No. 06-51489

In The
United States Court of Appeals
for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

IGNACIO RAMOS AND JOSE ALONSO COMPEAN,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas

BRIEF *AMICUS CURIAE* OF CONGRESSMAN WALTER B. JONES, CONGRESSMAN VIRGIL H. GOODE, JR., CONGRESSMAN TED POE, GUN OWNERS FOUNDATION, U.S. BORDER CONTROL FOUNDATION, U.S. BORDER CONTROL, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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August 18, 2008

Case No. 06-51489

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IGNACIO RAMOS AND JOSE ALONSO COMPEAN,

Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Ignacio Ramos and Jose Alonso Compean, Appellants

David L. Botsford and Mary Stillinger, Appellant Ramos' counsel on appeal

Robert T. Baskett, Appellant Compean's counsel on appeal

United States of America, Appellee

Congressman Walter B. Jones, Congressman Virgil H. Goode, Jr., Congressman Ted Poe, Gun Owners Foundation, U.S. Border Control Foundation, U.S. Border Control, and Conservative Legal Defense and Education Fund, *Amici Curiae*

J. Mark Brewer, William J. Olson, Herbert W. Titus, John S. Miles, and Jeremiah L. Morgan, counsel for *Amici Curiae*

Washington Legal Foundation, *Amicus Curiae* and Richard Abbott Samp, Daniel J. Popeo, Paul D. Kamenar, counsel for *Amicus Curiae*

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *amici curiae* Gun Owners Foundation, U.S. Border Control Foundation, U.S. Border Control, and Conservative Legal Defense and Education Fund are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them.

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William J. Olson

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INTEREST OF AMICI CURIAE

Walter B. Jones, Virgil H. Goode, Jr., and Ted Poe are members of the United States House of Representatives, and have a keen interest in the correct interpretation and implementation of 18 U.S.C. Section 924(c)(1)(A). Gun Owners Foundation, U.S. Border Control Foundation, U.S. Border Control and Conservative Legal Defense and Education Fund are nonprofit corporations dedicated, *inter alia*, to the correct construction, interpretation and application of the law.

ARGUMENT

I. THE PANEL APPROVED PROSECUTORIAL USURPATION OF CONGRESSIONAL AUTHORITY, BY ITS FLATLY ERRONEOUS READING OF SECTION 924(c)'S TEN-YEAR MINIMUM SENTENCE REQUIREMENT, IGNORING BINDING JUDICIAL PRECEDENT.

The panel specially noted that, although it was vacating Ramos and Compean's convictions on some counts, it was leaving "the major sentence — 18 U.S.C. § 924(c) — untouched." Slip Op., p. 3. Concerned that "the rather lengthy sentences imposed on the defendants — eleven years and a day (Ramos) and twelve years (Compean)" — required explanation, the Court made it clear that they were not imposed at the trial court's discretion, but because: "**Congress** [has] directed a mandatory minimum sentence of **ten years** for **all** defendants convicted under [924(c)], i.e., **using** a gun in relation to the commission of a crime of violence." *Id.* (emphasis added). This statement is flatly inaccurate, mistakenly attributing to

Congress a uniform minimum sentencing structure to be administered by the jury for **all** persons convicted under § 924(c) when, in fact, Congress chose a graduated set of minimum sentences to be administered by the trial court.

A. The Panel Misread the Statute, Contrary to Binding Precedent.

Contrary to the panel's statement, Section 924(c) does not mandate a ten-year minimum sentence for all convicted for wrongful "use" of a firearm. Instead, the statute states unmistakably that any person so convicted "shall ... be sentenced to a term of imprisonment of not less than **5 years.**" *See* 18 U.S.C. § 924(c)(1)(A)(i) (emphasis added). As the Supreme Court explained in Harris v. United States, 536 U.S. 545 (2002), "subsection (i) sets a **catchall** minimum," which may be increased only if the trial judge, after conviction, finds that the firearm was "used" in a particular "manner," either "brandished" (7-year minimum), or "discharged" (10-year minimum). *Id.*, 536 U.S. at 552-56 (emphasis added). *See also* 18 U.S.C. § 924(c)(1)(A)(ii) and (iii). Further, as this Court found one year before Harris, Section 924(c)(1)(A) contained "'subsets of those persons [who wrongfully use firearms] for more severe punishment,'" not a single, uniform 10-year penalty for all uses. *See* United States v. Barton, 257 F.3d 433, 442 (5th Cir. 2001).

Both Harris and Barton concerned the sufficiency of an indictment under § 924(c). *See, e.g.,* Brief Amicus Curiae of Congressman Walter B. Jones, *et al.*, at 4, 6-8, 10, 12. Yet, in its review of the sufficiency of counts 4 and 5 in this

indictment, the panel failed to refer to either case. Instead, the Court relied upon Bailey v. United States, 516 U.S. 137 (1995), a case concerned with the sufficiency of evidence, not the sufficiency of an indictment. Just because a prosecutor may **prove** wrongful use of a firearm with evidence that such use involved the discharge of that firearm does not mean that he may **allege** wrongful **discharge** as an **element** of a § 924(c) offense. To the contrary, by making "discharge" an element of the offense, the prosecutor changed entirely the respective roles of the jury and judge in the trial, conviction, and sentencing of Ramos and Compean in this case.

B. Congress, not a United States Attorney, Determines the Elements and Sentencing Factors of a Crime.

1. An Indictment Must Meet Congressional Standards.

In Counts Four and Five of the indictment, Ramos and Compean were charged with the crime of "discharging" a firearm in relation to a crime of violence in violation of 18 U.S.C. Section 924(c)(1)(A). In their brief on appeal, and in reliance upon Harris and Barton, the two U.S. Border Patrol agents demonstrated that "**discharge**" of a firearm was **not an element** of the offense defined by Section 924(c)(1)(A), but only a "sentencing factor." Thus, they challenged the sufficiency of the indictment, noting that it charged that the two had neither "**possess[ed]**" a firearm in "furtherance of a "crime of violence" nor "**use[d]** or **carrie[d**] a firearm

during or in relation to a crime of violence," as required by Congress and as reflected in Harris and Barton. *See* Harris, at 549-56; Barton, at 439, 441-43.

Instead, the panel rejected Congress' choice of language, insisting that an indictment charging a violation of U.S.C. Section 924(c)(1)(A) "'need not track statutory language,'" and thereby, permitting the prosecutor to use other words so long as they "'meet minimal constitutional standards'" of notice and double jeopardy. Slip Op., p. 32. But an indictment's sufficiency is **not** measured **solely** by minimal constitutional standards. Rather, it must also meet the more exacting Congressional standards that govern the two very different practical functions of conviction and sentencing. Thus, an indictment fails to meet legislative standards if it identifies, as an element of the offense, a sentencing factor, because, by doing so, that indictment would place in the hands of the jury a subject matter that belongs to the judge only **after, not before,** a person is convicted of the offense charged. And that is precisely what happened in this case. By alleging "discharge" instead of "use," in Counts 4 and 5 of the indictment, the prosecutor wrested the sentencing decision from the trial judge, contrary to Congress' intent that "discharge" was a matter for the judge to be decided only **"[a]fter** the accused is convicted." *See* Harris, 536 U.S. at 549.

2. Congress Determines the Roles of Judge and Jury.

Throughout Harris, the Court stressed that whether a matter was an "**element**" of an offense for the **jury** to decide or whether it was a "**sentencing factor**" for the

judge was a matter for **Congress** to decide, so long as the allocation respected the constitutional minima. *See* Harris, 536 U.S. at 550, 551, 553, 555, and 567-69. Thus, the Court emphasized that "Congress [has] conditioned mandatory minimum sentences upon **judicial findings** that ... a firearm was ... discharged." *Id.*, 536 U.S. at 556 (emphasis added). An indictment that charges a violation of Section 924(c) in the language of a sentencing factor — here "discharge" — rather than in the more general language of an offense element — here "use" — would, upon the return of a guilty verdict by the jury, compromise the judge's discretionary sentencing authority, as granted by Congress. Indeed, as the panel concluded, "[o]nce the defendants were charged by the government and convicted by the jury under [§ 924(c)(1)(A)], the district court had **no** discretion but to impose at least a **ten-year sentence** (*see* Slip Op., p. 3 (emphasis added)), contrary to Congress' intent.

But the panel saw no problem with this outcome, because it had previously made the mistake that **all** defendants convicted for "using a firearm in relation to a crime of violence" were subject to the 10-year minimum. However, allowing the jury, rather than the trial judge, to make the minimum mandatory sentencing decision under Section 924(c)(1)(A) directly contradicts Congress' intent to reserve to the judge the power to impose a ten-year sentence. *See* Harris, 536 U.S. at 556.

By allowing the prosecution to edit and manipulate the indictment so as to change the elements of a criminal statute written by Congress, the panel put its stamp

of approval upon the prosecutor's usurpation of a function that belongs to the legislative, **not** the executive, branch.

C. The Indictment Was Plain Error, Substantially Affecting Defendants' Rights, and Undermining the Fairness and Integrity of These Judicial Proceedings.

Typically, prosecutors make allegations in indictments only as required by statute and the courts. *See, e.g.,* Resendiz-Ponce v. United States, 549 U.S. 102 (2007). After all, had the indictment charged wrongful use, instead of discharge, the prosecution could still have introduced evidence of discharge and made the same arguments to the jury. Indeed, the prosecution could have made additional arguments that the two agents had misused their firearms in a manner other than by discharging them.

Instead, having charged the two agents with wrongful discharge, the prosecution narrowed the focus of the trial to the **events immediately related** to the shooting of the firearm. In this way, the prosecution not only **diverted the jury's attention** away from the overall encounter between the two agents and the smuggler, but compelled the defendants to defend themselves primarily on the ground that they had a **right to discharge** their firearms. Had the indictment charged the agents with use of their firearm in relation to a crime of violence, it would have opened the door for the defendants to argue equally, and for the jury to consider equally, the question

of guilt in light of the defendants' **overall right to use** their firearms in relation to their jobs as Border Patrol officers.

By manipulating the indictment, then, the prosecutor apparently hoped to seize an advantage that otherwise would not have been available to him, had he conformed the indictment to the Harris ruling that Congress had intended that discharge was a matter to be decided by the judge at sentencing. In so doing, the prosecution not only substantially affected defendants' rights, but **undermined the integrity, fairness and reputation of the judicial proceedings.**

As the Supreme Court recently observed, "[t]he decision to prosecute a criminal case ... is made by a publicly accountable prosecutor ... under an ethical obligation, not only to win and zealously advocate for his client but also to serve the cause of justice." *See* Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 386 (2004). While a prosecutor is endowed with significant discretion, Harris makes it abundantly clear that such **discretion does not include the power to transform a sentencing factor into an element of a crime**. In this case, however, the prosecutor ran roughshod over the constitutional **separation of powers** principle. And he did so to gain a **tactical trial advantage**, **not** in order to do justice.

If the panel decision stands, it would establish a precedent that in future Section 924(c) cases prosecutors may indiscriminately manipulate the sentencing factors of "brandishing" and "discharging" as elements **whenever they believe it to**

be to their advantage, notwithstanding their insistence in past cases that such factors are not elements subject to proof beyond a reasonable doubt and other constitutional protections that would inure to a defendant's advantage. *See* Harris, at 551; Barton, at 441-43. In sum, in Harris, the Supreme Court sustained the Justice Department position that "use," "possess," and "carry" were (alternative) elements of, and "discharge" was a sentencing factor for, the crime set out in § 924(c). This Court should not allow the Justice Department to take successfully the exact opposite position in this case.

Respectfully submitted,

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August 18, 2008

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief Amicus Curiae of Congressman Walter B. Jones, Congressman Virgil H. Goode, Jr., Congressman Ted Poe, Gun Owners Foundation, U.S. Border Control Foundation, U.S. Border Control, and Conservative Legal Defense and Education Fund in Support of Appellants' Petition for Rehearing En Banc, was made, this 18th day of August, 2008, electronically and by depositing sufficient hard copies thereof in the United States Mail, First-Class, postage prepaid, addressed to the following:

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