 2009.

STATEMENT OF CASE

The respondent was charged in a superceding indictment with Counts I and II charging Hobbs Act violations for attempted robbery and conspiracy to affect interstate commerce, 18 U.S.C. §1951. Count III charged that the defendants possessed and used a Cobray CM11 pistol with a serial number of #94-0014612 in violation of 18 U.S.C. §924(c)(1) while committing a violation of 18 U.S.C §1951 (Hobbs Act). Count IV charged that the defendants possessed and used a Cobray CM11 machinegun with a serial number of #94-0014612 in violation of 18 U.S.C. §924(c)(1) while committing a violation of 18 U.S.C §1951

(Hobbs Act). The government moved to dismiss Count IV, and the motion was allowed. The respondent entered guilty pleas to Counts I, II, and III.

The government knew the Cobray CM11 pistol (serial number #94-0014612) was manufactured and sold, as a Semi-Automatic weapon and had previously provided records to the defendant during the discovery process that supported that fact. The FBI Examiner's report did not state that the Cobray CM11(serial number #94-0014612) weapon was ever modified by anyone to operate as a machine gun.[1]

Some five months after the confiscation of the weapon, after the FBI test fired the Cobray, did the Examiner state in his report that the weapon fired in the automatic mode.[2]

[1] In this case, an agent of the ATF, opined that the MAC-11 that the respondent was charged with came under 18 U.S.C. §§ 921(a)(3), describing a firearm pursuant to § 924(c)(1). He did not describe the firearm as a machinegun pursuant to §§ 921(a)(23). §§ 921(a)(30) (Assault Weapons) was repealed when the Sunset provision took effect on September 13, 2004.

[2] There is no automatic mode on the Cobray. The only two modes on the weapon are fire and safe and on the housing/receiver it states, "SEMI".

Respondent refers to the First Circuit of Appeal's description of the relevant facts as well as the Plea Hearing when the Honorable Mark L. Wolf analyzed the differences in cases regarding the 1998 version of 18 U.S.C. §§924(c)(1)(B)(ii) and the §924(c)(1)(a) (1988 Ed. Supp. V). The above were exhibited in the Petition for Certiorari in Appendix "A" and "C" respectively.[3]

At the plea hearing Judge Wolf decided that proving a machinegun, as required by the statutory provision, is an element of the offense, not a sentencing factor. Judge Wolf agreed with the Sixth Circuit in *U.S. v. Harris*, 397 F.3rd 404 and disagreed with the reasoning of the Seventh Circuit in Sandoval, 241 F.3rd 549. The Seventh Circuit found that the semiautomatic assault weapon pursuant to 18 U.S.C. §§924(c)(1)(B)(i) was a sentencing factor. (Pet. App. C. at p. 15a). While on the other hand Harris held, "...§924 Firearm-Type Provision mandatory minimum is not binding on a sentencing court unless the type of firearm involved is charged in the indictment and proved to a jury beyond a reasonable doubt." *Harris* at 406.

Judge Wolf concluded that proving a machine gun was an element of the offense was consistent with this Court's decision in *Castillo*, 530 U.S. 126. In *Castillo*, although an early version of 18 U.S.C. §924(c)(1)(a) (1988 Ed. Supp. V) was decided after Congress enacted the 1998 version. Judge Wolf stated that the Court in *Castillo* explained the considerations for analysis in deciding whether a machinegun is an element of the offense or a sentencing factor and that the

[3] Respondent will reference Petitioner's Appendix as Pet. App. at p__.

Sixth Circuit in *Harris* also considered all the factors discussed in *Castillo* where the Seventh Circuit in *Sandoval* did not. (Pet. App. C. at p. 16a).

The Supreme Court stated in *Castillo*, 530 U.S. 126, that the nature of the weapon, including the distinction between a pistol and a machinegun, is usually a substantive matter and the nature of the weapon is therefore traditionally an element of the offense. (Pet. App. C. at p. 16a).

Judge Wolf stated that the structure of the statute favored the conclusion that a machinegun is an element and not a sentencing factor. Beside the above Judge Wolf's reasoning was that Congress would have listed a machinegun under 18 U.S.C. §§924(c)(1)(A) with traditional sentencing factors. Judge Wolf stated that by not listing a machinegun with the traditional sentencing factors and inserting a new subsection "manifests an understanding of the traditional distinction between the way a weapon is used and the nature of the weapon itself.". (Pet. App. C. at p. 17a).

Just prior to Judge Wolf's conclusion that a machine gun is an element of the offense, he stated that the rule of lenity reinforces that, the length and severity of the added mandatory sentence, 30 years if it's a machinegun as opposed to five years, weighs in favor of finding that a machinegun is an element of the offense quoting from *Castillo* at 131. (Pet. App. C. at p. 17a).

The First Circuit's decision, from which, a request for a en banc hearing was denied stated: "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 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.". (Pet. App. A. at p. 10a).

REASONS FOR DENYING CERTIORARI

The respondent, Martin O'Brien, respectfully requests that this Court deny the Solicitor General's petition for a writ of certiorari. The respondent states that the judgment of the Untied States Court of Appeals of the First Circuit is correct.

Although, the petitioner believes that the issue in this case relating to 18 U.S.C. §924(c)(1)(B) may not have been resolved, the same issue in another similar statute has been resolved. This Court decided in *Jones v. United States*, 526 U.S. 227, (1999), that the language in the structured subsections (2) and (3) of 18 U.S.C. 2119 (Carjacking Statute), created separate offenses from the main paragraph. See *Jones* at 251-252.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the court held, what *Jones* noted in 1999, "under the Sixth Amendment, any act (other than a prior conviction) that exposes a sentence in excess of the relevant statutory maximum must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Apprendi* at 490. See also *Cunningham v. California* , 549 U.S. 270 (2007).

In *Ring v. Arizona*, 536 U.S. 584, Justice Ginsburg stated, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt….A defendant may not be 'expose[d]…to penalty *exceeding* the

maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring* at 602.

Justice Scalia and Thomas concurred with Justice Ginsburg facts by stating, "I believe the fundamental meaning of the jury trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives-whether the statute calls them elements of the offense, sentencing factors, or Mary Jane-must be found by the jury beyond a reasonable doubt." *Ring* at 610.

Further, in *Blakely v. Washington*, 542 U.S. 296 (2004), Justice Scalia expounded on the above and distinguished with clarity as to the holding in *Apprendi* stating, "Our precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.". *Blakely* at 303.

In *United States v. Booker*, 543 U.S. 220 (2005), the Court affirmed its holding in *Apprendi* stating, "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved beyond a reasonable doubt." *Booker* at 244.

Moreover, In *Cunningham v. California* , 549 U.S. 270, (2007), this Court stated, “This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge *and established beyond a reasonable doubt, not merely by a preponderance of the evidence*.” *Cunningham* at 863.

THE DISTRICT COURT AND COURT OF APPEAL’S

DECISION IS CORRECT

The petitioner argues review is warranted because the First Circuit's "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 (2000) and *Harris v. United States* 536 U.S. 545 (2002)." In addition, the First Circuit ruling "widens and entrenches an existing circuit split."[4] Pet. Brief at 10. The respondent will address each of the petitioner's arguments.

I. THE TEXT AND STRUCTURE OF 18 U.S.C. §§924(C)(1)(B) IS SIMILAR TO 18 U.S.C. §§2119(1)(2)(3)

The Respondent disagrees with the Petitioner's assertion that the First Circuit's ruling is contrary to the statute's text and structure. The petitioner asserted, "…courts have generally applied the analysis in this Court's opinion in *Harris*, which interpreted the new version of §924(c)(1)(A) to provide that whether the firearm is 'brandished'…,is a sentencing factor not an offense element….The courts of appeals have reasoned that this Court's analysis in Harris of the structural and textual aspects of §924(c)(1)(A) 'applies with equal force to the factors listed in [Section] 924(c) (1)(B).' *Gamboa* 439 F.3d at 811." Pet. Brief at 11-12.

[4] The respondent does not agree for Fifth and Sixth Amendment purpose that the circuits are split.

However, this Court in 1999 determined the text and structure of another statute, which is identically[5] broken up into subsection as the 1998 version of §§924(c)(1)(A) and (B). In that case this Court held, in a well reasoned decision, the language of serious bodily injury and death in the subsections of 18 U.S.C. 2119 were elements of the principle paragraph. Therefore, they were separate offenses and had to be either admitted by the defendant or proven to a jury beyond a reasonable doubt. *See Jones v. United States*, 526 U.S. 227, (1999).

The issue in *Jones* presented by Mr. Denvir to this Court was: "…whether in selecting certain factors to increase the sentence from carjacking from 15 years to a maximum to 25 to life, Congress intended those factors be considered only at the time of sentencing under a reduced standard of proof, or did they…Congress intend that they be elements of an offense which would have to be pled and **prove** beyond a reasonable doubt to a jury.". See *Jones v. United States* - Oral Argument at http:www.oyez.org.

This Court's holding in *Jones* avoided serious constitutional issues of the Fifth and Six Amendments. *Jones* held, "…the Government's view would raise serious constitution questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions.…This is done by construing §2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by the

[5] The only difference in 18 U.S.C. 2119 and 924(c)(1)(A)&(B) is that its subsections are identified differently, 2119 have numbered subsections (1), (2) and (3) while 924(c)(1)(A)&(B) have (i)(ii)(iii).

indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict." *Jones* at 251-252.

The respondent states the question in this case is the same as in *Jones* concerning the structure of the statute.

Shortly after the *Jones* decision, this Court incorporated its analysis of *Jones* concerning the difference as to a sentencing factor and an element in *Castillo v. United States*, 530 U.S. 120, (2000).

The question for the Court in *Castillo* was, "…whether Congress intended the statutory references to particular firearm types in §924(c)(1)(1988 Ed. Supp. V)to define a separate crime or simply to authorize an enhanced penalty. If the former, the indictment must identify the firearm type and a jury must find that element proved beyond a reason doubt. If the latter, the matter need not be tried before a jury but may be left for sentencing judge to decide." *Castillo* at 123-124.

It was well established in *Castillo* that carrying a machinegun was both substantive and substantial. "Appeals have interpreted §924(c)(1) as setting forth a separate 'machinegun' element in relevant cases, See *Alerta* 96 F.3d, at 1235; …other citations omitted…points to the conclusion that the difference between the act of using or carrying a 'firearm' and the act of using and carrying a 'machinegun' is both substantive and substantial a conclusion that supports a 'separate crime' interpretation." *Castillo* at 127.

This argument is not a novel approach, See *United States v. Carll*, 105 U.S. 611 (1881) and *United States v. Hess*, 124 U.S. 483 (1888).

In *Carll* and *Hess* the government omitted substantive information in the charges against the defendants. This Court held it was wrong to omit the substantive information.

In *Hess* the Court stated, "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but must state the species; it must descend to particulars…The object of the indictment is, first, to furnish the accused with such a description of the charges against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and , second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances." *Hess* at 487-488.

In the above case, Justice Fields could not have put it any more convincingly, "first, to furnish the accused with such a description of the charges against him as will enable him to make his defence, and to avail himself of his conviction or acquittal for protection against a further prosecution for the same cause." *Hess* at 487. Justice Fields protected Hess' Fifth and Sixth Amendment rights.

The respondent should be entitled to the same protection as Justice Fields stated that *Hess* was entitled to. To be more precise and to analogize this case with Justice Field's phrase as to generic and species terms, pursuant to §§924(c)(1)(A) and

(B) 1998 version, the firearm would be the generic term while the machinegun is the species term.

If this Court decides that the machine gun is an element and has to be pled in the indictment, the issue is decided.

However, if this Court decides that the machine gun is a sentencing factor and may be decided by a judge by the preponderance of the evidence at a sentencing hearing, that decision eliminates the defendant's rights under the Fifth Amendment to the United States Constitution, which states in pertinent part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury…without due process of law…". When the court violates the defendant's Fifth Amendment rights it also violates the defendant's Sixth Amendment right to a jury trial.

There is no legal argument that supports Congressional intent to have opposite meanings in statutes that have the same structure which are identical in substance. See 18 U.S.C. §2119 and 18 U.S.C. §924(c)(1).

II. THIS CASE DOES NOT CONFLICT WITH *CASTILLO*

Petitioner's argues a second issue, in that, the First Circuit's ruling, "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)." Pet. Brief at 10.

Respondent states *Harris and* Castillo are irreconcilable, and this case cannot be reconciled with both of those opinions. If the petitioner is arguing that there is a conflict between *Castillo* and *Harris* the respondent agrees.

Judge Wolf's analysis and decision, upheld by the First Circuit is consistent with *Castillo,* and is not irreconcilable with *Harris*. The *Harris* court only decided the use of a firearm issue as a sentencing factor in section (A) and did not decide whether the firearm type provision in section (B) was either a sentencing factor or an element.

The *Harris* Court ruled, a traditional seven year sentence pursuant 18 U.S.C. §§924(c)(1)(A)(ii), defined brandishing as a sentencing factor, and was better left to a judge to decide, by the standard of preponderance of the evidence.

The *Castillo* Court ruled, that a thirty year sentence with regards to a machine gun in 18 U.S.C. §924(c)(1)(a) (1988 Ed. Supp. V), now 18 U.S.C. §§924(c)(1)(B)(ii), the Firearm Type Provision, was an element better left for a jury to decide using the standard beyond a reasonable doubt.

In fact, Judge Wolf in his ruling followed *Castillo*'s reasoning and analogy, concluding that a machinegun was an element of §§924(c)(1)(B)(ii). Pet. Appendix "A" pages 7a-10a.

The 1998 version of §924(c)(1)(a) has two separate and distinct subsections, (A) and (B), and they are separated by a period. Each distinct subsection has its own independent thought. This independent thought processes separates the use of a weapon from the firearm type provision.

Judge Wolf used the same reasoning in reaching his conclusion, "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) [sic] with the traditional sentencing factors like 'brandishing.' Instead, including 'machine gun' in Section 924(c)(1)(b) [sic] manifests an

understanding of the traditional distinction between the way a weapon is used and the nature of the weapon itself." Pet. App. C at 17a.

Judge Wolf found that a machine gun has been traditionally treated as an element of §924(c)(1) 1998 version prior to *Castillo v. United States*, 530 U.S. 120 (2000), See *Smith v. United States*, 508 U.S. 223, (1993). "Most important here, the indictment alleged that the petitioner knowingly used the MAC-10 and its silencer…" *Smith* at 226. Also in *United States v. Melvin*, 27 F.3d 710, (1st Cir. 1994) the government stated, "that a defendant found guilty of violating §924(c) may be sentenced to a thirty-year term only if the jury specifically identifies a machinegun or silencer as the firearm supporting the conviction." *Melvin* at 714. In addition see *United States v. Alerta*, 96 F. 3d 1230, (9th Cir. 1996); *United States v. Moore*, 958 F.2nd 310 (10TH Cir. (1995); *United States v. Sims*, 975 F.2d 1225, (6th Cir. 1992); which all were charged in the indictment of using and/or carrying a machine gun in relation to a drug or violent crime.

There has been no ruling by this Court that *Castillo* was overruled.

The petitioner wishes this Court to believe that in 1998 when Congress enacted the new version of §924(c)(1) with its new subsections, it made both subsections sentencing factors.

Congress in 1998 amended 18 U.S.C. §924(c)(1) as a result of the decision in *Bailey v. United States*, 516 U.S. 137 (1995). The Bailey Court interpreted the text 'use' to mean 'active employment of the firearm by the defendant. The *Bailey* Court held, "in order to 'use' a firearm in relation to a drug-trafficking crime within the

meaning of 18 U.S.C. §924(c)(1), a criminal defendant must actively employ the weapon." *Bailey* at 506

Congress was disturbed with the *Bailey* decision and as a result amended 18 U.S.C. §924(c)(1988 Ed. Supp. V). However, nowhere in the Congressional record did Congress state that its intention was to create subsections as sentencing factors.

Just as Congress addressed the use issue as a result of *Bailey*, Congress could and should have addressed this issue in 18 U.S.C. §924(c)(1)(B)(ii), if Congress was disturbed with the decision in *Castillo*, but it did not.

Subsequent to the 1998 amendment of 18 U.S.C. §924(c)(1) Congress has amended that statute on three occasions. Congress chose not to take any action or make any changes as a result of the Court's decision in *Castillo* as it did in response to the *Bailey* decision.

Congress was well aware of the language necessary to create sentencing factors. In 1986, this Court decided *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) in which a similar issue was raised with regards to when a defendant visible possession [brandishes] a weapon. The Pennsylvania legislature enacted 42 Pa.C.S.A. §§9712(a) and 9712(b) in crystal clear language separating the sentencing provision of the visible possession (the use) of a firearm in §(a) from the standard of proof , in §(b). The statute reads in §(a) that if convicted of the visible possession of a firearm a defendant would receive at least five years. In §(b) the Pennsylvania legislature enacted the standard of proof for conviction under §(a) "Provisions of this section shall not be an *element of the crime*…and shall determine, *by the preponderance* of the evidence, if this section is applicable." *McMillian* at 82. (Emphasis Supplied).

In 1998, if Congress intended that the firearm type provisions in section (B) were to be sentencing factors and were to be decided by the preponderance of the evidence standard, Congress could have easily inserted the above or similar language contained in 42 Pa.C.S.A. §§9712(a) and 9712(b) into18 U.S.C. §924(c)(1), but it did not

The petitioner states that there are six Circuit Courts of Appeal's cases that have already held that the firearm's characteristics need not be charged in the indictment or found by a jury beyond a reasonable doubt.

The respondent states that the 18 U.S.C. §§924(c)(1)(B)(i) and (ii) Firearm Type Provisions do not state the characteristics[6] of the weapon. The subsections define the nature of the weapons: i.e. (i) short-barreled rifle, short-barrel shotgun, or semiautomatic assault weapon…; (ii) machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler… These are the not the weapons characteristics.

The characteristics of semiautomatic assault pistols were discussed when the Senate and House Bills were being acted upon regarding 18 U.S.C. 921(a)(30). Mr. Reynolds in introducing H.R. 3184 identified the characteristics of a semiautomatic assault weapon as follows: (1) an ammunition magazine that attaches to the pistol outside of the pistol grip; (2) a threaded barrel capable of accepting a barrel extender; (3) a flash suppressor; (4) a forward hand grip, or silencer; (5) a manufactured weight of 50 ounces or more when the pistol is unloaded; and (6) a semiautomatic version of

[6] Characteristics of weapons are defined in the legislative history of 18 U.S.C. 921(a)(30).

an automatic firearm. Mr. Reynolds then identified the characteristics of a shotgun under the semiautomatic assault weapon provision as follows: (1) a folding or telescoping stock; (2) a pistol grip that protrudes conspicuously beneath the action of the weapon; (3) a fixed magazine capacity in excess of 6 rounds; and (4) an ability to accept a detachable magazine. See Senate Bill S653; and H.R. 3184 introduced by Mr. Reynolds, (1993).

An example of a characteristic of a machinegun is a selector switch. For instance, a machine gun that fires automatically would have three modes/positions: safety, auto, and semi. A semiautomatic would only have two modes on the selector switch: safety and fire. Those are characteristics of machine gun and semi assault weapon respectively.

Thus, the First Circuit's ruling is not in conflict with this Court's reasoning in *Castillo.*

III. THERE IS NO CIRCUIT SPLIT CONCERNING THE RESPONDENT'S FIFTH AND SIXTH AMENDMENT RIGHTS

The petitioner cites the six Courts of Appeals' decisions as a basis for its argument that there is an existing conflict.

However, in those cases the defendants received notice of the nature of the weapon charged in the indictment. The indictment either cited the particular section of §§924(c)(1)(B)(i) or (ii) or identified the type of weapon in the overt act. As such, those defendants did not have their Fifth or Sixth Amendment Rights violated.

The first case cited by the petitioner is *United States v. Cassell*, 530 F.3d 1009, (D.C. Cir. 2008), cert, denied, 129 S.Ct. 1038 (2009).

On August 24, 2000, Dwayne Cassell was indicted in the District of Columbia by a federal grand jury. *Cassell*, inter alia, was charged that he did "unlawfully and knowingly use and carry during and in relation to, and possess in furtherance of, a drug trafficking offense, for which he may be prosecuted in a court of the United States, that is Count One of this indictment which is incorporated herein, firearms, that is, a Cobray PM-11 9mm assault pistol and a Colt AR-15 assault rifle. (Using, Carrying and Possessing a Firearm During a Drug Trafficking Offense, in violation of Title 18, United States Code, Sections 924(c)(1) and 924(c)(1)(B)(i))" Cassell was convicted of the drug offense and convicted of Count Three charging Cassell under Sections 924(c)(1) and 924(c)(1)(B)(i).

Cassell's Fifth Amendment rights were not violated. Cassell was notified by the indictment that he was being charged with a semi assault weapon under 924(c)(1)(B)(i), making the semi assault weapon an element of the offense in 924(c)(1). Cassell was tried and found guilty of 924(c)(1)(B)(i) by a jury using the beyond a reasonable doubt standard. In addition, Cassell's Sixth Amendment rights were not violated.

The next case petitioner cites is *United States v. Harri*son, 272 F.3d 220 (4th Cir. 2001), cert denied, 537 U.S. 839 (2002). Mr. Harrison contended that the MAC-11 charged in the indictment did not state that it was a semiautomatic assault weapon. The indictment charged Harrison, "with knowingly using and carrying a 'Mac-11 semi-automatic pistol," *Harrison* at 225. Harrison argued that his case should either be remanded or reversed, because the government left out the phrase, assault weapon, in the indictment, See *Harrison* n10. However, a federal agent testified that the actual

MAC-11 in the indictment, was in actuality a SWD M-11, a weapon listed under the semi-automatic definition pursuant to §921(a)(30). Harrison was charged in the indictment, tried and convicted by a jury. Harrison had no Fifth and Sixth Amendment Violations.

The next case petitioner cites is *United States v. Sandoval*, 241 F.3d 549 (7th Cir. 2001), cert denied, 534 U.S. 1057 (2001). This case was distinguished by Judge Wolf in his ruling from *United States v. Harris*, 397 F.3d 404 (2005). Judge Wolf stated, *Sandoval* did not consider all the factors that this Court did in *Castillo*, which *Harris* did when considering the §924(c)(1) issue. See Pet. App. C at 16a. The reading of *Sandoval* and the search of records do not illustrate, that any words were used in the indictment describing the semiautomatic assault weapon that Sandoval used or carried. However, the Circuit Court agreed with the other circuits, stating that instead of being an element of a separate offense, the weapon characteristics was a sentencing factor and can be decided by the preponderance of the evidence by a judge.

The next case petitioner cites is *United States v. Gamboa*, 439 F.3d 796 (8th Cir.) , cert denied, 549 U.S. 1042 (2006). In *Gamboa* it is important to note that the defendant was charged in the overt acts with use and carry, in addition to possession, of having specific weapons, which pertained to counts four and five in the indictment. See *Gamboa* at 809-810. Gamboa's Fifth and Sixth Amendment Rights were not violated.

The next case petitioner cites, is *United States v. Avery*, 295 F.3d 1158 (10th Cir.), cert denied, 537 U.S. 1024 (2002). Avery was charged with numerous counts of

§924(c)(1) violations, with each count listing specific firearms. Although, Avery was not charged pursuant to §924(c)(1)(B)(i), the indictment in Count Six read, "Mr. Avery with knowingly possessing a 'Colt AR 15 .223 Caliber…during and in relation to a drug trafficking crime,'…". There was no mention in the indictment or an instruction to a jury that the AR 15 was a semiautomatic assault weapon. However, the *Avery* Court determined that as long as the AR 15 was mentioned in Count Six it was enough notice to Avery, because 18 U.S.C. §921(a)(30) listed the AR 15 as a semiautomatic assault weapon. Avery's Fifth and Sixth Amendment Rights were not violated. See *Avery* at 1172.

The next case petitioner points out is *United States v. Ciszkowski*, 492 F.3d 1264 (11th Cir. 2007). Ciszkowski's claim was that the government violated his Six Amendment due process claim, in that the trial judge fail to give a jury instruction that he had knowledge of the silencer before finding him guilty. The indictment read in pertinent part, "Wojtek Ciszkowski, the defendant herein, did knowingly and unlawfully possess a firearm, that is a Ruger pistol, equipped with a firearm silencer, in furtherance of a crime of violence and a drug trafficking crime…". Ciszkowski was charged in the indictment with a silencer, and a jury found him guilty of having a silencer using the beyond a reasonable doubt standard. In addition, Ciszkowski was convicted of the drug violation pursuant 21 U.S.C. 841(a)(1) and (b)(1)(C).

Ciszkowski was notified by the indictment of being charged with a silencer pursuant to 18 U.S.C. 924(c)(B)(ii), thus making the silencer in that section an element of 924(c)(1). Ciszkowski was charged and the jury convicted him using the standard

beyond a reasonable doubt under §924(c)(1)(B)(i) as he was charged. There was no Fifth or Sixth Amendment Violations.

The last case petitioner points out is *United States v. Dixon*, 273 F.3d 636, 640 n.2 (5th Cir. 2001) (dicta), cert. denied, 537 U.S. 829 (2002). Dixon was indicted and charged with carrying a short-barreled shotgun under the 1988 version of 18 U.S.C. §924(c)(1), now 18 U.S.C. §924(c)(1)(B)(i). This case supports the respondent's argument that the government traditionally treated the weapons mentioned in §924(c)(1)(B)(i) as elements of §924(c)(1). *Dixon* at 637.

The Courts of Appeals decisions cited do not provide a basis for the petitioner's argument that there is an existing conflict.

THE COBRAY CM-11 Ser. #94-00114612
IS IN CONTROVERSY THAT IT IS A MACHINEGUN

The petitioner states in its last sentence, "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.", Pet. Brief at p. 20.

Nothing could be the further from the truth and the respondent would challenge that the weapon fired fully automatic in the automatic mode.

Since the date when the respondent received the FBI Examiner's report, stating that the Cobray (K1) in question "functions on the automatic mode only. Accordingly, the K1 pistol would be described as a 'machine gun.'", the respondent has uncontrovertibly stated to the government at District Court hearings, and in his briefs

to the First Circuit that the alleged machinegun was not a machine gun, but a semi automatic pistol.

The government, during discovery process, produced documents that established by its own records as well as other records that the Cobray pistol was manufactured by Leinad, Inc. on March 22, 1999, as a Semi-automatic pistol. Leinad, Inc. then sold the same Cobray to Southern Ohio Gun supplier International ("SOG"), of Lebbon, Ohio, on May 27, 1999 as a semi-automatic pistol. SOG then sold the Cobray to a dealer, Firepower Inc. on or about July 21, 1999, as a semi-automatic pistol. On or about October 3, 1999, the owner of the Cobray, of Lumberton, NC, purchased the semi-automatic Cobray pistol from Firepower Inc.

On June 15, 2006 the purchaser reported that the semi-automatic Cobray pistol was stolen either in the later part of 2002 or the early part of 2003, and he reported the theft to the Lumberton police department. He stated when it was stolen the Cobray was a semiautomatic weapon.

On June 16, 2005, the FBI searched the residence of a co-conspirator and found the semi-automatic Cobray pistol in his apartment. Shortly after the search that co-conspirator became an informant. On March 2, 2007, the informant was interviewed, by FBI agents. Part of that interview pertained to the semi-automatic Cobray. The co-conpirator was asked if he was aware that the MAC 11 (Cobray pistol) functioned fully automatic. He answered that he "…was not aware that the MAC 11 functioned fully automatic or as a machinegun.".

On February 23, 2007, another co-conspirator, also an informant, was also interviewed by FBI agents. Part of that interview pertained to the semi-automatic

Cobray. That co-conspirator was asked if he was aware that the MAC 11 (Cobray pistol) was fully automatic. He answered "…that he was not aware if the MAC 11 pistol was fully automatic.". He was also asked if the defendants were aware the Mac 11 pistol was fully automatic. He answered, "…he was not aware if ... [defendants] knew if the Mac 11 pistol was fully automatic.".

In the FBI Examiner' notes of the Firearm/Toolmark Unit of the FBI Laboratory, the examiner noted in his report and bench notes that the Cobray "functions on automatic mode only 'machinegun'". Neither his notes nor his report reflect that the Cobray fired fully automatic. However, in the FBI Examiner's second report, dated December 1, 2005 he states, "…when test-fired, operated only in automatic mode and thus meets the definition of a "machinegun,…".

The FBI Examiner never mentioned that there was any evidence that the Cobray was modified prior to him test firing it or that it fired *fully* automatic. Emphasis Supplied. In addition respondent would likely provide a firearm expert who would dispute all the issues including the fact that the Cobray operated as a fully automatic machinegun in the automatic mode.

CONCLUSION

The petition for writ of certiorari should be denied for all of the above reasons.

Respectfully submitted,

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August 24, 2009