No. 08-1569

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN O'BRIEN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF FOR RESPONDENT O'BRIEN

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

Timothy P. O'Connell
Counsel of Record
C-8 Shipway Place
Charlestown, MA 02129
(617) 242-4806

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

BRIEF FOR RESPONDENT O'BRIEN

Respondent Martin O'Brien respectfully requests that this Court affirm the judgment of the United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

Section 924(c)(1) of Title 18 of the United States Code establishes punishments for people who use firearms in relation to crimes of violence. One provision of that statute punishes machinegun usage particularly harshly. In *Castillo v. United States*, 530 U.S. 120 (2000), this Court held that the machinegun provision, as set forth in a previous version of the statute, constituted an element of a criminal offense – in other words, that it created a greater offense under the statute than possession of an ordinary firearm in relation to a crime of violence. The Government now argues that amendments Congress made to Section 924(c)(1) in response to a different and unrelated decision from this Court transformed the machinegun provision from an element into a sentencing factor, and thereby also relieved the Government of any statutory obligation to prove that the defendant *knew* the firearm he possessed was a machinegun. The First Circuit rejected this argument, holding that the amendments' treatment of the machinegun provision merely restructured its placement within the statutory scheme without changing its meaning or operation.

1. In 2005, Respondent Martin O'Brien and three others – Respondent Arthur Burgess, Dennis Quirk, and Patrick Lacey – set out to rob an armored car outside of a bank in Boston, Massachusetts. O'Brien,

Burgess, and Quirk arrived on the scene in a minivan. Each possessed a firearm. Upon arriving at the scene, the three men emerged from the minivan and told the security guards who were guarding the car to get on the ground. When one of the guards fled, the men promptly abandoned the attempted robbery. O'Brien drove Burgess and Quirk away in the minivan. No shots were fired, no money was taken, and no one was injured. Gvt. C.A. App. 176-179.

Later that day, law enforcement officers arrested Quirk outside of a train station and executed a search warrant at an apartment leased by a co-conspirator, Jason Owens. Inside, the officers found three firearms that had been used in the crime: an AK-47 semiautomatic rifle, a Sig Sauer pistol, and a Cobray pistol. O'Brien and the others were arrested several days later.

All three firearms that law enforcement recovered were manufactured as semiautomatic weapons. The Cobray, in particular, does not have any "automatic mode" on the selector switch. Nor does it have any other visible indication that its operation has been altered. *See* Gvt. C.A. App. 196, 216. But after the FBI test-fired the Cobray (using its own ammunition), it issued a report claiming that the gun operated in the fully automatic mode that characterizes a machinegun – a claim that O'Brien vigorously disputes. *Compare* BIO 23 *with* U.S. Br. 6. But even if the Cobray was somehow, at some point, transformed from a semi-automatic weapon into a machinegun, there is no evidence that either O'Brien or any of the other defendants believed that the pistol constituted a machinegun. *See* BIO 23-25.

In fact, the two members of the conspiracy whom the Government interviewed both said that none of the participants had any idea whether the Cobray had been modified.

2. The Government charged O'Brien and Burgess with committing three crimes, including – as is relevant here – using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1).[1] Subsection (A) of that statute provides that a defendant who uses a "firearm" during a crime of violence shall be punished by not less than five years in prison. Subsection (B) provides that "[i]f the firearm possessed by a person convicted of a violation of this subsection . . . is a machinegun . . . , the person shall be sentenced to a term of imprisonment not less than 30 years."

The Government charged O'Brien and Burgess with violating Section 924(c) based on two alternative constructions of that statute. Count 3 charged them simply with using a "firearm" under subsection (A), under the theory that subsection (B), the machinegun provision, would be merely a sentencing factor for the judge to find and apply if respondents were convicted. Count 4 charged O'Brien and Burgess directly with using a machinegun under Subsection (B), under the theory that the machinegun provision was an element of a greater offense than Subsection (A) that needed to be charged and proven beyond a reasonable doubt to a jury. J.A. 20-21.

---

[1] The Government also charged O'Brien and Burgess with two counts of violating the Hobbs Act, 18 U.S.C. § 1951. These charges were Counts 1 and 2 in the indictment.

During motion practice concerning these alternative charges, the Government conceded that if Section 924(c)'s machinegun provision stated an element of a greater crime, as charged in Count 4, then it "would have to prove that the defendants knew it was a machine gun." J.A. 28. The Government admitted that it could not meet this burden, noting that "we will not have sufficient evidence to establish that they knew." J.A. 29; U.S. Br. 6-7. Accordingly, the Government proposed that the court dismiss Count 4. J.A. 12 n.2, 29.

At the same time, the Government continued to argue, for two "essentially combined" reasons, that if respondents were convicted on Count 3, they would still be subject to the machinegun provision's thirty-year mandatory minimum sentence. J.A. 28. First, the Government argued that the machinegun provision is properly characterized as a sentencing factor rather than an element of a greater crime. *Id.* Second, the Government asserted that because the machinegun provision is a sentencing factor, it does not have to prove knowledge. *Id.*

The district court rejected the Government's arguments and held that a firearm's status as a machinegun under subsection (B) is an element of a greater crime. Relying on this Court's decision in *United States v. Castillo*, 530 U.S. 120 (2000), which interpreted an earlier version of the machinegun provision, the district court held that the language of the statute, the history of firearm type provisions, and the severity of the resulting mandatory sentence continued to require treating the provision as an element. J.A. 39-42.

Following this ruling, the district court formally granted the Government's motion to dismiss Count 4. J.A. 42. Respondents then changed their pleas to guilty. Gvt. C.A. App. 145.

With the machinegun provision's mandatory thirty-year term off the table, the Government recommended sentencing O'Brien to twelve years in prison on his Section 924(c)(1) conviction. Gvt. C.A. App. 209. O'Brien countered by arguing that a seven-year sentence for the violation would be sufficient, in light of the fact that Section 924(c)(1)(A) requires a term of not less than seven years when the firearm was not just possessed but brandished. Gvt. C.A. App. 231-32. The district court sentenced O'Brien to eight-and-one-half years on Count 3, to run consecutively with his sentences on the other two counts, for a total sentence of fifteen years in prison. Gvt. C.A. App. 237.

3. The Government appealed the sentence for the Section 924(c)(1) violation. The First Circuit affirmed.

Using *Castillo* as its compass, the court of appeals held that the machinegun provision still constituted an element of a greater Section 924(c) offense, not a sentencing factor. The court of appeals noted that the only objective Congress announced in rewriting section 924(c) was to expand the section to cover "'mere' possession of firearms." Pet. App. 9a & n.5. The changes the 1998 amendments made to the firearm *type* provisions, as opposed to the firearm *use* provisions, were primarily structural, simply placing them in a separate subsection from other parts of the statute. The "only . . . substantive difference" in the firearm type provisions, the court of appeals

continued, was "the conversion of the numerical figures from fixed-term sentences to mandatory minimums." Pet. App. 9a-10a. But the court of appeals could find no evidence that this change was designed to turn the machinegun provision into a sentencing factor or to dispense with requiring the Government to prove the "defendant's knowledge" that the gun he allegedly used was, in fact, a machinegun. Pet. App. 8a.

"Absent a clearer or more dramatic change in language or legislative history expressing a specific intent to assign judge or jury functions," the court of appeals concluded that *Castillo* still controlled. Pet. App. 10a.

4. The Government petitioned for a writ of certiorari on the issue whether the machinegun provision states an element or a sentencing factor. O'Brien opposed certiorari on two grounds. First, O'Brien disputed the Government's assertion (Pet. 20) that reversing the First Circuit's decision would lead to O'Brien being resentenced under the machinegun provision. In this respect, O'Brien emphasized that the Government cannot prove the facts necessary to invoke the provision because the firearm at issue is not a machinegun or, at the very least, because none of the defendants "were aware" that it was. BIO 23-25. Second, O'Brien argued, on both statutory and constitutional grounds, that the First Circuit correctly held that the machinegun provision is an element of a greater offense. BIO 7-23. This Court granted the Government's petition.

SUMMARY OF ARGUMENT

In order to prevail in this case, the Government must prevail on two issues it has said are "essentially combined," J.A. 28: (1) that it need not prove under the machinegun provision in Section 924(c)(1) that a defendant *knew* that the firearm at issue was a machinegun; and (2) that the machinegun provision is a sentencing factor, not an element. The Government cannot prevail on either issue.

I. Regardless of whether the machinegun provision constitutes an element or a sentencing factor, the Government must prove that the defendant *knew* that the firearm at issue was a machinegun. Yet the Government has admitted it cannot prove knowledge here beyond a reasonable doubt, and there is no reason to believe the Government could make such a showing by a preponderance of the evidence either. Thus, this case can be resolved (or dismissed) on this ground alone, without resolving whether the machinegun provision constitutes an element or a sentencing factor.

II. As a matter of pure statutory construction, the machinegun provision constitutes an element.

A. This Court held in *Castillo v. United States*, 530 U.S. 120 (2000), that a prior version of the machinegun provision constituted an element. In order now to deem the provision a sentencing factor, this Court would have to find "a clear indication," *see, e.g.*, *Grogan v. Garner*, 498 U.S. 279, 290 (1991), that Congress intended in the 1998 amendments to the Section 924(c)(1) to change the provision's classification. Yet nothing in the text or statutory

history of the amendments evinces any such congressional intent. To the contrary, the amendments' history makes clear that Congress revised Section 924(c)(1) in order to address an entirely different decision from this Court, *Bailey v. United States*, 516 U.S. 137 (1995), which involved whether merely possessing a firearm was enough to trigger the Section's penalties.

B. Even if this Court were to re-analyze the machinegun provision from the ground up, it would still have to conclude that the provision constitutes an element. Four of the five factors that drove this Court's decision in *Castillo* remain unchanged: there is still a tradition of treating firearm type as an element; there is no risk of unfairness in putting this issue to a jury; the punishment the provision commands is still severe; and the legislative history still fails to suggest the Congress wanted the firearm provision to be treated an element. To be sure, the 1998 amendments made some alterations to the text and structure of Section 924(c)(1), which is the fifth *Castillo* factor. But those alterations were inconsequential. The text is still silent as to how the machinegun provision should be classified. And while the provision is now broken down into various subsections, that restructuring, as the Government itself put it in *Castillo*, did nothing more than "reorganize and clarify[] the statute's treatment of firearm type," U.S. Br. 41, *Castillo v. United States*, 530 U.S. 120 (2000) (No. 99-658), pursuant to a then-prevailing drafting policy (which still exists today) of revising old statutes when possible to make them more readable. This restructuring did not change the meaning or operation of the machinegun provision.

III. To any extent that statutory analysis alone is not dispositive, constitutional considerations require this Court to deem the machinegun provision an element.

A. Treating the machinegun provision as a sentencing factor would violate the doctrine of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). That doctrine provides that any fact (other than a prior conviction) that exposes a defendant to a longer sentence than he could otherwise receive must be treated as an element. The Federal Sentencing Guidelines' recommended sentence on the facts of this case, *absent the use of a machinegun*, would be a mere seven years. While that recommendation would be advisory and Section 924(c)(1)(A) would in theory allow for a prison term up to life, the Sentencing Reform Act's "reasonableness" requirement would prohibit any sentence in the range of thirty years. (Indeed, no defendant of whom we are aware has ever received a sentence even *half* that long on similar facts without machinegun usage.) Thus, the thirty-year mandatory-minimum sentence the Government seeks depends on a machinegun finding for its legality. In other words, a finding of machinegun usage would be implicate the *Apprendi* doctrine because it would require a higher sentence than O'Brien could otherwise receive. *See Rita v. United States*, 551 U.S. 338, 371 (2007) (Scalia, J., concurring in part and concurring in the judgment) (recognizing that the Sentencing Reform Act's "reasonableness" requirement will result in some facts exposing defendants to higher sentences than would otherwise be permissible); *Cunningham v.*

California, 549 U.S. 270, 310-11 (2007) (Alito, J., dissenting) (same).

Nothing about this conclusion is inconsistent with this Court's holding in *Harris v. United States*, 536 U.S. 545 (2002). As the Government itself recognizes, *Harris* held merely that the Sixth Amendment does not apply to "fact-finding that raises a minimum sentence *within an otherwise authorized range*." Pet. Reply 8-9 (emphasis added). While this holding will typically insulate facts that dictate mandatory minimum sentences from Sixth Amendment scrutiny, it cannot do so when a provision not only establishes a mandatory minimum but also requires a higher sentence than is otherwise authorized. And that is the case here: the Sentencing Reform Act's reasonableness requirement forbids a thirty-year sentence on these facts absent a machinegun finding.

B. Wholly apart from the *Apprendi* doctrine, treating the machinegun provision as an element would violate the Due Process Clause's limitations on diluting the prosecution's burden of proof. Even the dissenters from the *Apprendi* line of cases have acknowledged that if a statute gives the "impression of having been tailored to permit [a factual] finding to be a tail which wags the dog of the substantive offense," then that finding should be treated as an element. *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986); *see also Blakely v. Washington*, 542 U.S. 296, 344 (2004) (Breyer, J., dissenting). That is exactly what the Government intimates Congress did in the 1998 amendments. According to the Government, Congress took a particularly important fact that was traditionally an element and turned it into a

sentencing factor that now accounts for roughly 75% of the punishment at issue. This Court should avoid concluding that Congress intended to transgress due process principles in this manner.

ARGUMENT

Section 924(c)(1)(B)(ii) requires a prison term of not less than 30 years in prison "[i]f the firearm possessed by a person convicted of a violation of [Section 924(c)(1)] . . . is a machinegun." The Government has conceded that it cannot prove beyond a reasonable doubt that O'Brien *knew* that the Cobray pistol used in his crime was a machinegun. Nor has it ever suggested that it could prove such knowledge by a preponderance of the evidence. The Government also has renounced any ability to proceed against O'Brien if Section 924(c)(1)(B)(ii) sets forth an element of a criminal offense. U.S. Br. 33 n.10.[2]

In light of this statutory, factual, and procedural framework, the Government can obtain a sentence here under Section 924(c)(1)(B)(ii)'s machinegun provision only if it prevails on two issues. First, it must persuade this Court that no proof of knowledge is required under that provision (since it has already conceded that it cannot establish knowledge here).

---

[2] Even if the Government did not renounce any ability to proceed on the basis that the machinegun provision states an element of a greater offense, the Double Jeopardy Clause would prevent such future action, since the count charging O'Brien with such an offense was dismissed and O'Brien was then convicted of a lesser offense. *Ohio v. Johnson*, 467 U.S. 493, 501 (1984); *Morris v. Reynolds*, 264 F.3d 38 (2d Cir. 2001).

Second, it must persuade this Court that machinegun status under Section 924(c)(1)(B)(ii) is only a sentencing factor, rather than an element of a greater offense. The Government recognized below that these issues are "essentially combined." J.A. 28. Indeed, while focusing in this Court on the element/sentencing factor issue, the Government continues to raise arguments regarding the knowledge issue as well. U.S. Br. 33-34. It follows, in this Court's parlance, that each of these issues respecting how Section 924(c)(1)(B)(ii) functions is a "subsidiary question fairly included" within the other. S. Ct. Rule 14.1(a).[3]

The Government cannot prevail on either issue. Furthermore, it makes sense for this Court to address the knowledge issue before turning to the element/sentencing factor issue. The former is exclusively a question of statutory interpretation, whereas the latter may implicate constitutional

---

[3] The fact that the Government simultaneously claims that the knowledge issue is "not a question presented here" cannot take it outside of the ambit of Rule 14.1(a). *See United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007) (resolving case based on how to construe criminal statute under which defendant was charged even though "the Government expressly declined to 'seek review'" of the court of appeals' treatment of the issue). When, as here, this Court grants certiorari to decide how a provision of law works or whether it is constitutional, "there can be little doubt" that the grant "fairly includes the question of what the statute says." *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 56 (2006); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) (substantive meaning of statute at issue is "intimately bound up" with question of how it is employed).

considerations. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007) (considering substantive scope of federal criminal statute involved before constitutional issue); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (constitutional questions should be avoided unless "absolutely necessary" to decide case).

I. Section 924(c)(1)'s Machinegun Provision Cannot Apply To O'Brien Because The Government Cannot Prove He Knew The Firearm At Issue Was A Machinegun.

Straightforward principles of statutory construction establish that, regardless of whether the machinegun provision in Section 924(c)(1)(B)(ii) is an element or a sentencing factor, the provision requires the Government to prove the defendant's knowledge that the firearm at issue was a machinegun. In light of the Government's concessions that it cannot prove O'Brien had such knowledge, the First Circuit's decision can be affirmed (or this case could be dismissed as improvidently granted) on this threshold basis alone, without ever reaching the question whether the machinegun provision is an element or a sentencing factor.

1. At O'Brien's sentencing hearing and in the First Circuit, the Government acknowledged that if the machinegun provision in Section 924(c)(1)(B)(ii) still constitutes an element of a greater Section 924(c) offense, "then [the Government] would have to prove that the defendants knew it was a machine gun." J.A. 28; *accord* Gov't. C.A. Br. 8. Put another way, the Government has acknowledged that the

machinegun provision as it existed at least until 1998 required the Government to prove knowledge.

That acknowledgement makes good sense. It is well-established that the Government must prove that a defendant "knowingly" used or carried a firearm to secure a conviction under Section 924(c). *United States v. Franklin*, 561 F.3d 398, 402 (5th Cir. 2009), *cert. denied sub nom. Alejandro-Gonzalez v. United States*, 129 S. Ct. 2848 (2009) & *Salazar-Ramirez v. United States*, 129 S. Ct. 2882 (2009); *accord United States v. Wallace*, 447 F.3d 184, 187 (2d Cir. 2006); *United States v. Nava-Sotelo*, 354 F.3d 1202, 1205 (10th Cir. 2003); *see generally Liparota v. United States*, 471 U.S. 419, 426 (1985) (noting "background assumption" of scienter requirements in criminal statutes). That knowledge requirement logically extends to machinegun status to the extent such status is an element of a greater Section 924(c)(1) offense.

Indeed, requiring proof of knowledge is especially appropriate in this context, as this Court has already held that the Government must prove knowledge of machinegun status to convict a defendant of unlawfully possessing an unregistered machinegun under 26 U.S.C. § 5861(d). *See Staples v. United States*, 511 U.S. 600 (1994). In *Staples*, the Court recognized the possibility that a weapon an individual "genuinely and reasonably believed was a conventional semi-automatic [weapon might turn] out to have worn down into or been secretly modified to be a fully automatic weapon." *Staples*, 511 U.S. at 615 (internal citation and quotation marks omitted). Invoking the maxim that "imposing severe punishments for offenses that require no *mens rea*

would seem incongruous," this Court concluded that the "harsh" ten-year penalty at issue could not be imposed without proof of knowledge. *Id.* at 616-17. The courts of appeals invoked the same reasoning to reach the same conclusion with respect to 18 U.S.C. § 922(o). *See, e.g.*, *United States v. Rogers*, 94 F.3d 1519, 1523 (11th Cir. 1996). And the same risk of mistake is present here – not just in theory but also on the facts of this case, because the Cobray pistol at issue was not manufactured as a machinegun, and contains no visible clues of having been modified into one. *Compare supra* at 2-3 *with Rogers*, 94 F.3d at 1523.

2. The Government maintains, however, that if Congress changed the machinegun provision in 1998 from an element into a sentencing factor, then this reclassification somehow erased the requirement that the Government prove knowledge of machinegun status. J.A. 28, 29, 51. This argument does not make any sense. This Court has never held – nor is there any reason to hold now – that substantive mens rea requirements differ depending solely on whether a statutory sentence-enhancing provision constitutes an element or a sentencing factor.

To begin with, the question whether the Government must prove knowledge is analytically distinct from the question whether a particular issue constitutes an element of an offense or a sentencing factor. Just as Congress can create an offense some of whose elements involve no intent requirement, *cf. United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994), so too can it specify sentencing factors that *do* require proof of knowledge. *See Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) (concluding that

a "defendant must have *intended* to brandish the firearm" to trigger sentencing factor in Section 924(c)(1)(A)(ii)) (emphasis added); *United States v. Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989) ("Although cases generally apply [the presumption against strict liability] to statutes that define criminal offenses, we have little doubt that it should also be applied to legal norms that define aggravating circumstances for purposes of sentencing."); *United States v. Tucker*, 136 F.3d 763, 764 (11th Cir. 1998) (invoking same principle). So it is plainly not the case that knowledge is always required of elements and never required of sentencing factors.

Whether the Government must prove knowledge to satisfy a criminal statute depends instead on the text and structure of the statutory provision, and the nature of the conduct it covers. *See Dean*, 129 S. Ct. at 1853-54; *Burke*, 888 F.3d at 867-68 (holding that an enhancement for possessing a firearm or other dangerous weapon during the commission of the offense required proof of knowledge). But none of those factors change here depending on whether Section 924(c)(1)(B)(ii)'s machinegun provision constitutes an element or a sentencing factor. All that is at stake in the element/sentencing factor debate is the *procedures* for proving the fact at issue. *See, e.g.*, *Harris*, 536 U.S. at 550 (sentencing factors, unlike elements, need not be "alleged in the indictment, submitted to the jury, or established beyond a reasonable doubt"). Consequently, the Government's *substantive* burden of proof should remain the same: It must prove knowledge of machinegun status under Section 924(c)(1)(B)(ii)

regardless of whether the provision constitutes an element of a greater Section 924(c) offense, or is merely a sentencing factor.

3. The Government cannot provide such proof here. At O'Brien's sentencing hearing, the Government repeatedly conceded that it cannot prove beyond a reasonable doubt that O'Brien knew that the Cobray pistol was a machinegun. *See* J.A. 29 (Government stating that if machinegun status is an element, "we're going to lose on the knowledge, because we will not have sufficient evidence"); J.A. 48, 51. The Government further suggested that it could not prove knowledge even by a preponderance of the evidence. *See* J.A. 28 (Government admitting that "if [924(c)(1)(B)(ii)] is a sentencing factor, we will not have sufficient evidence to establish knowledge"). And the record provides no reason to think otherwise, for the Cobray pistol was not manufactured as a machinegun; it has no visible signs of conversion to one; and the two cooperating defendants told federal authorities they, as well as the other defendants, did not know if it was a machinegun. *See* BIO 23-25. Accordingly, because O'Brien is not eligible for the machinegun sentencing enhancement under any standard of proof, the question whether that provision constitutes an element or sentencing factor is purely academic. This Court should affirm on that basis alone or dismiss the writ as improvidently granted.

II. The Machinegun Provision Remains An Element Of A Greater Offense.

If this Court reaches the question whether the machinegun provision constitutes an element or a sentencing factor, it should deem it the former.

Statutory interpretation in this case does not start from a blank slate. In *Castillo*, 530 U.S. 120, this Court held that the references to firearm types in the previous version of Section 924(c)(1) stated elements of greater crimes, rather than sentencing factors. The Government argues that the 1998 amendments to that section dictate that the machinegun provision now constitutes a sentencing factor. The Government is incorrect. The 1998 amendments did not manifest a sufficient intent to change preexisting law so as to warrant conducting an entirely new statutory analysis of the machinegun provision. And even if this Court were to revisit the question whether the machinegun provision constitutes an element or a sentencing factor, *Castillo*'s analytic framework would still apply and dictate that the machinegun provision remains an element.

A. Nothing About The 1998 Amendments To Section 924(c)(1) Requires Revisiting Whether The Machinegun Provision Constitutes An Offense Element.

1. Congress frequently amends existing statutes. In order to provide stability in the law, however, this Court consistently has refused to disturb settled meanings of particular aspects of an amended statute "[a]bsent a clear indication from Congress of a change in policy." *Grogan v. Garner*, 498 U.S. 279, 290

(1991); *see also Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323 (2001) (rejecting argument that amendment changed a statute's meaning "because there is no indication that Congress intended to change [a prior interpretation] with the . . . amendments. . . . [I]t would be surprising, indeed, if Congress had eliminated this important fact *sub silentio*."); *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1998) ("[I]t tests the limits of reason to suggest that despite such silence, Members of Congress . . . intended to enact" a "significant change" in the statute's meaning); *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) ("[W]e are convinced that if Congress had . . . inten[ded]" to change the statute's meaning, "Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the . . . legislative history of the . . . amendment."); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 318 (1985) ("[T]his change was effected without substantive comment, and absent such comment it is generally held that a change during codification is not intended to alter the statute's scope."); *see generally* CJS STATUTES § 512 ("[A] statutory amendment should be construed as intending to state the previously existing law and *not* to change it unless such a purpose *clearly manifests itself*.") (emphasis added).

This canon of construction applies regardless of whether Congress amends a statute before or after this Court interprets the original version of the law. When this Court interprets a federal statute, it determines what the statute has "*always* meant."

Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 n.12 (1994) (emphasis in original). Thus, although this Court did not hold until after Congress enacted the 1998 amendments that the previous version of the machinegun provision constituted an element, one must presume that Congress understood the provision in 1998 to be an element. Indeed, *Castillo* itself found that "Congress intended" the prior version of the machinegun provision to be an element. 530 U.S. at 131.

2. The 1998 alterations to Section 924(c) contain no "clear indication" that Congress intended to transform the machinegun provision from an element into a sentencing factor. For starters, unlike other federal statutes, nothing in the text of the new legislation clearly labeled the machinegun provision as a sentencing factor.[4] Before the amendments, the machinegun provision stated: "[I]f the firearm is a machinegun," the defendant shall be sentenced "to imprisonment for thirty years." 18 U.S.C. § 924(c)(1) (Supp. V 1993). After the amendments, the provision

---

[4] For examples of other such statutes, see 46 U.S.C. § 70504 ("Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense."); 49 U.S.C. § 5124(b)(2) ("[K]nowledge of the existence of a statutory provision, or a regulation or a requirement required by the Secretary, is not an element of an offense under this section."); 49 U.S.C. § 46312(b) ("For purposes of subsection (a), knowledge by the person of the existence of a regulation or requirement related to the transportation of hazardous material prescribed by the Secretary under this part or chapter 51 is not an element of an offense under this section but shall be considered in mitigation of the penalty.").

states essentially the same thing (albeit in a subsection that is separated from other parts of the statute): "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." 18 U.S.C. § 924(c)(1)(B).

Nor does anything in the amendments' drafting history indicate Congress intended to make the change the Government suggests. To the contrary, the amendments to Section 924(c)(1) were enacted for reasons entirely unrelated to the machinegun provision. In *Bailey v. United States*, 516 U.S. 137 (1995), this Court held that in order to prove "use" of a firearm under Section 924(c)(1), the Government had to "show active employment of the firearm." *Id.* at 144. The Court reasoned that, "[h]ad Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided." *Id.* at 143.

"[T]he intent" the 1998 amendments, as Senator Jesse Helms put it when introducing them to the Senate Judiciary Committee, was to accept this Court's "invitation" to "make clear that 'possession alone' does indeed 'trigger liability.'" 143 CONG. REC. S405 (May 8, 1997) (statement of Sen. Jesse Helms). Sen. Helms also trumpeted the tough new provisions governing the brandishing and discharge of firearms. But he never suggested that the legislation was intended to alter anything concerning Section 924(c)(1)'s firearm type provisions, let alone the established methods of proving firearm type. *See id.* Nor did anyone else advert to the element/sentencing

factor distinction during the Senate or House hearings.[5]

The Government, in fact, acknowledges that "[t]he legislative history" of the "*Bailey* Fix Act," as it became colloquially known, 144 CONG. REC. S12670-02, 1998 WL 723068 (statement of Sen. Mike DeWine), is "silent" with respect to whether Congress intended to transform the machinegun provision into an element. U.S. Br. 29. As the Government put it in *Castillo*, "there is nothing to suggest that the 1998 amendments were intended to change, rather than simply reorganize and clarify, the statute's treatment of firearm type . . . ." U.S. Br. 41, *Castillo v. United States*, 530 U.S. 120 (2000) (No. 99-658) (U.S. *Castillo* Br.).[6] But the Government now contends (U.S. Br. 29-30) that this silence is irrelevant to the statutory interpretation question at hand, citing *Morales v. TWA, Inc.*, 504 U.S. 374, 385 n.2 (1992), which in turn relies on *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 591-92 (1980).

---

[5] The press release accompanying President Clinton's signing of the bill into law touted the new "stiff, mandatory penalties that apply to criminals who *actually use* firearms during the commission of certain federal crimes." Press Release, The White House, Office of the Press Secretary, Fact Sheet on Honoring and Protecting our Law Enforcement (Nov. 13, 1998), *available at* 1998 WL 797591 (emphasis added).

[6] The Government, of course, contended in *Castillo* that Congress intended all along that the machinegun provision be treated as an element instead of as a sentencing factor. But the important point for present purposes is that the Government recognized that Congress did not intend in 1998 to *change* the provision's classification.

Those cases, however, do not help the Government. In *Harrison*, this Court held simply that silence during the legislative process does not require this Court to adhere to a pre-existing construction of a statute when Congress' desire to change the statute's meaning is "obvious on the face of [the amended] statute." 446 U.S. at 592. This principle might assist the Government if, for example, the 1998 amendments to Section 924(c) had taken a cue from the law that this Court treated as a sentencing factor in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and explicitly labeled the machinegun provision as a sentencing factor. *See McMillan*, 477 U.S. at 81 n.1 ("Provisions of this section shall not be an element of the crime . . . .").

But even though Congress has used such language in several other criminal statutes, *see supra* at 20 & n.4, it did not use such language, or anything close to it, here. Instead, Congress merely broke out the firearm type provisions from other provisions in the law and provided for the possibility of greater punishments than before. It did not clearly label the machinegun provision as either an element or a sentencing factor, suggesting that it was content with its prior treatment as an element.

Lest there be any doubt that Congress did not intend to change the way firearm type must be proved, nine years have passed since this Court held in *Castillo* that the prior version of the machinegun provision constituted an element, and four years have passed since the Sixth Circuit held in *United States v. Harris*, 397 F.3d 404 (6th Cir. 2005), that the machinegun provision still constitutes an element. But in that time, Congress has not enacted

legislation clearly denoting firearm type as a sentencing factor. Whereas Congress acted promptly to override *Bailey*, it has left *Castillo* and *Harris* in place, even while amending other portions of Section 924. *See* Pub. L. No. 107–273, 116 Stat. 1809, 1821 (2002) (amending Section 924(e)(1) to limit civil penalties and Section 924(a) to add a new subsection); Pub. L. No. 109-92, 119 Stat. 2102 (2005) (amending Section 924(c) to add penalties for armor piercing ammunition). This Court should decline to tread where Congress has not gone explicitly, and leave it to Congress to give this Court a "clear indication" if and when it wishes to exercise its prerogative to change the law.

B. Applying The *Castillo* Framework To The New Version Of The Machinegun Provision Confirms That The Provision Remains An Element.

Even if this Court were to re-analyze the current version of Section 924(c), it should reach the same result it reached in *Castillo*: the machinegun provision is an offense element, not a sentencing factor. In *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998), this Court established a multi-factored approach to determine whether a statutory provision constitutes an element or a sentencing factor. In *Castillo*, this Court refined that approach, basing its holding that the machinegun provision constituted an element on five factors: language and structure; tradition; risk of unfairness; legislative history; and severity of punishment. Four of those factors remain entirely unchanged. Nothing about the fifth – the language and structure of the machinegun provision – demonstrates that the 1998

amendments require a different result than in *Castillo*. To the contrary, a careful analysis of that factor shows that the amendments – as the Government put it in *Castillo* – were simply meant to "reorganize and clarify," rather than to change, "the statute's treatment of firearm type." U.S. *Castillo* Br. at 41.

1. **Unchanged Factors**

a. *Tradition*. In *Castillo*, this Court noted that "numerous gun crimes make substantive distinctions" in the form of elements "between weapons such as pistols and machineguns." 530 U.S. at 127. By contrast, the Court could not say "that courts have typically or traditionally used firearm types (such as 'shotgun' or 'machinegun') as sentencing factors." *Id.* at 126. Nothing about that analysis changes here; the provision at issue obviously continues to punish machinegun use.

The Government argues that the amended version of the machinegun provision "belongs to a somewhat different tradition" than the prior version because the amended version is phrased in terms of setting a mandatory minimum sentence. U.S. Br. 22, 24. But the possession provision of Section 924(c)(1)(A) is also phrased in terms of setting a mandatory minimum sentence; just like the machinegun provision, it requires the defendant to "be sentenced to a term of imprisonment of not less than" a specified term of years. 18 U.S.C. § 924(c)(1)(A)(i). Yet this Court already has made clear (and the Government does not here dispute) that the possession provision sets forth an element of a substantive offense. *Dean*, 129 S. Ct. at 1853.

There is no reason to treat the machinegun provision any differently.[7]

b. *Risk of Unfairness*. In *Castillo*, this Court concluded that the realities of trial favored treating the machinegun provision as an element because "ask[ing] a jury, rather than a judge, to decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfairness," 530 U.S. at 127, whereas "a contrary rule – one that leaves the machinegun matter to the sentencing judge – might unnecessarily produce a conflict between the judge and the jury," *id.* at 128. Once again, nothing about that analysis changes here.

The Government protests that "[n]o great policy interest would be served by treating firearm type as an offense element because a jury determination is unlikely to improve the accuracy of fact-finding on such an issue." U.S. Br. 33. That assertion, however, is nothing more than a disagreement with *Castillo.*

In any event, the Government misses the point entirely. The primary function of juries is not to increase accuracy; "for every argument why juries are more accurate factfinders, there is another why they

---

[7] The Government also argues that *Castillo*'s analysis is no longer valid because the Federal Sentencing Guidelines sometimes treat firearm type as a sentencing factor. U.S. Br. 23. But this does not add anything to what the Government could have argued in *Castillo.* The Sentencing Reform Act, which established the guidelines system, was enacted in 1984, two years before the original machinegun provision of Section 924(c) was enacted, *see* Pub. L. No. 99-308 (1986) (amending statute to insert machinegun provision), and long before this Court considered the *Castillo* case.

are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). Instead, the purpose of juries is to interpose citizens between the Government and the judiciary, thereby ensuring that "the judge's authority to sentence derives wholly from [those citizens'] verdict." *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see generally Duncan v. Louisiana*, 391 U.S. 145, 151-58 (1968). Juries cannot serve that function if they are "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 307. Thus, especially when, as here, the Government insists that the fact at issue is "particular[ly]" serious and therefore triggers the need for especially harsh punishment, U.S. Br. 31-32, it makes eminent sense for Congress to interpose the jury in this fashion, and also to require the fact to be proven beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000) ("structural democratic constraints . . . discourage legislatures" from transforming important facts into sentencing factors).

c. *Severity*. This Court observed in *Castillo* that "the length and severity of an added mandatory sentence that turns on the presence or absence of a 'machinegun' . . . weighs in favor of treating such offense-related words as referring to an element." 530 U.S. at 131; *see also Jones v. United States*, 526 U.S. 227, 233 (1999) ("It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring

with them for a defendant's benefit."). That observation is just as true today. Now, as then, a machinegun finding mandates a thirty-year prison term.

The Government contends that the 1998 amendments change the analysis because the prison term that the machinegun provision requires is now theoretically available under Section 924(c)(1) without proof of machinegun use. U.S. Br. 25. This argument is unavailing. In *Castillo,* this Court held that the severity of the "mandatory" sentence for machinegun use counseled toward treating that fact as an element. 530 U.S. at 131. It does not matter from this standpoint whether such a sentence would also theoretically be available (but not mandatory) absent the finding at issue. In any event, the stiff mandatory sentence in this case *does*, as an empirical matter, continue to produce more severe sentences than courts would otherwise give. *See infra* at 46-48 (typical sentences without machinegun use remain between five and ten years).

d. *Legislative History*. In *Castillo*, this Court determined that there was no legislative history that "significantly" supported the Government's position and noted that "the legislative statements that discuss a new prison term for the act of 'us[ing] a machine gun' . . . seemingly describe offense conduct, and, thus, argue *against* (not *for*) the Government's position." 530 U.S. at 130 (emphasis in original). Nothing has changed in this respect either. As elaborated above and as the Government concedes, the legislative history surrounding the 1998 amendments is "silent" on the issue of whether the

machinegun provision constitutes an element or a sentencing factor. U.S. Br. 29; *see supra* at 21-22.

2. The New Text And Structure

The prior version of Section 924(c) provided in relevant part: "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . 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, [or a] short-barreled shotgun to imprisonment for ten years, and if the firearm in a machinegun . . . to imprisonment for thirty years." 18 U.S.C. § 924(c)(1) (Supp. V 1993). In *Castillo*, this Court described this text as "neutral" with respect to the element/sentencing factor classification and found that its single-sentence structure suggested that the provision constituted an element. 530 U.S. at 124.

The text of amended Section 924(c) is no more favorable for the Government. Just as before, the Section provides that "[i]f the firearm . . . is a machinegun," the defendant is subject to an increased mandatory prison term. 18 U.S.C. § 924(c)(1)(B). Just as before, "by emphasizing the phrase 'if *the* firearm is a . . . ,' one can read the language as simply substituting the word 'machinegun' for the initial word 'firearm'; thereby both incorporating by reference the initial phrases that relate the basic elements of the crime and creating a different crime containing one new element, *i.e.,* the use or carrying of a 'machinegun' during and in relation to a crime of violence." *Castillo*, 530 U.S. at 124 (emphasis in original).

To be sure, amended Section 924(c) introduces the machinegun provision with the phrase "[i]f the firearm possessed by a person *convicted of a violation* of this subsection. . . ." 18 U.S.C. § 924(c)(1)(B) (emphasis added). The Government sees significance in the new, italicized language because the phrase "convicted of a violation" seems to presuppose "a finding of guilt, which necessarily precedes sentencing." U.S. Br. 14. But the word "subsection" obviously refers to subsection (c)(1), not (c)(1)(A), thus indicating that anything within subsection (c)(1) may constitute an element. At any rate, the prior version of the statute also pronounced "sentencing" consequences (thus also arguably presuming a preceding finding of guilt) before it got to the machinegun phrase, and this Court nonetheless deemed the machinegun provision an element. Hence, the most the Government can reasonably say about the amended version of the statute is that, just like the previous version, its text indicates that someone can be convicted of violating Section 924(c)(1) without using a machinegun. But that reality says nothing about whether using a machinegun creates a greater offense or merely serves as a sentencing factor for a generic Section 924(c) offense.[8]

---

[8] For much the same reason, it is puzzling that the Government asserts that the firearm type provisions are sentencing factors because they specify "how certain defendants 'shall be sentenced.'" U.S. Br. 14. That same language describes what happens when a person is convicted of the "offense defined in the principal paragraph of Section 924(c)(1)(A)," U.S. Br. 15, which does not contain any sentencing

The Government is thus left to hinge its entire case on the differences in structure between the pre- and post-amendment versions of Section 924(c). Those differences cannot bear the weight the Government places upon them.

To appreciate why that it so, it is useful to start by imagining what would have happened had Congress legislated the "*Bailey* fix" and adjusted the statute's penalties without changing the statute's structure or breaking the single initial sentence into multiple sentences. The result would have been an unwieldy mess:

> (c)(1) 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 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, or

---

factors. *See* 18 U.S.C. § 924(c)(1) (providing that whoever uses or carries a firearm during a crime of violence "*shall* . . . *be sentenced* to a term of imprisonment of not less than 5 years" (emphasis added)). In any event, the prior version of the statute contained the exact same language in the exact same place.

By the same token, the Government's reliance on the "introductory text of Section 924(c)(1)(A)," U.S. Br. 15, cannot aid it because that text applies not only to the machinegun provision but also to the "offense defined in the principal paragraph of Section 924(c)(1)(A)," U.S. Br. 15.

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, be sentenced to imprisonment for five years, and if the firearm is brandished, to imprisonment for not less than seven years, and if the firearm is discharged, to imprisonment for not less than ten years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for not less than 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 not less than 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 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, carried, or possessed.

It takes but a glance at this hypothetical statute to see that such revisions would have made an already convoluted law virtually unreadable. Any competent draftsperson, therefore, would have wanted to break the statute down into subsections.

Indeed, the structural changes Congress made to Section 924(c) follow directly from instructions in contemporary governmental manuals on legislative drafting. Both the House Office of Legislative Counsel and the Senate Office of Legislative Counsel, "in their manuals printed in 1995 and 1997, respectively, adopt[ed] a drafting style that encourage[d] maximum clarity by applying good drafting principles in an organizational structure that uses headings for subdivisions of a section . . . over the 'traditional' style (the predominant style in use before 1990 . . . .)." LAWRENCE E. FILSON AND SANDRA L. STROKOFF, THE LEGISLATIVE DRAFTER'S DESK REFERENCE 87 (2008). The manuals explained that the "use of headings is more likely to ensure that each subdivision deals with a single subject and makes the organization of the bill much easier to ascertain." *Id.*

What is more, those governmental manuals specifically encouraged that such structural changes be made when statutes were being amended for other reasons. The House manual explained: "It is a goal that, in time, all Federal law will be in the office style. It is also a goal that uniformity of style be maintained within a statute, at least as required for consistency of interpretation. In amending existing law, attorneys should pursue both goals." HOUSE OFFICE OF LEGISLATIVE COUNSEL, MANUAL ON DRAFTING STYLE (1995) § 205, at 19; *see also* SENATE

OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL (1997) § 126(a)(2), at 26-27 (noting that amendments to one portion of a statute "provides an opportunity to improve the style of the unchanged portions").[9] It is thus wishful thinking for the Government to suggest that the 1998 amendments' structural changes reflect "anything more than th[is] current trend." Pet. App. 9a. As with numerous other criminal statutes in the late 1990s and early 2000s, Congress simply took the opportunity of amending a statute to break it down into multiple subsections for ease of digestion.[10]

At any rate, nothing inherent in the new statutory structure transforms the machinegun provision into a sentencing factor. There is nothing unusual about statutes that describe the basic prohibited conduct in a preamble before breaking out additional facts to be treated as elements of the crime or, as here, of greater crimes. *See, e.g.*, 18 U.S.C. § 2119(2) & (3); 18 U.S.C. § 2118(a)(3) & (b)(3). As a

---

[9] The House Manual is available at: http://thecapitol.net/Research/images/HOLC.Manual.on.Drafting.Style.1995.pdf. Among other things, it is striking that the examples in Section 204 of a "traditional" law and a "new" one track the structural differences between the pre- and post-1998 versions of Section 924(c). *Id.* § 204, at 14-18. The Senate manual is not available online.

[10] For other examples of this phenomenon, see 18 U.S.C. § 845(b) (amended in 2002); 18 U.S.C. § 981(a)(1)(B) (amended in 2001); 18 U.S.C. § 2247 (amended in 1998); 18 U.S.C. § 2318(a), (c)(3) (amended in 2004); 18 U.S.C. § 2721(a) (amended in 2000). These statutes, both before and after they were amended, are set out fully in the Appendix to this brief.

result, the "'look' of the statute . . . is not a reliable guide to congressional intentions" on the element/sentencing factor front. *Jones*, 526 U.S. at 233 (construing 18 U.S.C. § 2119(2) & (3)).

The Government argues that, in light of this Court's holdings in *Harris* and *Dean* that Section 924(c)'s firearm *use* provisions are sentencing factors, this Court must interpret *type* provisions as sentencing factors, too, in order to ensure that the statute contains "an orderly progression from offense elements to sentencing considerations." U.S. Br. 20. O'Brien is aware of no canon of statutory construction that provides that criminal statutes must progress from elements to sentencing factors. Indeed, if anything, the Government's focus on structure and order gets things exactly backward. The simplest way for Congress to have rendered both the use provisions and the type provisions sentencing factors would have been to list them all together under the same subsection. Certainly there would not have been any linguistic obstacle to doing so; subsections in both provisions start with the phrase "if the firearm . . . ." But instead of listing the use and type provisions together, Congress put the firearm type provisions in a separate subsection from the use provisions (and also from the statute's recidivism provisions, which were already sentencing factors), signaling that the firearm type provisions are somehow different. The obvious way in which the firearm type provisions are distinct from those others is that, at least before the amendments, they were *elements*. That the type provisions ended up "surrounded" (U.S. Br. 19) by sentencing factors is simply a consequence of their sandwiched location in

the original statute, which was carried forward in the amendments.

In the end, it must be remembered that structure is just one factor in the calculus when, as here, no language in the provision explicitly says whether the provision is an element or a sentencing factor. *See Castillo*, 530 U.S. at 124-31. In *Jones*, for example, this Court held that the "fairest reading" of a provision with a structure similar to the one at issue here was that it constituted an element because factors such as history, tradition, and penalty severity suggested that the provision should be an element. 526 U.S. at 239. By contrast, this Court held in *Harris* that another similarly structured provision was a sentencing factor because history, tradition, and the relatively mild penalties for firearm use *all* supported treating the provision as such. 536 U.S. at 553-55. This case is much more like *Jones* than *Harris.* Whatever inference or presumption might arise from the structure of the machinegun provision is easily overcome by the other four factors that remain unchanged from *Castillo*, when this Court concluded that the provision was an element.[11]

---

[11] To the extent this question is a close one, the rule of lenity – otherwise known as the "canon of strict construction of criminal statutes," *United States v. Lanier*, 520 U.S. 259, 266 (1997) – dictates resolving that doubt in favor of the defendant.

III. Treating The Machinegun Provision As Sentencing Factor In This Case Would Violate The Fifth And Sixth Amendments.

Even if statutory analysis alone did not resolve this case, two constitutional impediments to holding here that the machinegun provision is a sentencing factor should determine the outcome. First, treating firearm type as a sentencing factor would violate the Sixth Amendment's jury-trial guarantee as applied to this case because a thirty-year sentence, absent a machinegun finding, would be substantively unreasonable under the Sentencing Reform Act. In other words, the machinegun finding is subject to the doctrine of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the sentence the Government seeks is permissible only if such a finding is made. Second, even apart from *Apprendi*, the machinegun provision must be treated as an element because it is the "tail which wags the dog," *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986), of the Section 924(c)(1) offense the Government has charged. In other words, treating the machinegun provision as a sentencing factor would transgress the Due Process Clause's limitations on diluting the standard of proof concerning the facts that drive the punishment the Government seeks.

Accordingly, this Court, if necessary, should reject the Government's request to treat the machinegun provision as a sentencing factor either based on the doctrine of constitutional avoidance, *see Jones*, 526 U.S. at 239, or because it is outright unconstitutional.

A. Treating as the Machinegun Provision As A Sentencing Factor In This Case Would Violate The *Apprendi* Doctrine.

1. The Sixth Amendment guarantees the right to trial by jury, and the Fifth Amendment requires fair notice of all criminal charges and that all elements of a crime be proven beyond a reasonable doubt. As these rights developed at common law and were understood at the time of the Founding, "[w]here a statute annexe[d] a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, [had to] expressly charge it to have been committed under those circumstances, and [had to] state the circumstances with certainty and precision." JOHN ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES *61 (5th Am. ed. 1846) (citing 2 MATTHEW HALE, PLEAS OF THE CROWN *170 (1800)). In addition, the "the truth of every accusation" in the indictment had to be proven to the jury beyond a reasonable doubt. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *343 (1769). Thus, every fact "which the law ma[de] essential to the punishment" the prosecution sought to impose was treated procedurally as an element. *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004) (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)).

In the *Apprendi* line of cases, this Court has carried these principles forward to modern times, holding that when the prosecution invokes modern statutes dictating certain punishments for certain acts, any fact (other than a prior conviction) that

increases the "prescribed range of penalties to which a criminal defendant is exposed" must be treated as an element. *Apprendi*, 530 U.S. at 490 (internal quotation marks omitted); *see also Cunningham v. California*, 549 U.S. 270, 275 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely*, 542 U.S. at 301-02; *Ring v. Arizona*, 536 U.S. 584 (2002). Put another way, "all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring); *see also Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("[T]he 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.").

By contrast, this Court held in *Harris v. United States*, 536 U.S. 545 (2002), that the *Apprendi* doctrine does not apply to facts that require a judge to impose a minimum sentence within an already authorized sentencing range. In other words, if the punishment a factual finding dictates "may be imposed with or without the factual finding," then the Fifth and Sixth Amendments do not apply to the finding, for "the finding is by definition not 'essential' to the defendant's punishment." *Id.* at 561 (plurality opinion).

The question whether the *Apprendi* doctrine applies to the machinegun provision in this case, therefore, depends on whether the thirty-year sentence the provision dictates could be imposed

"without th[at] factual finding." *Harris*, 536 U.S. at 561 (plurality opinion). And that question, in turn, depends upon examining the interplay between the Sentencing Reform Act (SRA) and Section 924(c)(1)'s provisions establishing maximum and minimum sentences for various forms of using a firearm during a crime of violence.

2. The SRA previously required courts to sentence defendants according to the Federal Sentencing Guidelines. In *Booker*, however, this Court excised the provisions in the SRA that had made the Guidelines binding. 543 U.S. at 245. Going forward, the Guidelines play an "advisory" role in sentencing. In any given case, courts must consider the Guidelines' recommended sentence, along with various other factors enumerated in 18 U.S.C. § 3553(a).[12]

---

[12] The complete list of factors includes: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, (B) to afford adequate deterrence to criminal conduct, (C) to protect the public from further crimes of the defendant, (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the Federal Sentencing Guidelines; (5) any pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a).

But this Court has been careful to note that the post-*Booker* advisory sentencing system does not permit courts to impose any sentences they wish. In particular, courts are not free to impose sentences at the default statutory maximum in every case. Rather, *Booker* emphasized that the SRA continues to require courts to impose "reasonable" sentences, as defined by reference to the applicable Guidelines range and the other factors set forth in section 3553(a). *See Booker*, 543 U.S. at 261-62. This "reasonableness" requirement means that when the maximum guideline sentence is far below the default statutory maximum, the SRA may set a statutory maximum somewhere below the default maximum sentence. Alternatively stated, "*Booker's* reasonableness review necessarily supposes that some sentences" within default statutory limits "will be unreasonable in the absence of additional [judge-found] facts justifying them." *Cunningham*, 549 U.S. at 309 (Alito, J., dissenting).

This Court elaborated on the concept of substantive reasonableness in *Gall v. United States*, 552 U.S. 38 (2007). There, it explained that a "district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an . . . unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Id.* at 46. If the judge's explanation fails to justify "the extent of a deviation from the Guidelines," the sentence is substantively unreasonable and therefore unlawful. *Id.* at 47. Although this Court has not yet itself reversed a sentence on these grounds, the courts of appeals following *Gall* have confirmed that some above-

Guidelines sentences within default statutory ranges are unreasonably high.[13] (The statutory reasonableness requirement also applies to below-Guidelines sentences; thus, courts of appeals also have found, at the Government's urging, several such sentences to be unreasonably low because they are too far out of line with recommended Guidelines ranges.[14])

3. As several members of this Court have recognized, the requirement that federal sentences be

---

[13] *See, e.g.*, *United States v. Ortega-Rogel*, 281 Fed. Appx. 471 (6th Cir. 2008) (24-month sentence substantively unreasonable where the Guideline range was 8-14 months); *United States v. Ofray-Campos*, 534 F.3d 1, 42-44 (1st Cir. 2008) (480-month sentence substantively unreasonable where guidelines range was 188-235 months), *cert. denied*, 129 S. Ct. 588 (2008); *United States v. Lente*, 323 Fed. Appx. 698, 717 (10th Cir. 2009) (Holmes, J., concurring) (216-month substantively unreasonable where guidelines range was 46-57 months).

[14] *See, e.g., United States v. Lychock*, 578 F.3d 214 (3d Cir. 2009) (five-year term of probation substantively unreasonable where guidelines range was 30-37 month prison sentence); *United States v. Harris*, 339 Fed. Appx. 533 (6th Cir. 2009) (84-month sentence substantively unreasonable where guidelines range was 210-262 months); *United States v. Omole*, 523 F.3d 691 (7th Cir. 2008) (12-month sentence substantively unreasonable where guidelines range was 63-78 months); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008) (five-year term of probation substantively unreasonable where guidelines range was 97-120 month prison sentence); *see also United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008) (Williams, J, dissenting) (agreeing with Government that five-year term of probation was substantively unreasonable where guidelines range was 10-16 month prison sentence).

statutorily "reasonable" means that *Apprendi* doctrine applies to any fact that is *necessary* in a given case to prevent a sentence from being unreasonably high. Justice Scalia explained this concept most fully in his concurrence in *Rita v. United States,* 551 U.S. 338, 368 (2007): When the sentence the Government seeks can be defended as statutorily reasonable "only because [of] additional judge-found facts" – that is, "aggravating facts, not found by the jury, that distinguish the case from the mine run" – then those facts are subject to the Sixth Amendment. *Id.* at 369-370 (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment).

Justice Scalia provided a hypothetical example of this principle at work:

> [C]onsider two brothers with similar backgrounds and criminal histories who are convicted by a jury of respectively robbing two banks of an equal amount of money. Next assume that the district judge finds that one brother, fueled by racial animus, had targeted the first bank because it was owned and operated by minorities, whereas the other brother had selected the second bank simply because its location enabled a quick getaway. Further assume that the district judge imposes the statutory maximum upon both brothers, basing those sentences primarily upon his perception that bank robbery should be punished much more severely than the Guidelines base level advises, but explicitly noting that the racially biased decisionmaking of the first brother further

> justified his sentence. Now imagine that the appellate court reverses as excessive only the sentence of the nonracist brother. Given the dual holdings of the appellate court, the racist has a valid Sixth Amendment claim that his sentence was reasonable (and hence lawful) only because of the judicial finding of his motive in selecting his victim.

551 U.S. at 371; *see also Marlowe v. United States*, 129 S. Ct. 450 (2008) (Scalia, J., dissenting from the denial of certiorari) (stating that when a sentence is substantively reasonable "solely because of [a] judge-found fact," that fact is subject to Sixth Amendment procedures).

The Justices in the *Rita* majority did not dispute the validity of Justice Scalia's analysis. Instead, they found only that such a scenario was "not presented by [that particular] case." *Rita*, 551 U.S. at 353. Justices Stevens, joined by Justice Ginsburg, also wrote separately to express their view that the viability of an as-applied Sixth Amendment challenge should be "decided if and when [a non-hypothetical] case arises" in this Court. *Id.* at 365-66. And in *Cunningham*, this Court held that the Sixth Amendment applied to a state sentencing system that operated, at least in the dissent's view, just like *Booker*'s substantive reasonableness system, in that certain sentences were statutorily unreasonable absent facts beyond the guilty verdicts. *See Cunningham*, 549 U.S. at 310-11 (Alito, J., joined by Kennedy, J., and Breyer, J., dissenting). Thus, "[t]he door . . . remains open" in federal cases for a defendant to invoke the Sixth Amendment by demonstrating that the sentence the Government

seeks would not be "upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 552 U.S. at 60 (Scalia, J., concurring).

4. While such is unlikely to be the case in the context of most mandatory-minimum laws, which require sentences in the five-to-ten-year range, such *is* the case here. The machinegun provision would subject O'Brien not only to a mandatory sentence of at least thirty years, but also to a higher sentence than he could otherwise receive.

O'Brien pleaded guilty to possessing a firearm under Section 924(c)(1)(A), and has admitted that he brandished the gun as defined in Section 924(c)(1)(A)(ii). Gvt. C.A. App. 180. Section 924(c) dictates a prison term of not less than seven years, and implies a maximum of life, for that conduct. 18 U.S.C. § 924(c)(1)(A)(ii). But the Federal Sentencing Guidelines specify with respect to violations of Section 924(c)(1), save for an exception not pertinent here, that "the guideline sentence is the minimum term of imprisonment required by statute." U.S.S.G. § 2K2.4(b). Thus, the Guidelines' recommended sentence for the conduct to which O'Brien pleaded guilty is seven years in prison.

The Government seeks to impose a sentence of thirty years in prison – twenty-three years more than the Guidelines' recommended sentence for the conduct to which O'Brien pleaded guilty – based on an allegation that one of the firearms used in the offense, the Cobray pistol, was actually a machinegun. Yet the Government did not include this allegation in the Section 924(c)(1) charge to which O'Brien pleaded guilty, and O'Brien has not otherwise admitted this fact. (In fact, he denies it.)

No jury has found it either. In order for a thirty-year sentence to be consistent with the Sixth Amendment, therefore, this Court would have to hold that imposing such a sentence *without a machinegun finding* would be a statutorily reasonable (and therefore lawful) deviation from the Guidelines' seven-year benchmark. If, on the other hand, a machinegun finding *would be* necessary to render a thirty-year sentence statutorily lawful, then that finding is subject to Sixth Amendment procedures.

Three strands of empirical data show that a machinegun finding would be necessary here to support a thirty-year sentence.

First, no court of which we are aware has *ever* imposed a sentence under Section 924(c)(1) of anywhere near thirty years for brandishing a firearm in furtherance of a bank robbery when the firearm was not a machinegun. *See United States v. Pugh*, 515 F.3d 1179, 1203 (11th Cir. 2008) (finding sentence substantively unreasonable, at Government's urging, in part because "we cannot find a single case [involving the conduct at issue] in which any court has upheld a . . . sentence like this one"). To the contrary, in the vast majority of such cases (after *Booker*, as before), courts impose a seven-year sentence – the Guidelines' recommended sentence and the mandatory minimum.[15] That, in fact, is the

---

[15] See *Harris*, 536 U.S. at 578 (Thomas, J., dissenting) ("[T]hose found to have brandished a firearm typically, if not always, are sentenced only to 7 years in prison . . . .") (citing United States Sentencing Commission, 2001 Datafile)*; see also*, *e.g.*, *United States v. Baldwin*, 2009 U.S. App. LEXIS 22724

sentence that one of respondent's co-defendants received in this case.

Even in the rare cases where courts have exceeded the recommended seven-year sentence, the prison terms they have imposed still come nowhere near thirty years. *See United States v. Schoultz*,

---

(4th Cir. Oct. 16, 2009) (7-year sentence for Section 924(c) charge based on brandishing unspecified firearm during bank robbery); *United States v. Gatson*, 2009 U.S. App. LEXIS 18272 (7th Cir. Aug. 17, 2009) (same); *United States v. Jackson*, 335 Fed. Appx. 933 (11th Cir. 2009) (same); *United States v. Donzo*, 335 Fed. Appx. 191 (3d Cir.) (same), *cert. denied*, 130 S. Ct. 251 (2009); *United States v. Benford*, 574 F.3d 1228 (9th Cir. 2009) (same); *United States v. Stevens*, 580 F.3d 718 (8th Cir.) (same), *cert. denied*, 130 S. Ct. ___, 2010 U.S. LEXIS 384 (2009); *United States v. Wallace*, 573 F.3d 82 (1st Cir.) (same), *cert. denied*, 130 S. Ct. ___, 2009 U.S. LEXIS 8131 (2009); *United States v. Berryman*, 322 Fed. Appx. 216, 219 (3d Cir.) (same), *cert. denied*, 130 S. Ct. 262 (2009); *United States v. Robinson*, 322 Fed. Appx. 105 (3d Cir.) (same), *cert. denied*, 130 S. Ct. 316, (2009); *United States v. Beasley*, 322 Fed. Appx. 777 (11th Cir. 2009) (same); *United States v. Gomez*, 302 Fed. Appx. 868, 869 (11th Cir. 2008) (same), *cert. denied sub nom.*, *Aviles v. United States*, 129 S. Ct. 1658 (2009) & *Bachiller v. United States*, 129 S. Ct. 1926 (2009)*; United States v. Perdomo*, 298 Fed. Appx. 185, 187 (3d Cir. 2008) (same), *cert. denied*, 129 S. Ct. 2168 (2009); *United States v. Harper*, 314 Fed. Appx. 478, 479 (3d Cir. 2008) (same); *United States v. Reyes*, 542 F.3d 588 (7th Cir. 2008) (same), *cert. denied*, 129 S. Ct. 1027 (2009); *United States v. Middlebrook*, 221 Fed. Appx. 888 (11th Cir. 2007) (same); *United States v. Katalinic*, 2007 U.S. App. LEXIS 29291 (7th Cir. 2007) (same); *United States v. Watkins*, 509 F.3d 277 (6th Cir. 2007) (same); *United States v. Johnson*, 195 Fed. Appx. 508 (6th Cir. 2006) (same); *United States v. Dowd*, 451 F.3d 1244 (11th Cir. 2006) (same); *United States v. Beaudion*, 416 F.3d 965 (9th Cir. 2005) (same); *United States v. Wheeler*, 128 Fed. Appx. 58 (10th Cir. 2005) (same).

2009 U.S. App. LEXIS 17943 (4th Cir. Aug. 12, 2009) (ten years); *United States v. Magana*, 279 Fed. Appx. 754 (11th Cir. 2008) (ten years; vacated for procedural errors); *United States v. Collins*, 160 Fed. Appx. 514, 515 (7th Cir. 2005) (almost ten years). The longest sentence we have found for such conduct is fourteen years – less than half of the term the Government seeks here. *See United States v. Batts*, 317 Fed. Appx. 329 (4th Cir. 2009). And in that case, the Fourth Circuit expressed serious concern about that sentence and vacated it on the ground that "the district court's explanation for the sentence [was] devoid of the 'compelling' reasons necessary to justify the upward departure." *Id.* at 332.

In light of this collection of cases, holding that a district court could sentence O'Brien to an unprecedented term of thirty years' imprisonment *without finding that the firearm involved here was a machinegun* would empty the SRA's reasonableness requirement of any meaning. Indeed, treating such a potential sentence as legitimate would make a mockery of the SRA's "basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways." *Booker*, 543 U.S. at 252; *see also* 18 U.S.C. § 3553(a)(6) (requiring courts to "avoid unwarranted sentence disparities"); *cf. United States v. Cavera,* 550 F.3d 180, 224 (2d Cir. 2008) (en banc) (Sotomayor, J., concurring in part and dissenting in part) ("Appellate courts" after *Booker* and *Gall* "must not abdicate their responsibility to ensure that sentences are based on sound judgment, lest we return to the 'shameful' lack of parity . . . which the Guidelines sought to remedy.") (internal citation omitted), *cert. denied*, 129 S. Ct. 2735 (2009).

Virtually any deviation from the Guidelines, no matter how extreme and unprecedented, and no matter how ordinary the case involved, would be substantively reasonable.

Second, as the Government emphasizes at great length, using a machinegun during a crime of violence is far more "dangerous and threatening" than using a firearm that is not fully automatic. U.S. Br. 31-32. Accordingly, once the machinegun provision was off the table in this case, the Government itself sought a mere twelve-year sentence for O'Brien. Gvt. C.A. App. 208. This recommendation was not based on any plea arrangement; the Government was free to recommend whatever sentence it believed was appropriate on the supposition that O'Brien used a firearm but not a machinegun during his crime. The Government chose to advocate a twelve-year term.

Third, the district court in this case, again acting on the supposition that O'Brien used a firearm but not a machinegun, sentenced him to just eight and one-half years for his Section 924(c) violation. J.A. 14. In reaching this number, the sentencing judge explained that it "considered the Section 3553(a) factors." Gvt. C.A. App. 236. He considered the dangerousness of the weapons involved, Gvt. C.A. App. 235-36; the presence of bystanders, Gvt. C.A. App. 236; the volatility of the situation, *id.*; and the amount of money at stake in the robbery, *id.* At the same time, O'Brien never pointed his gun at anyone, and he aborted the attempted robbery as soon as a guard ran, never taking any money or hurting anyone. The district court, therefore, never suggested that O'Brien's actions somehow could

warrant more than *double* the punishment that anyone has *ever* received for violating Section 924(c)(1) without using a machinegun.[16]

This constellation of data makes clear that, even though Section 924(c)(1)(A) provides in theory that court may impose a thirty-year prison term (indeed, it implies a maximum term of life) for using *any* firearm during a crime of violence, the SRA would not allow such a sentence on the facts of this case if the firearm at issue was not a machinegun. Therefore, just as in *Blakely*, the factual finding at issue is "essential to the punishment" the Government seeks to impose. 542 U.S. at 301-02 (internal quotation marks omitted). The sentencing judge would "acquire[] the legal authority to impose the sentence the Government seeks only by finding some additional fact" – the use of a machinegun – beyond those encompassed in O'Brien's guilty plea. *Id.*

5. The Government disputes this conclusion, contending that the Sixth Amendment poses no obstacle to deeming the machinegun provision a sentencing factor in this case "because Congress has already specified the sentence" for using a

---

[16] The district judge told O'Brien that he believed his sentence "could have been higher," but that he chose the eight-and-one-half year term based on his "obligation" under Section 3553(a) "to impose the sentence that's sufficient and no more than necessary." Gvt. C.A. App. 241. Given that Section 3553(a) does indeed impose that obligation, it is unclear why the judge believed he could have given a longer sentence than he believed was necessary.

machinegun at thirty years, thus rendering such a sentence "not subject to appellate review under *Booker* for reasonableness." Pet. Reply 9. This assertion, however, misunderstands how the *Apprendi* doctrine works. When it comes to an argument that the Sixth Amendment as applied to a particular case requires an alleged fact to be treated as an element, the issue is not whether the sentence the Government seeks is would be reasonable, or lawful, *assuming the presence of the fact at issue* (here, that O'Brien used a machinegun). Rather, the issue is whether the sentence the government seeks would be lawful "without finding [that] fact[]." *Rita*, 551 U.S. at 370 (Scalia, J., concurring in part and concurring in the judgment); *see also Blakely*, 542 U.S. at 303-04 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts.") (emphasis in original). And here, without finding that O'Brien used a machinegun, a thirty-year sentence for his Section 924(c) violation would be substantively unreasonable, and thus unlawful, under the SRA.

This reality also explains, lest there be any remaining confusion, why concluding that the Sixth Amendment is implicated here poses no conflict with this Court's decision in *Harris*. This Court did not hold in *Harris* that the Sixth Amendment never applies to any facts that trigger mandatory minimum sentences. Instead, as the Government itself recognizes, *Harris* held merely that the Sixth Amendment does not apply to "fact-finding that raises a minimum sentence *within an otherwise authorized range*." Pet. Reply 8-9 (emphasis added);

see also McMillan, 477 U.S. at 87-88 (Fifth and Sixth Amendments do not apply to a fact that requires the court to impose a certain minimum sentence "within the range already available to it"). Here, the SRA's reasonableness requirement forbids a thirty-year sentence absent a machinegun finding. So *Harris* does not insulate the Government's machinegun allegation from the Sixth Amendment.[17]

B. Treating Firearm-Type As A Sentencing Factor Would Allow The "Tail To Wag The Dog" Of The Substantive Offense In Violation Of Due Process.

Wholly apart from the *Apprendi* problem with deeming the machinegun provision a sentencing factor, doing so would also violate the Due Process Clause's longstanding restrictions on diluting the prosecution's burden of proof.

---

[17] Even if *Harris* were somehow controlling here, the Justices who dissented in that case would do better to adhere to those views than to apply *Harris* here. *Harris* was decided by a bare majority. One member of that majority, Justice Breyer, wrote separately, to acknowledge that the "logic" of *Apprendi* extends to any finding that triggers a mandatory minimum, but asserting that he could "[]not yet accept" the *Apprendi* doctrine. *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). This Court has since applied *Apprendi* to numerous other sentencing systems, entrenching that holding in its jurisprudence and acknowledging that it "must be implemented in a principled way." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring); *see also Cunningham*, 549 U.S. at 270; *Booker*, 543 U.S. at 220; *Blakely*, 542 U.S. at 296. When it becomes necessary, *Harris* should be overruled.

The Due Process Clause requires the prosecution to prove each element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). The *Winship* principle would be a dead letter, however, if legislatures were to have "unlimited choice" over whether to deem a stated fact an element. *Jones*, 526 U.S. at 240-41. Accordingly, the Due Process Clause places "constitutional limits" on a legislature's ability to "reallocate burdens of proof" by transforming an issue that was formerly an element into a sentencing factor or affirmative defense. *Patterson v. New York*, 432 U.S. 197, 210 (1977).

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), for instance, this Court observed that a legislature may not dispose of intent or recklessness as elements of murder, and instead allow "a life sentence for *any* felonious homicide – even one that traditionally might be considered involuntary manslaughter – unless the *defendant* [i]s able to prove that his act was neither intentional nor criminally reckless." *Id.* at 699. In *Apprendi*, this Court noted that this independent constitutional principle persists, stating that if, in response to its decision, "New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring the defendant to prove that it was not . . .), we would be required to question whether [under *Mullaney* and other cases] the revision was constitutional." *Apprendi*, 466 U.S. at 490-91 n.16.

This prohibition against "omit[ting] 'traditional' elements from the definition of crimes and instead requir[ing] the accused to disprove such elements," *Jones*, 526 U.S. at 242, applies as well to

transformations of elements into mandatory minimums. In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), this Court upheld a state law allowing judges to make a finding (visible possession of a firearm) that triggered a five-year mandatory minimum sentence. But this Court cautioned that the result might have been different had the statute given the "impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. In other words, due process concerns arise if a legislature manipulates a criminal statute so that the major portion of a defendant's sentence is attributable to a particular sentencing factor rather than to the offense itself. *See Witte v. United States*, 515 U.S. 389, 403 (1995) (recognizing that if "the enhancing role played by the relevant [sentencing factor] conduct" is large, the sentencing factor may become "a tail which wags the dog of the substantive offense") (internal quotation marks omitted); *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (same).

Taking the Government's view of the 1998 amendments to Section 924(c)(1), this case involves precisely the situation about which this Court has warned. Under this Court's decision in *Castillo*, the machinegun provision was originally an element of a greater offense – one that increased a defendant's permissible sentence by at least twenty years. *Castillo*, 530 U.S. at 131. According to the Government, however, Congress decided in 1998 to "simplif[y] and streamline[] guilt-stage proceedings" by rendering *every* violation of Section 924(c) theoretically punishable by life in prison and then leaving it to sentencing judges to discern by a

preponderance of the evidence whether or not defendants used a machinegun and, if so, to sentence them based on this particularly "dangerous" and "threatening" conduct. U.S. Br. 32-33. In this scenario, and in light of the fact that defendants convicted of ordinary Section 924(c) violations continue to receive sentences in the 5-10 year range, *see supra* at 46-48, a machinegun finding, whenever made, would account for at least two-thirds of a defendant's sentence. The "tail" in such a case would overwhelmingly outweigh the "dog," betraying that machinegun use would really be the core conduct that the Government aims to punish.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

Timothy P. O'Connell
Counsel of Record
C-8 Shipway Place
Charlestown, MA 02129
(617) 242-4806

Patricia A. Millett
Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

January 14, 2010

APPENDIX

18 U.S.C. § 845(b)

The statute originally read:

"A person who had been indicted for or convicted of a crime punishable by imprisonment for a term exceeding one year may make application to the Attorney General for relief from the disabilities imposed by this chapter with respect to engaging in the business of importing, manufacturing, or dealing in explosive materials, or the purchase of explosive materials, and incurred by reason of such indictment or conviction, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the indictment or conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest. A licensee or permittee who makes application for relief from the disabilities incurred under this chapter by reason of indictment or conviction, shall not be barred by such indictment or conviction from further operations under his license or permit pending final action on an application for relief filed pursuant to this section."

The statute was amended in 2002 to read:

(b)(1) A person who is prohibited from shipping, transporting, receiving, or possessing any explosive under section 842(i) may apply to the Secretary for relief from such prohibition.

(2) The Secretary may grant the relief requested under paragraph (1) if the Secretary determines that the circumstances regarding the applicability of section 842(i), and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of such relief is not contrary to the public interest.

(3) A licensee or permittee who applies for relief, under this subsection, from the disabilities incurred under this chapter as a result of an indictment for or conviction of a crime punishable by imprisonment for a term exceeding 1 year shall not be barred by such disability from further operations under the license or permit pending final action on an application for relief filed pursuant to this section.

18 U.S.C. § 981(a)(1)(B)

The statute originally read:

"Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act), within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States."

The statute was amended in 2001 to read:

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense--

(i) involves trafficking in nuclear, chemical, biological, or radiological weapons technology or material, or the manufacture, importation, sale, or distribution of a controlled substance (as that term is defined for purposes of the Controlled Substances Act), or any other conduct described in section 1956(c)(7)(B);

(ii) would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year; and

(iii) would be punishable under the laws of the United States by imprisonment for a term exceeding 1 year, if the act or activity constituting the offense had occurred within the jurisdiction of the United States.

18 U.S.C. § 2247

The statute originally read:

"Any person who violates a provision of this chapter, after one or more prior convictions for an offense punishable under this chapter, or after one or more prior convictions under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact have become final, is punishable by a term of imprisonment up to twice that otherwise authorized."

The statute was amended in 1998 to read:

(a) Maximum Term of Imprisonment.--The maximum term of imprisonment for a violation of this chapter after a prior sex offense conviction shall be twice the term otherwise provided by this chapter, unless section 3559(e) applies.

(b) Prior Sex Offense Conviction Defined.--In this section, the term "prior sex offense conviction" has the meaning given that term in section 2426(b).

18 U.S.C. § 2318

Subsection (a) of the statute originally read:

"Whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in a counterfeit label affixed or designed to be affixed to a phonorecord, or a copy of a computer program or documentation or packaging for a computer program, or a copy of a motion picture or other audiovisual work, and whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in counterfeit documentation or packaging for a computer program, shall be fined under this title or imprisoned for not more than five years, or both."

Subsection (c)(3) of the statute originally read:

"the counterfeit label is affixed to or encloses, or is designed to be affixed to or enclose, a copy of a copyrighted computer program or copyrighted documentation or packaging for a computer program, a copyrighted motion picture or other audiovisual work, or a phonorecord of a copyrighted sound recording; or".

Subsection (a) was amended in 2004 to read:

(a)(1) Whoever, in any of the circumstances described in subsection (c), knowingly traffics in--

(A) a counterfeit label or illicit label affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany--

(i) a phonorecord;

(ii) a copy of a computer program;

(iii) a copy of a motion picture or other audiovisual work;

(iv) a copy of a literary work;

(v) a copy of a pictorial, graphic, or sculptural work;

(vi) a work of visual art; or

(vii) documentation or packaging; or

(B) counterfeit documentation or packaging,

shall be fined under this title or imprisoned for not more than 5 years, or both.

Subsection (c) was amended in 2004 to read:

(c) The circumstances referred to in subsection (a) of this section are--

(1) the offense is committed within the special maritime and territorial jurisdiction of the United States; or within the special aircraft jurisdiction of the United States (as defined in section 46501 of title 49);

(2) the mail or a facility of interstate or foreign commerce is used or intended to be used in the commission of the offense;

(3) the counterfeit label or illicit label is affixed to, encloses, or accompanies, or is designed to be affixed to, enclose, or accompany--

(A) a phonorecord of a copyrighted sound recording or copyrighted musical work;

(B) a copy of a copyrighted computer program;

(C) a copy of a copyrighted motion picture or other audiovisual work;

(D) a copy of a literary work;

(E) a copy of a pictorial, graphic, or sculptural work;

(F) a work of visual art; or

(G) copyrighted documentation or packaging; or

(4) the counterfeited documentation or packaging is copyrighted.

18 USCA § 2721(a)

The statute originally read:

"(a) In general.--Except as provided in subsection (b), a State department of motor vehicles, and any officer, employee, or contractor, thereof, shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record."

The statute was amended in 2000 to read:

(a) In general.--A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): Provided, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.