No. 08-1569

IN THE

SUPREME COURT OF THE UNITED 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

BRIEF ON BEHALF OF ARTHUR BURGESS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Castillo v. United States*, 530 U.S. 466 (2000), this Court unanimously held that under a previous version of 18 U.S.C. §924(c) the type of firearm was an offense element that had to be proven beyond a reasonable doubt to a jury. The question presented is whether the 1998 amendments, enacted to address this Court's ruling in *Bailey v. United States*, 516 U.S. 137 (1995), changed the status of firearm type from an element to a sentencing factor, allowing judges to find facts that would increase the mandatory minimum consecutive sentence from five years to thirty years.

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STATEMENT

Arthur Burgess and three others were charged by indictment with, inter alia, Hobbs Act violations, 18 U.S.C. §1951, and using, carrying, or possessing firearms during and in furtherance of a crime of violence, 18 U.S.C. §924(c). Doc. 9, at 1-8. (indictment).[1] The charges arose from a failed attempt to rob an armored car in Boston's North End in broad daylight. Three firearms were involved: an AK-47, a Sig-Sauer, and a Cobray pistol that the government claims functioned in fully automatic mode.[2] G. C.A. S. App. 9, 53.

Six weeks before the trial date, the government obtained a superseding indictment to add a second §924(c) count (Count IV) that alleged the Cobray pistol was a machinegun. *See* 18 U.S.C. §924(c)(1)(B)(ii).[3] The Cobray

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[1] Portions of the pleadings filed in the trial court are cited as "Doc.," with reference to their places on the trial court's docket. Citations to the government's original Appendix filed in the First Circuit in this matter are cited as "G. C.A. App." Citations to the government's Supplemental Appendix filed in the First Circuit are cited as "G. C.A. S. App."

[2] The petition cites to two paragraphs in the presentence report. Both citations say that ". . . the Cobray. . . functioned in fully automatic mode." Pet. 7. The presentence report says: "The Cobray . . ., although originally manufactured to fire in semi-automatic mode, in fact fired fully automatically *when test-fired at the FBI Laboratory*." G. C.A. S. App. 9, 53 (emphasis added).

[3] The term "machinegun" is defined for purposes of §924(c)(1)(B)(ii) as "any weapon which shoots . . . automatically more than one shot, without manual reloading, by a single function of the trigger. 18 U.S.C. §921(23); 26 U.S.C. §5845(b). This definition does not include firearms that fire in semiautomatic mode, as they (cont'd)

also remained listed in Count III as one of the three §924(c) firearms.

The defendants moved to strike the Cobray from the list of guns alleged in Count III. Doc. 189. The government responded that it would move to dismiss Count IV regardless of the court's ruling on the defendants' motion. If the court agreed with the government that the type of firearm was a sentencing factor, then Count IV was unnecessary. Doc. 204, at 3-5. If the court agreed with the defendants that the type of firearm was an offense element, then Count IV was not viable because the government conceded that it could not prove that the defendants knew the Cobray was a machinegun. *Id.* The government's memorandum stated that it would request authority from the Solicitor General to seek interlocutory review in the event of an adverse ruling. *Id.* A week later, the government filed a supplemental memorandum stating that it would not seek interlocutory review. Doc. 221, at 1-2.

On the trial date, the district court announced its ruling that the type of firearm is an offense element.

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automatically chamber additional rounds, but require additional pulls of the trigger to fire. *United States v. O'Brien*, 542 F.3d 921, 922 n.1. (1st Cir. 2008).

G. C.A. App. 142. The court dismissed Count IV upon the government's motion. G. C.A. App. 143. The defendants then changed their pleas to guilty. G. C.A. App. 145. During the plea colloquy, the defendants acknowledged their understanding that the mandatory minimum sentence on the §924(c) count was seven years, as a firearm was brandished. G. C.A. App. 153-155. They made no admission regarding the nature of the firearms beyond that they were real firearms as described in the indictment. G. C.A. App. 177, 179-180.

The government did not seek interlocutory review of the district court's ruling that firearm type was an offense element. Its objections to the presentence report included an objection to that ruling, but it did not ask the court to sentence the defendants to the mandatory minimum term set forth in 18 U.S.C. §924(c)(1)(B)(ii). G. C.A. S. App. 84. The government recommended that Mr. Burgess and Mr. O'Brien each receive a twelve-year sentence on the §924(c) count, to run consecutively to the sentences on the other counts. G. C.A. App. 209:6-21.

At sentencing, the government did not ask the district court to find that the Cobray was a machinegun. Instead, it suggested that the Cobray was a machinegun in support of its request for an upward departure, stating "there's nothing on [the Cobray] that says, 'I am a machinegun' or

'I fire in automatic mode,' but the fact of the matter is that it does." G. C.A. App. 216:19-21. The sentencing court made no finding as to whether the Cobray fired in fully automatic mode at the time of the offense. G. C.A. App. 51-53, 55-56.

REASONS FOR DENYING THE PETITION

The government's petition is based on a false premise: that the question presented "frequently results in widely varying sentences." Pet. 18. In fact, there is no evidence that the circuit split has had any significant impact on conviction or sentencing outcomes since its inception in 2005. Any claimed sentencing disparity would arise not from the question presented by the government, but instead from a separate issue that the government concedes is not raised here: whether the government must prove the defendant's knowledge of the firearm's characteristics. This case is not the appropriate one by which to resolve the circuit split as no factfinder ever determined that the Cobray pistol was a machinegun at the time of the offense under any standard of proof. In fact, the government never asked the district court to make such a finding. A case in which the petitioner did not request the relief to which it now claims entitlement in this Court is not one in which certiorari should be granted.

The court of appeals correctly decided this case, consistent with the framework established by this Court for finding Congressional intent in the language, structure, and content of criminal statutes. *Jones v. United States*, 526 U.S. 227 (1999); *Castillo v. United States*, 530 U.S. 120 (2000); *Harris v. United States*, 536 U.S. 545 (2002). In light of the court of appeals' adeherence to this Court's precedents, certiorari is unwarranted.

The doctrine of constitutional avoidance provides further support for the First Circuit's resolution of this case. A grant of certiorari in this case would require this Court to confront the question whether, where reasonableness review limits the lawfulness of sentences at the high end, judicial factfinding as to the type of firearm violates the Sixth Amendment because it increases the sentence sixfold over the mandatory minimum and over the guidelines maximum authorized by the jury's verdict or defendant's plea. *See Cunningham v. California*, 127 S.Ct. 856, 875 (2007)(Alito, dissenting); *Rita v. United States*, 127 S. Ct. 2456, 2477 (2007)(Scalia, concurring).

A. The circuit split over whether firearm type is an offense element or a sentencing factor is not one of significant importance to the administration of federal criminal justice because it has had no practical effect on sentences imposed under 18 U.S.C. §924(c)(1)(B)(ii).

1. The circuit split is neither new nor important.

The circuit split has existed since February 8, 2005, when the Sixth Circuit held in *United States v. Harris*, 397 F.3d 404 (6th Cir. 2005) (hereafter "*Harris 6th*") that machinegun as used in 18 U.S.C. §924(c)(1)(B)(ii) is an offense element. The government did not seek certiorari in that case even though three circuit courts of appeals had held by then that firearm type was a sentencing factor under §924(c)(1)(B). *United States v. Sandoval*, 241 F.3d 549 (7th Cir. 2001); *United States v. Harrison*, 272 F.3d 220 (4th Cir. 2001); *United States v. Avery*, 295 F.3d 1158 (10th Cir. 2002). Since *Harris 6th*, three more circuit courts of appeals have held that firearm type is a sentencing factor. *United States v. Cassell*, 530 F.3d 1009, 1017 (D.C. 2008), *cert. denied*, 129 S.Ct. 1038 (2009); *United States v. Ciszkowski*, 492 F.3d 1264 (11th Cir. 2007); *United States v. Gamboa*, 439 F.3d 796 (8th Cir.), *cert. denied*, 549 U.S. 1042 (2006).

Around the country, both before and after *Harris 6th*, the government obtained pleas and verdicts in district

courts, including admissions and findings on the question of firearm type. *United States v. Cruz*, 352 F.3d 499 (1st Cir. 2003) (affirming jury verdict specifying machinegun under §924(c)(1)(B)(ii)); *United States v. Sahlin*, 399 F.3d 27 (1st Cir. 2005) (rejecting challenge under *United States v. Booker*, 543 U.S. 220 (2004), to enhanced sentence where defendant's plea included admission to enhancing facts under §924(c)(1)(B)(i)). During the post-*Harris 6th* period, the government has continued to obtain guilty verdicts in §924(c)(1)(B)(ii) cases where firearm type was treated as an element and decided by the jury, even in circuits that have not specifically addressed the issue. *See, e.g., United States v. Chavez*, 549 F3d 119 (2d Cir. 2008) (affirming conviction and sentence for firearm equipped with silencer); *United States v. Walters*, 490 F.3d 371 (5th Cir. 2007) (vacating variant consecutive sentence of sixty years in destructive device case); *United States v. Charles*, 469 F.3d 402 (5th Cir. 2006) (affirming jury verdict for firearm equipped with a silencer). The government offers nothing to suggest that because of the circuit split over element versus sentencing factor, it will not continue to obtain such admissions, jury verdicts, and sentences in appropriate cases where the evidence warrants them.

2. The government's claim that review is needed is based on a false premise and on an issue outside the scope of its question presented.

The government offers two unsupported reasons why this Court should resolve the circuit split: (1) that *O'Brien* brought an end to the prospect that the Sixth Circuit might reverse its jurisprudence and join the majority circuits, Pet. 12-13, and (2) that the government *may* have difficulty proving a defendant's knowledge of a firearm's characteristics where firearm type is treated as an element, leading to allegedly frequent sentencing disparities, Pet. 19.

In support of the first point, the government cites *United States v. Thompson*, 515 F.3d 556 (6th Cir. 2008), which held that the discharge of a firearm was a sentencing factor under §924(c)(1)(A)(iii). Pet. 12 n.3. In *Thompson*, the Sixth Circuit observed that *Booker* did not overrule this Court's decision in *Harris v. United States*, 536 U.S. 545 (2002) (hereafter *Harris SCt*). The government interprets this as a move away from *Harris 6th*. *Id.* This argument misreads *Harris 6th* and ignores earlier Sixth Circuit decisions.[4] The Sixth Circuit took the view before *Harris 6th*, in *Harris 6th*, and after *Harris 6th* that the

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[4] Three earlier decisions also recognizing the impact of *Harris SCt* are cited in *Thompson*: *United States v. Gonzalez*, 501 F.3d 630 (6th Cir. 2007); *United States v. Bowen*, 194 F. App'x 393, 404 (6th Cir. 2006); *United States v. Wade*, 318 F.3d 698 (6th Cir. 2003).

Sixth Amendment principles at the heart of *Apprendi* and *Booker* were not inconsistent with this Court's decision in *Harris SCt*. Its statements in *Thompson* are not new and do not indicate a turn away from *Harris 6th*.

The government's second claim, that the circuit split "frequently results in widely varying sentences," Pet. 19, is wholly unsupported. This argument suggests the existence of a large number of cases in which the question presented will determine whether or not defendants are subject to the mandatory minimum thirty year sentence. In contrast, the supporting facts consist of but one example of an allegedly disparate sentence: this case. It has been over four years since *Harris 6th*, and yet the government offers nothing to suggest that the conviction or sentencing rates are different in the district courts of the Sixth Circuit than they are in the district courts of any other circuits. Further, not only is the government's claim unsupported, the relevant data shows that it is incorrect.

Data supplied by the Administrative Office of the United States Courts ("AOUSC") suggests that cases involving machineguns comprise only a tiny fraction of the total cases prosecuted under §924(c).[5] For example, of the

[5] The statistics do not separate convictions or sentences by subsection, but they do track the number of sentences in categories of years, including five, ten, fifteen, twenty, twenty-five and (cont'd)

2,252 cases sentenced under §924(c) throughout the country between September 30, 2007 and September 30, 2008, there were only ten, a scant .4%, in which the defendant received a thirty-year sentence.[6] During that same period, life sentences were imposed in just eighteen, or a mere .8%. In other words, of 2,252 cases, only twenty eight, or 1.2%, involved sentences of thirty years or more. Thus, even with six circuits holding that firearm type is a sentencing factor, sentences enhanced under §924(c)(1)(B)(ii) accounted for less than 1.5% of §924(c) sentences.

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thirty years and life, and some categories in between. The thirty year and life sentences correspond to the mandatory minimum sentences required under §924(c)(1)(B)(ii) and §924(c)(1)(C)(ii)(second and subsequent offense) where the firearm is a machinegun, destructive device, or firearm equipped with a muffler or silencer. Not every thirty year or life sentence necessarily indicates the involvement of a machinegun, as these sentences could be based on other factors. For example, the mandatory minimum sentence for a second §924(c) offense is twenty-five years. §924(c)(1)(C)(1). A thirty year sentence could be imposed in such a case with an upward departure or variance. However, because these are mandatory minimum sentences, the absence of a thirty year or life sentence must mean the absence of a finding that the firearm was a machinegun. In the courts of those circuits where firearm type is held to be a sentencing factor, the number of thirty year and life sentences imposed establishes the greatest number of cases in which the government proved to a sentencing court that the firearm was a machinegun. A comparison with the sentences in the courts of the other circuits does not suggest any measurable disparity. Moreover, a comparison of sentences imposed under §924(c) in Sixth Circuit courts before and after *Harris 6th* shows no significant change in the number or percentage of thirty year and life sentences.

[6] With the majority of circuit courts of appeals holding that the type of firearm is a sentencing factor, the thirty year and life sentences imposed in the district courts of those circuits define the outer limit of cases that may have involved machineguns. Stated differently, resolving the circuit split in the government's favor would not change the number of sentences enhanced under §924(c)(1)(B)(ii) in those courts. There were no thirty year sentences imposed during this recent period in the courts of the D.C.; Second, Sixth, Seventh, Tenth, and Eleventh Circuits. Four of these circuits treat machinegun as a sentencing factor. The Second Circuit has not yet ruled on the issue, and the Sixth Circuit treats it as an element.

Within the subset of cases in which thirty year and life sentences were imposed is an even smaller subset of cases in which the government asserts that it may have difficulty proving that the firearm was a machinegun and that the defendant knew its character. The potential effect of the issue raised by the government's petition is limited to this insignificant, unquantified sub-subset. These cases, if they exist, do not include at least three classes of cases from among the total number of thirty year and life sentences imposed under the statute.

First, some cases involve not machineguns, but "destructive devices" and firearms equipped with mufflers or silencers. *See United States v. Freed*, 401 U.S. 601, 609 (1971) (cited at Pet. 18). It seems unlikely that the government would have difficulty proving knowledge of the characteristics of a hand grenade. Second, there are cases in which the firearm is a machinegun, but there is no problem of proof, either because of the nature of the particular firearm or because of available witness testimony. Third, as explained in note 5 *supra*, some of the thirty year or life sentences may have resulted from facts unrelated to firearm type. The government asks this Court to grant certiorari to address an issue whose possible effect is limited to this unquantified,

undescribed, smaller sub-subset of an already tiny percentage of §924(c) cases.

The limited number of cases affected by the classification of the firearm type as either an offense element or a sentencing factor is further illustrated by AOUSC statistics for the fiscal years beginning in 2003-2004 and continuing through 2006-2007. Those statistics, like those for 2007-2008, suggest that machineguns are involved in only a minuscule percentage of §924(c) cases. *See* App. A, App. B. Examining those statistics in connection with the government's claim that the distinction between classifying a machinegun as an offense element or a sentencing factor will result in frequent sentencing disparity strongly suggests that the claim is unsupported. A circuit-by-circuit comparison of sentences imposed under §924(c) does not support the government's claim of a frequent sentencing disparity. See App. A 1-3. Notably, the number and percentage of thirty year and life sentences imposed in the district courts of the Sixth Circuit was not significantly different after *Harris 6th* than before it. Nor were those numbers or percentages significantly different from those in the district courts of the other circuits.

This Court should deny certiorari because the circuit split on the question presented is not significant. The government offers nothing to support its claims of importance and frequent sentencing disparity. In contrast, the available sentencing data suggests that the split has had no impact on case outcomes across the country. Thus, it is not clear that the issue affects any cases other than this one. And as argued next, even the effect on this case is not established.

B. This case is an inappropriate vehicle for resolving the circuit split because neither the judge or a jury was asked to make a finding as to whether the firearm was a machinegun, and consequently, reversal would not end the controversy in this case.

This case is an inappropriate vehicle for resolving the circuit split, and certiorari should be denied for that reason. The government's own strategic choices at the trial level insured that the question of firearm type would not be decided by any factfinder in this case. Thus, no such finding was made.

In anticipation of trial, the government stated its reason for adding the §924(c)(1)(B)(ii) count as follows:

> in order to protect any conviction obtained for using/carrying/possessing a machinegun from appellate reversal in the event that either the First Circuit or the Supreme Court later determines that the type of firearm is an element of a §924(c) crime and must be

pled in the indictment and found by the jury beyond a reasonable doubt.

Doc. 173, at 11. On the day the trial was to begin, the government forfeited its chance to obtain a conviction protected from appellate reversal by moving to dismiss the §924(c)(1)(B)(ii) count and foregoing a request for interlocutory review of the court's ruling that firearm type is an offense element. With the prospect of a thirty year mandatory minimum consecutive sentence removed, all three defendants waived their trial rights and changed their pleas to guilty. In the course of the plea colloquies, the trial court advised the defendants that the mandatory minimum sentence to which they were exposed under §924(c) was seven years, consecutive to the sentences on the other counts. G. C.A. App. 153:22-25. The court did not advise the defendants that the mandatory minimum would increase from seven years to thirty years in the event of appellate reversal. G. C.A. App. 154-156.

At sentencing, the government did not ask the court to impose a thirty-year mandatory minimum consecutive sentence, nor did it request a factual finding that the Cobray was a machinegun.[7] G. C.A. S. App. 84. The

[7] The government objected to the trial court's ruling in its written objections to the presentence report. At the sentencing hearing, the court overruled the objection and offered the government an opportunity to address the point further. The government remained silent, (cont'd)

government recommended that Mr. Burgess and Mr. O'Brien each receive a twelve-year sentence on the §924(c) count, to run consecutively to the sentences on the remaining counts. G. C.A. App. 209. The court made no finding as to whether the Cobray was a machinegun. G. C.A. App. 51-53, 55-56.

The government now asks this Court to grant certiorari and decide whether firearm type is an element or a sentencing factor, using a case in which neither judge nor jury has made such a finding under any standard of proof. Because no finding was made in the district court, a ruling by this Court would not end the controversy in this case. Should this Court reverse the court of appeals, the defendants would have viable motions to vacate their guilty pleas.[8] As a separate matter, if the defendants were resentenced, they would challenge the government's claim

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G. C.A. App. 192, and did not request a mandatory minimum thirty year sentence in the course of the hearing. It argued that the Cobray was not obviously a machinegun, but that it did function in fully automatic mode. It did not, however, make a request for a factual finding that the Cobray was a machinegun or for the imposition of a thirty year sentence.

[8] Failure to accurately advise defendants of the applicable mandatory minimum sentence has led appellate courts to vacate guilty pleas. *United States v. Hairston*, 522 F.3d 336 (4th Cir. 2008) (vacating plea where defendant was advised of thirty year mandatory minimum but was later determined to be an armed career criminal, increasing the mandatory minimum to forty-five years); *United States v. Benz*, 472 F.3d 657 (9th Cir. 2006) (reversing plea under plain error standard where court failed to inform defendant of ten day mandatory minimum).

that the Cobray was a machinegun at the resentencing hearing.

Certiorari is inappropriate in this case because the mens rea question was not raised below and is not contained in the question presented here. As the government acknowledges, the decision to dismiss Count IV was based on its own assumption that if firearm type is an element, then the defendants' knowledge of the firearm's characteristics must be proven beyond a reasonable doubt. Pet. 8 n.2. While conceding that the knowledge issue is not raised here *id.*, the government nevertheless relies heavily on the alleged possible difficulty of proving knowledge in support of its request for certiorari, Pet. 18-19. In prosecutions for the possession of an unregistered machinegun under 26 U.S.C. §5681, the government must always prove beyond a reasonable doubt that the defendant knew the firearm was a machinegun. *Staples v. United States*, 511 U.S. 600 (1994). There is no reason to believe that meeting that burden would be more difficult in a §924(c) case than in one brought under §5681. Finally, the knowledge argument the government now advances is outside the scope of the question it presented to the Court. Because the claimed practical effects of the First Circuit's ruling are not supported by any evidence and, if they exist, result from

an issue not raised below or addressed in the opinion, this case does not provide a good vehicle with which to resolve the circuit split.

In sum, because of the lack of a finding that the Cobray was a machinegun; because of the fact that a reversal by this Court would not conclusively decide the outcome in this case; and because the heart of the government's complaint is the knowledge issue, which is not presented in its petition and which it concedes is not before the Court, this case is an inappropriate vehicle for resolving the circuit split.

C. The court of appeals decided this case correctly, consistent with the analytical framework established by this Court.

The decision below was correct. Its conclusion is consistent with the analytical framework established by this Court in *Jones, Castillo*, and *Harris* for determining whether statutory language describes an offense element or a sentencing factor. In all three cases, language and structure were starting points for the Court's analysis, but because they were not conclusive, other factors determined the outcome.

The First Circuit noted, as did this Court in *Jones* and *Castillo*, that on a first glance, the statutory provision at issue appears to describe a sentencing factor.

The court of appeals noted the use of sub-paragraphs in the amended version of §924(c), in contrast to the run-on sentence of the prior version analyzed in *Castillo*. The court offered an explanation of the sub-paragraphs unrelated to the element versus sentencing factor controversy: "the current trend - probably for ease of reading - to convert lengthy sentences into subsections in the fashion of the tax code." *O'Brien*, 542 F.3d at 926. Comparing the two versions of the statute, the court concluded that the language used in the earlier version was "only slightly less favorable to the defendants than the current version but not markedly so." *Id.* at 925. While acknowledging the linguistic and structural aspects of the statute that might support an argument that firearm type is a sentencing factor, the court of appeals did not view them as conclusive.

A similar dash and subparagraph structure was present in the carjacking statute construed in *Jones*, but this Court held that "serious bodily injury," contained in one of the subsections, was an offense element.[9] Holding

[9] In addition to the carjacking statute analyzed in *Jones*, which had these same structural characteristics, which this Court viewed as indicia of sentencing factors, other statutes with similar structures have been held to contain elements in the subparagraphs. *See, e.g.*, 18 U.S.C. §111, held to create three separate crimes: (a) simple assaults involving no touching, (b) "all others," but without bodily injury or weapons, and (c) assaults involving bodily injury or weapons. (cont'd)

firearm type to be an element even with the dash and subparagraph structure does not contradict *Castillo*. Even in *Harris*, where this Court ultimately held that the brandishing provision of §924(c)(1)(A)(ii) was a sentencing factor, that conclusion was not reached based on language and structure alone; the substance of the provision was what mattered most.[10]

In this case, construing §924(c)(1)(B)(ii), the First Circuit considered the other key issues apart from language and structure, that informed this Court's statutory construction in rulings in *Jones*, *Castillo*, and *Harris*. Two factors determined the outcome in those three cases: the character and traditional treatment of the fact at issue, and its impact on sentencing. These critical components of this Court's analysis were in large part unchanged by Congress'amendment of §924(c) in 1998.

United States v. Nunez, 180 F.3d 227 (5th Cir. 1999); *United States v. Chestaro*, 197 F.3d 600 (2d Cir. 1999).

[10] The fact that other subparagraphs of §924(c)(1) have been held to contain sentencing factors does not require that the firearm type provisions of §924(c)(1)(B) also be treated as sentencing factors. *Cf. Watson v. United States*, 128 S.Ct. 579 (2007)(neighboring provision does not assist in statutory interpretation). The government, somewhat misleadingly, suggests the existence of a unanimous view that §924(c)(1)(C)(ii) (recidivism and firearm type combined) defines a sentencing factor. Pet. 16 n.5. In fact, only one of the published opinions cited in note 5 considered §924(c)(1)(C)(ii). *United States v. Cristobal*, 293 F.3d 134, (4th Cir.), *cert. denied* 567 U.S. 963 (2002). The others analyzed §924(c)(1)(C)(i), which addresses only recidivism.

The *Castillo* Court noted that there was no tradition of treating firearm type as a sentencing factor in the context of "use and carry" offenses. *Castillo*, 530 U.S. at 126. It further observed that

> the difference between carrying, say, a pistol and carrying a machinegun (or, to mention another factor in the same statutory sentence, a "destructive device," i.e., a bomb) is great, both in degree and kind. And, more importantly, that difference concerns the nature of the element lying closest to the heart of the crime at issue.

Id. at 126-27. The 1998 amendments and subsequent developments in no way undercut these observations.[11] Indeed, in *Harris SCt*, this same issue of character and traditional treatment was also pivotal, but it supported a different conclusion there because brandishing was viewed as a "paradigmatic sentencing factor." *Harris, supra* at 553 (*citing, Castillo, supra* at 126).[12]

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[11] The courts of appeals that have held firearm type to be a sentencing factor have, for the most part, failed to consider the traditional treatment factor. The two circuit court opinions to expressly acknowledge it concede that the analysis "cut[s] against the sentencing-factor interpretation," *United States v. Cassell*, 530 F.3d 1009, 1017 (D.C. Cir. 2008); and that it remains unchanged by the 1998 amendments, *United States v. Harrison*, 272 F.3d 220, 227 (4th Cir. 2001)(Motz, concurring)("this part of *Castillo's* analysis applies equally to the revised §924(c), which requires a significantly higher minimum penalty for use of a machine gun than for use of other firearms --- thirty years instead of five.").

[12] In *Harris SCt*, this Court construed the brandishing provision of §924(c)(1)(A)(ii), a different subsection of the same version of the statute at issue here. After recognizing that language and structure were not conclusive, this Court addressed the other factors analyzed in *Castillo* and *Jones*. In *Dean v. United States*, 129 S.Ct. 1849 (2009) the Court considered whether §924(c)(1)(A)(iii) requires proof of intent. The issue there was not element versus sentencing factor, and (cont'd)

The impact of firearm type on sentencing in the amended §924(c) is more than twice as great as that considered in *Jones*. The steep increase in the penalty, a twenty-five year, six-fold increase where the firearm is a machinegun, remains in the amended statute with one change: the determinate sentences of §924(c) became mandatory minimums in the amended statute.[13] The lengths of the mandatory minimums, and the applicable sentencing guidelines ranges, are identical to the lengths of the previously determinate sentences. Thus, the mandatory minimum and guidelines sentence under §924(c)(1)(A)(i) is five years and under §924(c)(1)(B)(ii), thirty years.

The history of the 1998 amendments reveals no legislative intent to address the issue the government seeks to raise today. The purpose of the statute's reenactment is well-known and has been recognized by this Court; it was a response to this Court's decision in

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a jury verdict encompassed the fact of the discharge. The question presented in *Dean* (mens rea) is analogous to the one *not* presented here: knowledge of firearm characteristics. The sentencing factor observations in *Dean* were based on *Harris SCt*, another §924(c)(1)(A) case. This case concerns §924(c)(1)(B), which is substantively different from §924(c)(1)(A).

[13] The two-year increase in the mandatory minimum for brandishing under §924(c)(1)(A)(ii) was characterized as no increase at all by the *Harris SCt* plurality. The contrary view, eloquently observed in the dissent, has even more force when the increase is twenty-five years. *Harris S.Ct.* (2002) 536 U.S. at 575-76; (Thomas dissenting). See also *Dean*, 129 S.Ct. 1849 (2009) (Stevens, dissenting).

Bailey. *Watson*, 128 S.Ct. at 582 n.3. There was no debate or discussion about transforming firearm type, then an offense element, into a sentencing factor. The lack of express legislative intent on this issue supports the conclusion that firearm type remains an offense element after the 1998 amendments. The rule of lenity, noted in *Castillo* in further support of its conclusion, is applicable here as well, perhaps even more so.[14]

The doctrine of constitutional avoidance provides further support for the First Circuit's decision. The Sixth Amendment concerns that informed *Harris 6th* are amplified in the current sentencing regime where appellate reasonableness review establishes the outer limits of lawful sentencing. As Justice Scalia explained in his concurring opinion in *Rita*: "[U]nder [the post-Booker federal sentencing] system, for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant." *Rita*, 127 S. Ct. 2456, 2477 (2007) (Scalia, J., concurring in part and concurring in the judgment); *Cunningham v. California*, 127 S.Ct. 856, 875 (Alito, dissenting). The Sixth Amendment prohibits the

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[14] The use of mandatory minimums provides a uniquely compelling reason for the application of the rule of lenity *Dean*, *supra* 129 S.Ct. at 1860 (Breyer dissenting)(comparing results of errors of inclusion with errors of exclusion.

justification of a sentence higher than this maximum based solely on judicial findings of fact other than a prior conviction.

This case illustrates in real, non-hypothetical terms, the problem described in Justice Scalia's *Rita* concurrence. The applicable mandatory minimum and guideline range in this case based upon the defendants' pleas and admissions of fact at sentencing was seven years for brandishing a firearm. 18 U.S.C. 924(c)(1)(A)(ii); U.S.S.G 2K2.4(b). The government sought an upward departure to a twelve-year sentence, which was denied as to Mr. Burgess. Had the district court sentenced Mr. Burgess to serve thirty years, consecutive to his other sentences, it would mean a twenty-three year variance, an increase more than four-fold, from the statute's mandatory minimum and also from the guideline range. On reasonableness review, such a variance would be impossible to justify without resort to judicial factfinding beyond the admissions made at the plea.

As Justice Scalia noted:

> [T]here is a fundamental difference, one underpinning our entire *Apprendi* jurisprudence, between facts that must be found in order for a sentence to be lawful, and facts that individual judges choose to make relevant to the exercise of their discretion. The former, but not the latter, must be found by the jury

> beyond a reasonable doubt in order 'to give intelligible content to the right of jury trial.'

Rita, 127 S.Ct. at 2477.

For the reasons contained within its opinion and also for reasons on which it did not rely, the First Circuit correctly decided that firearm type is an offense element.

CONCLUSION

Because the question presented has had no demonstrable impact on case outcomes, because this case is an inappropriate vehicle for resolving the circuit split, and because the court of appeals' decision was correct, this Court should deny certiorari.

Respectfully submitted,

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