

No. 08-5274

IN THE
Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who “discharge[s]” a firearm during a crime of violence, requires proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reprinted in the Joint Appendix at J.A. 133. It is also available at 517 F.3d 1224. The District Court for the Northern District of Georgia did not issue a written opinion.

JURISDICTION

The Eleventh Circuit entered its judgment on February 20, 2008, see J.A. 148, and denied a petition for rehearing on April 15, 2008, see J.A. 149. The petition for a writ of certiorari was filed on July 11, 2008, and granted on November 14, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

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

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).

STATEMENT OF THE CASE

Christopher Michael Dean was sentenced to a mandatory minimum ten-year term of imprisonment under 18 U.S.C. § 924(c)(1)(A)(iii) based on the finding that, during the crime of which he was convicted, a firearm was “discharged.” J.A. 103, 118, 135-36. This sentence was imposed despite evidence, undisputed by the government and accepted by the lower courts, that the discharge was accidental. *Id.* at 139-42, 158. Because § 924(c)(1)(A)(iii) applies only when the firearm was discharged knowingly, and not merely by accident or mistake, the judgment was in error and must be reversed.

1. The robbery from which this case arose occurred in the late morning of November 10, 2004. A masked man entered a bank in Rome, Georgia, brandished a small pistol, and told everyone to get on the floor. *Id.* at 16-19, 27-29, 77-79, 134-36. He walked behind the teller counter and started collecting money from the stations, picking up bills with his left hand and holding the pistol with his right. *Id.*

It was then that the accident occurred. As the perpetrator attempted to switch the gun from one hand to the other, it inadvertently discharged. *Id.* The bullet went through a partition, ricocheted off a computer, and landed on the teller counter. The

perpetrator was visibly shocked, as bank employees later testified. *Id.* at 18-19, 22-24, 47-48, 55, 77-79. He uttered an expletive and immediately left the bank, taking approximately \$3,642.00. None of the persons inside the bank were harmed. *Id.* at 18-20.

Local police soon arrested two suspects in the robbery: Christopher Michael Dean and Ricardo Curtis Lopez. These men were brothers-in-law who lived in the same apartment, along with Mr. Lopez's wife (Mr. Dean's sister). Both of them roughly matched the description of the perpetrator, and both were apprehended at or near the car used during the robbery. *Id.* at 31-40, 74-75.

The investigation then took an odd turn: Each man confessed to the crime and exonerated the other. At first, Mr. Lopez said that he had committed the robbery, and that Mr. Dean had not been involved. *Id.* at 75-76. Later, however, Mr. Dean admitted that he had committed the theft, without the knowledge of Mr. Lopez. He explained that Mr. Lopez was trying to take the blame for the crime in order to protect Mr. Dean and his family from the stress of a lengthy period of incarceration. *Id.* at 80-81. Mr. Dean said that he was coming forward because he "couldn't have [Mr. Lopez] going to prison for 10 years for something that [Mr. Lopez] was not guilty of." Mr. Lopez subsequently acknowledged that Mr. Dean had in fact committed the offense. *Id.* at 75-76, 80-81.

Prosecutors, however, charged both Mr. Dean and Mr. Lopez with conspiracy to commit a robbery affecting interstate commerce, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and aiding and abetting another in using, carrying, possessing, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). J.A. at 11-12.

2. Both men were tried before a jury in May 2006 in the Northern District of Georgia. They testified consistently that Mr. Dean had committed the robbery without the assistance or involvement of Mr. Lopez. *Id.* at 75-76, 80-81. Mr. Dean reiterated that the firearm had been discharged inadvertently, a fact corroborated by the prosecution's testifying eye witnesses. The jury returned a verdict of guilty for both defendants on both counts. *Id.* at 82, 136.

The presentence report recommended that Mr. Dean was subject to the mandatory ten-year minimum term of imprisonment under § 924(c)(1)(A)(iii) because the firearm had been "discharged." Defense counsel objected on the ground that the discharge had been accidental. *Id.* at 94-99, 156-58, 164. The district court did not disagree with this characterization, but held that § 924(c)(1)(A)(iii) applies even to an unintentional discharge. It therefore sentenced Mr. Dean to the mandatory minimum term of imprisonment of ten years under § 924(c)(1)(A)(iii), to be served consecutive to any other sentence imposed.¹ *Id.* at 103, 118, 124-26.

The Eleventh Circuit affirmed. It acknowledged that "[t]estimony at trial supports [the] assertion that the discharge of the firearm . . . was likely accidental" – a finding the government did not dispute. *Id.* at 139, 147. Nonetheless, it held that, because "§ 924(c)(1)(A)(iii) does not contain a separate intent requirement," the "mere discharge of [the firearm] is controlling" and mandates application of the ten-year mandatory minimum sentence. *Id.* at 134-42.

¹ Mr. Dean was also sentenced to a 100-month term of imprisonment for his conviction under the Hobbs Act of conspiracy to commit bank robbery. His total sentence of imprisonment was 220 months. J.A. 124-26.

SUMMARY OF ARGUMENT

The judgment below, holding that § 924(c)(1)(A)(iii) applies even when the firearm was discharged unintentionally, contravenes all relevant canons of construction. It ignores the plain meaning of the statutory language, which requires proof of intent, in favor of an interpretation that runs counter to Congress’s expectations. It refuses to read a *mens rea* requirement into the provision despite settled doctrine presuming that criminal statutes incorporate such a requirement. And it adopts a construction which imposes substantial additional penalties on the defendant even though the rule of lenity demands that a statute whose meaning is doubtful be interpreted in the manner most favorable to the defense.

The statutory language itself compels an interpretation contrary to that of the Eleventh Circuit. The ten-year mandatory minimum sentence of § 924(c)(1)(A)(iii) applies only when the firearm was discharged “in relation to” a crime of violence. Inherent in that phrase is a requirement that the discharge be for the purpose of facilitating the offense, not merely accidental or involuntary. *Smith v. United States*, 508 U.S. 223, 237-38 (1993). This interpretation renders subparagraph (iii) consistent with other provisions of the statute – which prescribe lesser minimum sentences for “us[ing] or carry[ing]” and “brandish[ing]” a firearm, and which undoubtedly require proof of intent – and accords with the statute’s purpose of imposing increased mandatory minimum punishment only for increasingly culpable conduct. This reading is further supported by legislative reports and statements reflecting Congress’s understanding that

§ 924(c)(1)(A)(iii) would apply only when the conduct was done “knowingly.”

Incorporation of an intent requirement is also mandated by the presumption of *mens rea*. That doctrine holds that a criminal statute will be read to require proof of general intent – *i.e.*, proof that the criminal act was committed knowingly and not by accident or mistake – “absent a clear statement from Congress that *mens rea* is not required.” *Staples v. United States*, 511 U.S. 600, 605-06, 618 (1994). No such statement exists in this case, either in the statute or the legislative record. To the contrary, all available material demonstrates that Congress understood and intended that a *mens rea* element would be read into § 924(c)(1)(A)(iii).

Any doubts that might remain over the proper interpretation of the statute are resolved by the rule of lenity. That rule requires that, “where text, structure, and history fail to establish that the Government’s position is unambiguously correct,” any statutory ambiguity must be resolved in the defendant’s favor. *United States v. Granderson*, 511 U.S. 39, 54 (1994). The “text, structure, and history” of § 924(c)(1)(A)(iii), far from showing the government’s position to be “unambiguously correct,” demonstrate beyond doubt that the government is wrong. Nevertheless, even if the statute could still somehow be deemed “ambiguous,” the rule of lenity mandates adoption of the interpretation most favorable to the defendant, requiring proof of knowing misconduct.

The Eleventh Circuit misapplied these canons of construction. Contrary to its decision, the ten-year mandatory minimum sentence under § 924(c)(1)(A)(iii), for discharging a firearm during and in relation to a crime of violence, can be applied

only when the firearm is discharged knowingly, and not by accident or mistake. The judgment of the Eleventh Circuit should be reversed, with instructions to remand for resentencing.

ARGUMENT

I. SECTION 924(C)(1)(A)(III) INCORPORATES A GENERAL INTENT ELEMENT.

The language and history of § 924(c)(1)(A)(iii) demonstrate that it incorporates a general intent element. Congress included a scienter requirement in the principal paragraph, through the phrase “in relation to,” and the statute’s syntax and structure show that this requirement applies to the “discharge” provision, demanding proof that the defendant acted at least knowingly, and not by accident or mistake.

A. The Statutory Language Includes a General Intent Element.

The text of § 924(c)(1)(A), the “starting place” of any interpretive inquiry, *Staples v. United States*, 511 U.S. 600, 605-06, 618 (1994), clearly includes a general intent element. That provision states, in part, as follows:

any person who, *during and in relation to* any crime of violence or drug trafficking crime[,] . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (emphasis added). The phrase “in relation to” necessarily embodies a *mens rea* requirement, and must be read to require that any of the prohibited acts in the statute – including “discharge” of a firearm – be committed knowingly.

1. The meaning of the phrase “in relation to” was addressed in *Smith v. United States*, 508 U.S. 223 (1993). That phrase clarifies, the Court held, that the firearm must “at a minimum” have some “purpose or effect” with respect to the underlying crime and that its use or presence “cannot be the result of *accident or coincidence*.” *Id.* at 237-38 (emphasis added). In other words, the use of the firearm must “facilitat[e], or ha[ve] the potential of facilitating,” the underlying offense. *Id.* at 238 (quoting *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) (Kennedy, J.)).

Implicit in this definition is a requirement that the firearm be used knowingly. An accidental or involuntary act can hardly be said to “facilitate” an offense.² Only if the defendant used the gun knowingly, not merely by accident, can that use be deemed “in relation to” the crime. See *United States v. Santeramo*, 45 F.3d 622, 624 (2d Cir. 1995) (per curiam) (“[C]learly, a person cannot have possession

² This point is illustrated by the facts of this case. When the firearm accidentally discharged during the bank robbery, the perpetrator yelled an expletive, stopped collecting money, and ran from the bank. J.A. 18-19, 22-24, 47-48, 55, 77-79. Thus, far from “facilitating” the crime, the unexpected discharge of the firearm apparently resulted in a premature end to the robbery, forcing a rushed exit from the premises and preventing the accumulation of additional cash.

or control of a firearm and allow the firearm to play a role in the crime unless the person knew of the firearm's existence.") (quoting *United States v. Gutierrez*, 978 F.2d 1463, 1467 (7th Cir. 1992)). Circuit courts have so held, concluding that the phrase "fairly imports [a] knowledge requirement." *Id.*; see *United States v. Dahlman*, 13 F.3d 1391, 1400 (10th Cir. 1993) ("The language 'during and in relation to' is the equivalent of or meets the scienter requirements of knowledge . . ."); *United States v. Gutierrez*, 978 F.2d 1463, 1467 (7th Cir. 1992) (agreeing that "'during and in relation to' necessarily include[s] a knowledge requirement").

This interpretation, beyond flowing from the plain meaning of "in relation to," is necessary to avoid rendering that phrase superfluous. The statute applies only when a firearm was used "*both 'during and in relation to' a drug crime.*" *Muscarello v. United States*, 524 U.S. 125, 137 (1998) (quoting 18 U.S.C. § 924(c)(1)); see *United States v. Williams*, 344 F.3d 365, 371 (3d Cir. 2003). The term "during" covers the necessary temporal relationship between the use of the firearm and the underlying crime, so the only job for "in relation to" to perform is to prescribe the necessary causal connection: *i.e.*, requiring that the firearm be used for the *purpose* of facilitating the offense. *Smith*, 508 U.S. at 237-38; see *United States v. Iiland*, 254 F.3d 1264, 1274 (10th Cir. 2001) ("[M]erely carrying the gun during the crime is not enough to meet the 'during and in relation to' element unless the government proves the defendant *intended* the weapon to be available for use during the crime.") (emphasis added). Only if "in relation to" is interpreted to include a *mens rea* element can the phrase be given independent meaning and effect.

2. It is equally clear that the “in relation to” modifier, with its scienter requirement, applies not only to the “use or carry” provision of § 924(c)(1)(A) but also to the “brandish” and “discharge” provisions of subparagraphs (ii) and (iii). When a modifier is antecedent to a series of verbs, it is properly construed to apply to each of the verbs in the series. *American Heritage Book of English Usage* 53 (1996); cf. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) (applying “knowingly” to subsequent terms in statute). The adverbial phrase “in relation to” in § 924(c)(1)(A) appears before a series of verbs that constitute the *actus reus* of the provisions, including “use,” “carry,” “possess,” “brandish,” and “discharge.” 18 U.S.C. § 924(c)(1)(A). That phrase must therefore be construed to apply to all of these acts, requiring that they be performed knowingly. Cf. *X-Citement Video*, 513 U.S. at 68-69.

The fact that the series of verbs is interrupted by a separate modifying clause, prohibiting “possess[ion]” of a firearm “in furtherance of” a crime, does not change this conclusion. First, the possession clause is set off from the remainder of the statute by commas, suggesting that it is grammatically distinct from the other provisions. That clause must therefore be treated as a separate prong, which does not affect the interpretation of other provisions.³ Cf. *United States*

³ The explanation for the somewhat awkward phrasing of the statute, as well as confirmation that “in relation to” modifies the “brandish” and “discharge” provisions, is found in the statute’s legislative history, as described below. See *infra* Part I.B.2 (discussing prior bills); cf. *X-Citement Video*, 513 U.S. at 73-74 (“The legislative history of the statute evolved over a period of years, and perhaps for that reason speaks somewhat indistinctly to the question whether ‘knowingly’ in the statute modifies the elements of (1)(A) and (2)(A) . . .”).

v. *Combs*, 369 F.3d 925, 931 (6th Cir. 2004) (discussing possession clause and concluding that it enumerates a separate offense). Second, “brandish” and “discharge” represent ways in which a firearm is “used,” beyond mere possession. *Smith*, 508 U.S. at 237-38. It therefore makes sense to apply to these provisions the same modifier that applies to “use”: *i.e.*, “in relation to.”⁴

The phrasing of subparagraphs (ii) and (iii) supports this construction. Those provisions impose an increased, consecutive mandatory minimum sentence whenever the firearm “is brandished” or “is discharged.” 18 U.S.C. § 924(c)(1)(A). The subparagraphs, standing alone, obviously do not themselves define the period in which the firearm must be used, or instruct whether or how the firearm’s use must be linked to the underlying crime. The simplest and most natural way to fill this gap is to rely on the “during and in relation to” language in the principal paragraph. Incorporating this modifier into subparagraphs (ii) and (iii) provides the temporal and causal limitation that is necessary but otherwise lacking.

A contrary interpretation would produce absurd results. Considered in isolation, subparagraphs (ii) and (iii) would apply *whenever* the gun at issue “is brandished” or “is discharged,” regardless of when

⁴ The statute’s interpretation would not change if “in furtherance of,” instead of “in relation to,” were deemed to modify “brandish” and “discharge.” Several courts have recognized that these phrases carry substantially the same meaning. *United States v. Avery*, 295 F.3d 1158, 1174-75 (10th Cir. 2002); *see also, e.g., Iiland*, 254 F.3d at 1271-74 (concluding that “in furtherance of” is a “slightly higher standard” which “encompasses the ‘during and in relation to’ language”) (quoting H.R. Rep. No. 105-344, at 9 (1997)).

the actions occur, or by whom or for what reason they are taken. This would presumably mean that a defendant could be sentenced under subsection (iii) if the gun used during the crime had been discharged at some point long before or after the offense, or if it was appropriated and discharged by another person during the offense – even by a police officer in self-defense. See *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir. 2006) (noting that, without an intent element, the discharge provision of § 924(c) might “render an armed robber liable for the discharge by a law enforcement officer or bank teller who got a hold of the robber’s gun and used it to threaten the robber” or “if a defendant’s weapon accidentally discharged when he dropped it to comply with a police request to do so”); cf. *Carter v. United States*, 530 U.S. 255, 269 (2000) (interpreting statute prohibiting taking of money by force to incorporate *mens rea* requirement to avoid application “to the hypothetical person who engages in forceful taking of money while sleepwalking”). It is inconceivable that Congress would have intended, without an express statement of purpose, to punish individuals for the actions of another person or for conduct unrelated to the underlying crime. To avoid this result, the statute must be interpreted to read “in relation to,” with its *mens rea* element, as modifying “brandish” and “discharge” in § 924(c)(1)(A).

3. The structure of the statute supports this construction. See *Bailey v. United States*, 516 U.S. 137, 145 (1995) (“We consider not only the bare meaning of the [language] but also its placement and purpose in the statutory scheme.”). There is no doubt that the mandatory minimum sentences of subparagraphs (i) and (ii) apply only if the proscribed conduct was performed knowingly. *Brown*, 449 F.3d

at 156; see *United States v. Nava-Sotelo*, 354 F.3d 1202, 1205 (10th Cir. 2003). It follows, then, that the mandatory minimum sentence of subparagraph (iii) applies only if the conduct was committed “during and in relation to” the underlying crime, and therefore knowingly.

This construction would best serve the statute’s purpose. Section 924(c)(1)(A) imposes increasingly harsh punishment for increasingly culpable conduct: for possessing, using, or carrying a firearm, the statute mandates a five-year minimum sentence; for brandishing a firearm, a seven-year sentence; and for discharging a firearm, a ten-year sentence. 18 U.S.C. § 924(c)(1)(A). Each increase in the minimum term of imprisonment is linked to conduct that is increasingly blameworthy. *Brown*, 449 F.3d at 156; see also H.R. Rep. No. 105-344, at 6 (1997) (stating that the bill imposes “increased penalties for escalating egregious conduct”). It is therefore consistent with the structure of the statute to apply those increases only in response to knowing (and escalating) misconduct.

The escalating mandatory minimum sentences for misconduct specified in the statute are not explained solely by the increased risk of harm inherent in such conduct, independent of greater culpability. This fact is most clearly demonstrated by the statute’s definition of “brandish”:

to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.⁵

⁵ That § 924(c) explicitly defines “brandish” to require proof of a particular intent (“in order to intimidate”) hardly suggests, as

18 U.S.C. § 924(c)(4). Thus, under the statute, an individual “brandishes” a firearm when he or she merely informs another person of its presence, see *id.*, or wears the weapon in the ordinary course of business, cf. *Harris v. United States*, 536 U.S. 545, 556 (2002), even though this conduct does not, in and of itself, increase the risk of harm to others. The statute focuses not on risk, but on the defendant’s culpability.⁶ Cf. 18 U.S.C. § 924(j) (authorizing

the government claims, that “discharge” cannot be read to incorporate a general intent element. To the contrary, the fact that Congress defined the *particular* intent necessary to constitute “brandishing,” without even mentioning the requisite *general* intent, strongly implies that Congress understood that a general intent element had already been incorporated into subparagraphs (ii) and (iii). See *Brown*, 449 F.3d at 157. Considered in this light, the “in order to intimidate” language does not add a scienter element where none previously existed but, rather, supplements the already-present general intent element with an additional, specific intent requirement. See *id.* (“The statute’s definition of ‘brandish’ is broader than the dictionary definition Having embarked on a definition, the drafter thought it proper to specify the required intent.”) (internal citations omitted). While the inclusion of this language in the definition of “brandish” may suggest that no similar specific intent requirement should be read into the definition of “discharge,” see *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.”), it in no way conflicts with incorporation of a general intent element and certainly cannot be viewed as an affirmative choice to dispense wholly with the requirement of *mens rea*.

⁶ Use of the passive voice in subparagraphs (ii) and (iii) (“is brandished” and “is discharged”) does not imply that those provisions operate without regard to intent. First, as used in the statute, “brandish” and “discharge” are transitive verbs; they require a subject to act upon an object – in this case, an individual to act upon a firearm, causing it either to be

higher penalties for any person “who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm”).

It is inconsistent with § 924(c)(1)(A) to subject an individual who acted unintentionally, and cannot be deemed morally culpable, to increased mandatory minimum punishment. *Brown*, 449 F.3d at 156-57. Particularly because the increase in sentence for “discharging” a firearm is so substantial – three additional years’ mandatory imprisonment – and plainly associated with escalating criminality, it should be interpreted to apply only when the act was committed knowingly. *Id.*

B. The Legislative History Supports a General Intent Element.

The legislative history confirms that Congress expected § 924(c)(1)(A)(iii) to be interpreted, in accordance with its plain language and structure, to require proof of general intent.

1. The statute has always included some form of intent requirement. The original version of § 924(c), enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, provided as follows:

“brandished” or “discharged.” *American Heritage Book of English Usage, supra*, § 70. Congress could have mandated an increased penalty whenever the firearm “discharges,” a simpler (intransitive) verb form which might cover any case where the firearm happened to expel a bullet, regardless of the cause. That Congress instead used the transitive form, “is discharged,” suggests that an intentional act is required. *See id.* Second, in light of the statutory definition of “is brandished,” as used in subparagraph (ii) (which circumscribes that transitive verb to volitional acts), the parallel construction in the next subparagraph ((iii), “is discharged”), even though also phrased in the passive voice, weighs heavily in favor of reading an intent requirement into that subparagraph as well. *See supra* note 5.

(c) Whoever –

(1) uses a firearm *to commit any felony* for which he may be prosecuted in a court of the United States, or

(2) carries a firearm *unlawfully during the commission of any felony* for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

Id. § 102 (emphasis added). The highlighted phrases both reflect an element of intent. A defendant cannot be said to use a gun “to commit a felony” if he or she has no awareness of the gun’s usage; likewise, a defendant cannot be deemed to carry a gun “unlawfully during . . . [a] felony” when he or she has no knowledge of its presence. See *United States v. Nelson*, 733 F.2d 364, 370-71 & n.15 (5th Cir. 1984) (requiring proof of knowing conduct); *United States v. Barber*, 594 F.2d 1242, 1244 (9th Cir. 1979) (same).

That intent element was retained when the statute was amended by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. The amended statute stated, in relevant part:

Whoever, *during and in relation to any crime of violence*, . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment for such crime of violence, be sentenced to imprisonment for five years.

Id. § 1005 (emphasis added). The amendment combined the “use” and “carry” subsections, and replaced the phrases “to commit any felony” and

“unlawfully during the commission of any felony” with a single, common modifier: “during and in relation to.” *Id.*

Inherent in the new language was the same intent element that had existed in the prior version. *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) (Kennedy, J.) (“[T]he ‘in relation to’ language was not intended to create an element of the crime that did not previously exist, but rather was intended to make clear a condition already implicit in the statute.”); see *United States v. Wilson*, 884 F.2d 174, 178-79 (5th Cir. 1989) (same). Congress eliminated the modifier “unlawfully” not because it wanted to remove a *mens rea* component or impose strict liability, but because it wanted to remove protection for “policemen and persons licensed to carry firearms who committed Federal felonies,” see H.R. Rep. No. 98-1030, at 314 n.10 (1984), reprinted in 1984 U.S.C.C.A.N. 3182 – without extending the statute’s scope beyond those persons who carry or use a firearm for the *purpose* of facilitating a federal crime. *Stewart*, 779 F.2d at 539. The “during and in relation to” language achieved this goal, limiting the statute’s applicability to cases in which the defendant purposefully “chose” to use or carry a firearm – whether lawfully or not – and “intended” that it would facilitate the crime. H.R. Rep. No. 98-1030, at 314 & n.10.

The statute was amended again in 1986, to extend its coverage to “drug trafficking crime[s]” in addition to “crime[s] of violence.” Firearm Owners’ Protection Act of 1986, Pub. L. No. 99-308, § 104, 100 Stat. 449, 456. The “during and in relation to” modifier was retained, and there is no indication that Congress disagreed with judicial holdings that the statute applies only when the firearm was carried or used “knowingly.” See H.R. Rep. No. 99-495, at 25-29

(1986), *reprinted in* 1986 U.S.C.C.A.N. 1327. To the contrary, a committee report acknowledged these decisions and stated that, with respect to the Gun Control Act, “[i]t is the Committee’s intent, that unless otherwise specified, the knowing state of mind shall apply to circumstances *and* results.” *Id.* at 25-26 (emphasis added). The report noted that “[t]his comports with the usual interpretations of the general intent requirements of current law.” *Id.* (citing *United States v. Bailey*, 444 U.S. 394, 405 (1980)).⁷

Over the next decade, courts continued to interpret the statute to incorporate a knowledge element. *Santeramo*, 45 F.3d at 624; *Dahlman*, 13 F.3d at 1400; *Gutierrez*, 978 F.2d at 1467. Most notably, as discussed above, this Court held in *Smith* that the phrase “in relation to” requires that the firearm have some “purpose or effect” with respect to the underlying crime and that its use “[not] be the result of accident or coincidence.” 508 U.S. at 237-38. Congress never questioned or legislatively challenged these decisions, allowing the material language to remain unchanged in the three amendments to § 924(c) passed during this period.⁸

⁷ The report quoted a definition of “general intent” offered in an opinion by Justice Holmes: “If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent.” *Ellis v. United States*, 206 U.S. 246, 257 (1907), *quoted in* H.R. Rep. No. 99-495, at 26 n.21.

⁸ The statute was amended in 1988 to expand the definition of “drug trafficking crime,” *see* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360, in 1990 to increase the punishment for use of a short-barreled rifle or shotgun and to include “destructive device[s]” in the definition of “firearm,” *see* Crime Control Act of 1990, Pub. L. No. 101-647, § 1101, 104

2. The only relevant decision to which Congress did react was the Court's opinion in *Bailey v. United States*, 516 U.S. 137 (1995). The question in *Bailey* was whether a defendant could be convicted under § 924(c)(1) for "use" of a firearm when the gun was possessed by the defendant near the crime but was not utilized during the offense. *Id.* at 138-39. The Court answered that question in the negative. *Id.* at 143. Reading the term "use" in § 924(c)(1) to require proof of "active employment," it stated that, "[t]o sustain a conviction under the 'use' prong of § 924(c)(1), the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime." *Id.* at 143, 150.

Legislative response to *Bailey* was swift. Several bills were soon introduced to state explicitly that § 924(c)(1) applies when a firearm is "possessed" in relation to a federal crime, regardless of whether it is actively employed. *Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under 924(c): Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1996) (noting pending bills). At the same time, legislators decided to increase the penalty for individuals who "discharge" a gun in connection with the crime. *Id.* at 2-4 (statement of Sen. Helms).

Two principal bills were reported: H.R. 424 and S. 191. The House bill proposed to eliminate the "use or carry" language altogether, replacing it with separate prohibitions on "possessing," "brandishing" and "discharging." H.R. 424, 105th Cong. (as

Stat. 4789, 4829, and in 1994 to add "semiautomatic assault weapon" to the list of firearms implicating a ten-year mandatory sentence, see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102, 108 Stat. 1796, 1998.

reported Oct. 24, 1997). It would have amended § 924(c)(1) to state as follows:

A person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States –

(A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;

(B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or

(C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years

Id. There is no doubt in this version of the statute that “in relation to” modifies all of the relevant verbs: possess (even though it is also modified by the phrase “in furtherance of the crime”), brandish, and discharge. H.R. Rep. No. 105-344, at 3, 11-12.

The Senate bill, in contrast, retained the “use or carry” language from the original statute but added new prohibitions on “possessing” and “discharging.” In its original form, the Senate bill provided:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which a person may be prosecuted in a court of the United States, uses, carries, or possesses a firearm shall, in addition to the punishment

provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years

S. 191, 105th Cong. § 1 (as introduced Jan. 22, 1997). This version obviously did not include the “in furtherance of” language of the current statute. That phrase was added later, in order to conform more closely to the House version. See H.R. 424 (as reported Oct. 24, 1997). The amended Senate bill, as reported, provided:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which a person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years; and

(ii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

S. 191 (as reported Nov. 6, 1997). Despite the different (and rather awkward) structure, there is no indication that legislators understood this language to differ in meaning from that in the House bill, including the definition and scope of “in relation to.”

The two bills were passed in their respective houses, and referred to a conference committee. See

144 Cong. Rec. H10,329-30 (daily ed. Oct. 9, 1998) (statement of Rep. McCollum). That committee produced an amended bill that would become § 924(c)(1)(A). *Id.* It incorporated the structure and much of the language of the Senate proposal, but also included the “brandish” provision from the House bill. *Id.* The bill was subsequently approved by the House and Senate, and signed into law on November 13, 1998. *Remarks on Signing Legislation To Provide Educational Assistance to Families of Slain Officers and Strengthening Penalties for Criminals Using Guns*, 34 Weekly Comp. Pres. Doc. 2307 (Nov. 13, 1998).

3. Although the final bill did not adopt the precise structure of the House version, which most explicitly applied the “in relation to” modifier to the “brandish” and “discharge” provisions, it is clear that legislators anticipated that the bill would be interpreted in that manner. Notably, they characterized the Senate and House bills as “nearly identical” and as “companion” legislation. 144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998) (statement of Rep. McCollum); *id.* (statement of Rep. Myrick). The only difference mentioned during debates was the lesser penalties imposed under the Senate version: the House version prescribed a minimum sentence of ten years for possessing and twenty years for discharging a firearm, whereas the Senate bill provided for a sentence of five years for possessing and ten years for discharging. *Id.* (statement of Rep. Scott). There is no indication that legislators viewed the bills as incorporating different *mens rea* elements or restricting application of the “in relation to” modifier to only certain of the enumerated actions. See H.R. Rep. No. 105-344, at 12 (“The Committee intends to leave undisturbed the body of case law which has interpreted the phrase

‘during and in relation to’ in the context of prosecutions for violations of § 924(c).”) (citing *Smith*).

It was clearly reasonable for Congress to expect that “in relation to” would apply to the “brandish” and “discharge” provisions. “Brandish” and “discharge” represent nothing more than particular ways in which a firearm may be “used” during a crime. See 144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998) (statement of Rep. McCollum). Legislators understood that this Court had defined “use” to require proof of intent and “active employment,” *id.* (citing *Bailey*), and they did not attempt to change that definition through the amendment to § 924(c). Rather, they simply added a provision covering “possess[ion]” and then enumerated specific uses of a firearm that would be subject to higher penalties. *Id.* It follows that the same interpretation applied to “use,” including the “in relation to” modifier, should also apply to “brandish” and “discharge.”

The committee report confirms this conclusion. It states repeatedly that the “brandish” and “discharge” provisions will apply only if the defendant “brandishes or discharges a firearm *during and in relation to* the commission of a federal crime.” H.R. Rep. No. 105-344, at 2 (emphasis added); see *id.* at 12 (“To sustain a conviction for brandishing or discharging a firearm, the government must demonstrate that the firearm was used ‘during and in relation to’ the commission of the federal crime of violence or drug trafficking crime.”).⁹ Statements

⁹ See also H.R. Rep. No. 105-344, at 3 (“If a person brandishes a firearm, during and in relation to the commission of a crime, the additional prison term is fifteen years for a first offense. If the person discharges the firearm, during and in relation to the

during debates on the bill likewise assume that the “brandish” and “discharge” provisions will be modified by the phrase “in relation to.” 144 Cong. Rec. H531 (daily ed. Feb. 24, 1998) (statement of Rep. McCollum) (“The bill . . . allows a penalty enhancement for ‘possessing, brandishing, or discharging’ a firearm during and in relation to a Federal crime of violence or drug trafficking crime.”); 144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998) (statement of Rep. McCollum) (same).

The phrase “in furtherance of,” which appears in the “possession” clause of § 924(c)(1)(A), was not intended to displace the “in relation to” modifier or limit its scope. The committee report explains that this language was inserted to ensure that mere knowing possession of a firearm during a crime would not result in the increased sentence; prosecutors would be required to prove not only that the gun was possessed “during and in relation to” the crime, but also that it was possessed “in furtherance of” the offense. H.R. Rep. No. 105-344, at 11 (“[The bill imposes] increased penalties [on] any person who ‘possesses[,]’ ‘brandishes,’ or ‘discharges’ a firearm during and in relation to the commission of a federal

commission of a crime, the additional prison term is twenty years for a first offense.”); *id.* (“A person who brandishes a firearm, during and in relation to the commission of a crime, shall receive an additional term of imprisonment of at least twenty-five years. A person who discharges a firearm, during and in relation to the commission of a crime, shall receive an additional term of imprisonment of at least thirty years.”); *id.* at 13 (“Under subsection (c)(1)(B), for brandishing during and in relation to the commission of the crime, a person shall receive, in addition to any other penalties, a minimum of fifteen years imprisonment. Under subsection (c)(1)(C), for discharging a firearm during and in relation to the commission of the crime, a person shall receive, in addition to any other penalties, a minimum of twenty years imprisonment.”).

crime of violence or drug trafficking crime. Possession must *also* be ‘in furtherance of the crime.’”) (emphasis added). In other words, “in furtherance of” did not replace or change the “in relation to” standard, but merely added another evidentiary burden, requiring the prosecution to introduce additional “specific facts” showing that the firearm was possessed in order to advance the crime. *Id.* (“[T]he Committee believes that ‘in furtherance of’ is a slightly higher standard, *and encompasses* the ‘during and in relation to’ language.”) (emphasis added); 144 Cong. Rec. S12,671 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine) (“I believe that the ‘in furtherance’ language is a slightly higher standard that *encompasses* ‘during and in relation to’ language, by requiring an indication of helping forward, promote, or advance a crime.”) (emphasis added).

* * *

Congress understood “in relation to” to incorporate a general intent requirement, and expected that requirement to apply to all of the prohibited acts in § 924(c)(1)(A), including the “brandish” and “discharge” provisions. As such, the increased penalties of subparagraphs (ii) and (iii) may be applied only when a person brandishes or discharges a firearm “knowingly.”

II. THE PRESUMPTION OF *MENS REA* REQUIRES INCORPORATION OF A GENERAL INTENT ELEMENT IN § 924(C)(1)(A)(III).

The plain meaning of the statute is bolstered by the traditional presumption in favor of *mens rea*. See, e.g., *X-Citement Video*, 513 U.S. at 70. That doctrine holds that a criminal statute will be construed to require proof of at least general intent “absent a clear

statement from Congress that *mens rea* is not required.” *Staples*, 511 U.S. at 605-06, 618; see *Carter*, 530 U.S. at 267-69. No such statement exists in this case, and thus § 924(c)(1)(A)(iii) must be deemed applicable only when the firearm was discharged knowingly.

1. The presumption in favor of *mens rea* is strongly supported by a long and storied history. Edward Coke and William Blackstone, writing in the 17th and 18th Centuries, were expounding upon already-settled principles of law when they declared that the existence of “criminal intent” and a “vicious will” is the prerequisite of any crime. Edward Coke, *The Third Part of the Institutes of the Laws of England* 107 (William S. Hein Co. 1986) (1641) (“Actus non facit reum nisi mens sit rea [no act is criminal unless accompanied by a criminal intent].”); 4 William Blackstone, *Commentaries* *21 (“[A]n unwarrantable act without a vicious will is no crime at all.”). This principle was soon imported into American law, leading courts to presume conscious wrongdoing as an element of any crime. *E.g.*, *Davis v. United States*, 160 U.S. 469, 484-85 (1895) (quoting Blackstone); see also *Morissette v. United States*, 342 U.S. 246, 251-52 (1952).

The presumption of *mens rea* is now so ingrained in our jurisprudence that, as this Court has recognized, it stands as one of the “background principle[s]” against which Congress legislates. *X-Citement Video*, 513 U.S. at 71; see also *Staples*, 511 U.S. at 605; *Liparota v. United States*, 471 U.S. 419, 426 (1985). It is assumed that Congress, in crafting legislation, recognizes that courts will read criminal provisions as incorporating a scienter requirement, even when the statute does not so provide in express terms. *E.g.*, *Liparota*, 471 U.S. at 426. Only in “limited

circumstances” – where Congress (i) has indicated clearly that no *mens rea* is required or (ii) obviously intended to create a “public welfare” or “regulatory” offense (generally imposing relatively minor penalties for possession or use of an inherently dangerous item) – will the Court dispense with a *mens rea* requirement altogether. *Staples*, 511 U.S. at 606-07 (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978)); see also *Morissette*, 342 U.S. at 258-63.

Against this “background principle,” Congress undoubtedly anticipated that the presumption would apply to the Gun Control Act and its subsequent amendments. Nothing in § 924(c) or in the legislative record can be construed as a “statement from Congress that *mens rea* is not required.” *Staples*, 511 U.S. at 605-06, 618. To the contrary, the congressional report accompanying the 1986 amendment specifically cites cases from this Court discussing the presumption of *mens rea*. H.R. Rep. No. 99-495, at 25-26 (citing *Bailey*, 444 U.S. 394). It further states that, with respect to the Gun Control Act, “[i]t is the Committee’s intent . . . [that] the knowing state of mind shall apply to circumstances and results.” *Id.*

Nor can § 924(c)(1)(A) or its subparts be described as a “public welfare” or “regulatory” offense. The statute does not seek to regulate the sale or dispensation of dangerous substances, or set standards of reasonable conduct for otherwise acceptable activities (such as speed limits for driving). See *Staples*, 511 U.S. at 607 (discussing characteristics of “public welfare” offense); *Morissette*, 342 U.S. at 258-63 (same); cf. *U.S. Gypsum*, 438 U.S. at 442 (“The criminal sanctions [in a public welfare offense] would be used, not to punish conscious and

calculated wrongdoing at odds with statutory proscriptions, but instead simply to *regulate* business practices regardless of the intent with which they were undertaken.”) (emphasis in original). See generally Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933). The penalties imposed under § 924(c)(1)(A) are also far out of line with the minor fines and short prison terms that typify “regulatory” and “public welfare” offenses. See *Staples*, 511 U.S. at 616-18 (stating that “public welfare offense[s] . . . [generally] provide[] for only light penalties such as fines or short jail sentences,” and finding that a ten-year maximum term of imprisonment suggested “that Congress did not intend to eliminate a *mens rea* requirement”). Congress clearly intended § 924(c)(1)(A) to function as a traditional criminal statute, imposing punishment for specific wrongful behavior.

This conclusion is supported by the similarity of § 924(c)(1)(A) to the common law crime of assault. Presuming the existence of a *mens rea* element is, under this Court’s decisions, particularly appropriate when the provision at issue bears resemblance to a common law crime for which intent was required.¹⁰

¹⁰ This is not to suggest that a link to a common law crime is a prerequisite to application of the presumption of *mens rea*. *Carter*, 530 U.S. at 268 & n.6 (“This interpretive principle [the presumption of *mens rea*] exists quite apart from the canon on imputing common-law meaning.”) (citing *X-Citement Video*, 513 U.S. at 70); see Sayre, *supra*, at 70 (“Clearly [application of the presumption] will not depend upon whether the crime happens to be a common law or statutory offense.”), *cited in Staples*, 511 U.S. at 617. Nor is it to say that the elements of common law assault should themselves be incorporated into § 924(c)(1)(A). See *Carter*, 530 U.S. at 264-65 (refusing to assume that a statutory offense carried the same elements as a common law offense when the statute did not use common law terms of art).

See *Morissette*, 342 U.S. at 263; see also *United States v. Freed*, 401 U.S. 601, 607 (1971). The acts proscribed by subparagraphs (ii) and (iii) of § 924(c)(1)(A) involve threatening behavior that is likely to place others in fear for their physical safety. See 18 U.S.C. § 924(c)(4) (defining “brandish” to mean displaying a firearm “in order to intimidate [another] person”). This description closely matches the common law offense of criminal assault, which traditionally required proof that the defendant *intentionally* engaged in threatening conduct which put another person at fear for his or her safety. J.W. Cecil Turner, *Assault at Common Law*, 7 Cambridge L.J. 56, 57-58, 67 (1939); see also T.W. Hughes, *A Treatise on Criminal Law and Procedure* 165 (1919) (defining criminal assault, at common law, to require a “general criminal intent”); Wm. L. Clark & Wm. L. Marshall, *A Treatise on the Law of Crimes* 279 (1905) (“To render one guilty of criminal assault . . . a criminal intent . . . is necessary.”)¹¹ In light of the relationship between § 924(c)(1)(A) and common law assault, it makes even more sense to presume that Congress anticipated that a general intent requirement would be read into the statutory provisions.

2. The government’s counter-argument that the presumption of *mens rea* applies only to “elements” of

Rather, the similarity of the common law crime simply provides further proof that incorporation of a scienter element into § 924(c)(1)(A)(iii) is consistent with Congress’s intent. See *X-Citement Video*, 513 U.S. at 71-72 (linking statute to “common-law offenses against the ‘state, the person, property, or public morals’”) (quoting *Morissette*, 342 U.S. at 255).

¹¹ These definitions follow a long line of English cases. See generally Turner, *supra* (citing, among others, *Tuberville v. Savage*, 86 Eng. Rep. 684 (K.B. 1699)).

an offense, and not to “sentencing enhancements,”¹² fails for a number of reasons. This Court has never intimated that the presumption of *mens rea* does not apply to “sentencing enhancements,” or that its applicability depends on a provision’s classification as an “element” of an offense. See, e.g., *Liparota*, 471 U.S. at 427; *Morissette*, 342 U.S. at 273-75; see also *Brown*, 449 F.3d at 157 (“[A]lthough cases generally apply [the presumption of *mens rea*] 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.”) (quoting *United States v. Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989)). To the contrary, decisions in this area have apparently contemplated that the presumption would apply to *all* criminal provisions. See *Morissette*, 342 U.S. at 250-51 (“A relation between some mental element and *punishment* for a harmful act . . . has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.”) (emphasis added).

To deny application of the presumption of *mens rea* to sentencing enhancements would run counter to congressional expectations. Congress was aware of this Court’s decisions on the presumption of *mens rea* when it enacted the brandish and discharge provisions of § 924(c)(1)(A), see *Albernaz v. United States*, 450 U.S. 333, 341 (1981) (“[I]t is appropriate for us ‘to assume that our elected representatives . . . know the law.’”) (quoting *Canon v. Univ. of Chi.*, 441

¹² In *Harris*, this Court classified the “brandish” and “discharge” provisions of § 924(c)(1)(A) as “sentencing factors” for purposes of the Fifth and Sixth Amendments. 536 U.S. at 556.

U.S. 677, 696-97 (1979)), and it reasonably anticipated that the presumption would apply to those provisions, see H.R. Rep. No. 99-495, at 25-26. Since the presumption of *mens rea* is an interpretive doctrine, it would defy common sense to use it in a manner that defeats Congress's expectations, by refusing to apply it to § 924(c)(1)(A)(iii).

Nor is this interpretation mandated by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or other decisions of this Court discussing when a statutory fact must be submitted to a jury and proved beyond a reasonable doubt. Those opinions explicitly eschew the distinction between “sentencing enhancements” and “elements” on which the government now relies as too formalistic, holding that the constitutional inquiry must be guided by the practical effect of the statutory fact, not its legislative classification. *Id.* at 476-78. They were, moreover, concerned with the *procedural* protections to be afforded to defendants under the Constitution. *Id.* In contrast, the presumption of scienter is concerned with the *substantive* interpretation of statutes. *Staples*, 511 U.S. at 606-07. Its applicability depends principally on the intentions of Congress, largely without regard to constitutionally mandated procedural restrictions. See *id.*

The presumption of *mens rea*, like the rule of lenity, arises principally not from constitutional doctrine but from the common law rule of strict constriction.¹³

¹³ The absence of *mens rea* may, however, raise constitutional concerns in certain circumstances. See *Robinson v. California*, 370 U.S. 660, 666 (1962) (finding statute imposing penalty on persons addicted to narcotics, without proof of voluntary act, unconstitutional under Eighth Amendment); see also *U.S. Gypsum*, 438 U.S. at 437-38 (“While strict-liability offenses do not invariably offend constitutional requirements, the limited

Burke, 888 F.2d at 866 n.6; see *United States v. Lanier*, 520 U.S. 259, 266 (1996). That rule holds that *all* criminal provisions should be construed as narrowly as possible in accordance with congressional intent. *Lanier*, 520 U.S. at 266. It does not distinguish between “elements” and “enhancements.” *Bifulco v. United States*, 447 U.S. 381, 387 (1980). Indeed, this Court has specifically rejected arguments that the rule of lenity should be restricted to those aspects of a statute that define guilt or innocence. *Id.* (“[T]he Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.”); see also *Liparota*, 471 U.S. at 427 (linking presumption of *mens rea* to rule of lenity); *U.S. Gypsum*, 438 U.S. at 437 (same). There is no basis, in light of those decisions, to limit the presumption of *mens rea* to “elements” of an offense, or to preclude its application during sentencing. See Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Sentencing*, 7 Fed. Sent’g Rep. 121, 121 (1994) (“It contorts the meaning of *mens rea* to say that state of mind is irrelevant to sentencing. It is at sentencing that *mens rea* is most crucial.”); see also *Morissette*, 342 U.S. at 254 n.14 (“[N]o penal system that negates the mental element can find general acceptance.”); Stephen J. Morse, *Inevitable Mens Rea*, 27 Harv. J.L. & Pub. Pol’y 51, 51-52 (2003) (“[M]ens rea . . . is crucial to culpability . . .”).

circumstances in which . . . this Court has recognized such offenses attests to their generally disfavored status.”) (internal citations omitted); cf. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 107 (“*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes.”).

3. The government also offers that the presumption of *mens rea* should not apply to sentencing enhancements – specifically the brandish and discharge provisions of § 924(c)(1)(A) – because individuals subject to those enhancements have already been found guilty of an underlying offense and there is thus no risk of criminalizing otherwise “innocent conduct.” *Nava-Sotelo*, 354 F.3d at 1205, 1207. This argument misapprehends the nature of the presumption and the focus of the analysis.

This Court has often said that the presumption of *mens rea* is “particularly appropriate where . . . to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct.” *Liparota*, 471 U.S. at 426; see *Carter*, 530 U.S. at 269; *Staples*, 511 U.S. at 610. But it has never said that the presumption applies *only* in this circumstance. Cf. *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion) (applying rule of lenity when conduct at issue – operation of illegal lottery – was not itself innocent). The fact that a statute would impose penalties for otherwise innocent conduct if interpreted without an intent element has been viewed not as the *sine qua non* of the presumption of *mens rea*, but as another factor supporting incorporation of a scienter requirement.

The government’s argument, moreover, incorrectly emphasizes the innocence of the *person*, rather than the innocence of the *conduct*. The focus of the analysis, in assessing whether a particular interpretation will lead to the criminalization of “innocent conduct,” is necessarily on the “conduct” at issue: *i.e.*, the *actus reus* of the provision. See *X-Citement Video*, 513 U.S. at 71; *Staples*, 511 U.S. at 619. It is of no moment whether the particular defendant may be guilty of other offenses. The only

issue for these purposes is whether a strict liability construction of the provision might reach conduct that is not itself morally culpable, which Congress would likely not have intended to punish.

Phrased differently, the fact that a *person* is not “innocent” does not mean that specific aspects of his or her *conduct* are not so. An intent to do wrong cannot be extrapolated from one criminal act to all of the person’s conduct without distending “*mens rea*” beyond any recognizable contours.

The statute at issue illustrates this point. An individual potentially subject to the discharge provision of § 924(c)(1)(A)(iii) must first be found guilty of a violent or drug trafficking crime, and for that reason cannot be deemed “innocent.” But the particular *conduct* that gives rise to liability under subparagraph (iii) may itself be innocent. For example, an individual may, while committing a bank robbery, drop the firearm he or she is carrying at the direction of police. This is appropriate and “innocent” conduct in this circumstance – even if the gun discharges accidentally when it hits the floor. See *Brown*, 449 F.3d at 156-57. In this case, and in other hypotheticals that could be imagined, see *supra* pp. 11-12 (citing *Brown*),¹⁴ interpreting § 924(c)(1)(A)(iii) as dispensing with an intent element would criminalize “innocent conduct.”

¹⁴ To the extent the government may argue that these situations should be ignored because they are unlikely to arise often, this Court has never held that unjustified punishment should be ignored merely because it will occur only infrequently. *Cf. Carter*, 530 U.S. at 268-69 (presuming statute prohibiting taking of money “by force and violence” to incorporate general intent requirement when statute might otherwise “apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity)”).

The government's rule, under which the presumption could never apply when persons subject to the statute are guilty of another offense, would also contradict settled interpretations of other statutes, including § 924(c)(1)(A). Under the government's reasoning, the presumption of *mens rea* would not apply to the "use or carry" provision of § 924(c)(1)(A) because persons subject to that provision have been found guilty of a violent or drug trafficking crime and are thus not "innocent." Yet, every court to consider the issue has held that the presumption applies and requires that provision to be read to incorporate a general intent element. *E.g.*, *Brown*, 449 F.3d at 156; *Nava-Sotelo*, 354 F.3d at 1205. The government has not argued otherwise, nor could it, since it concedes that "elements" of an offense – like the "use or carry" provision, see *Harris*, 536 U.S. at 556 – are subject to the presumption.

The only reasonable way to apply the presumption of *mens rea* is universally, to all criminal statutes. This is the result that Congress expected, that this Court's decisions suggest, and that the underlying doctrine of strict construction compels.¹⁵

¹⁵ None of this is to say that a *mens rea* element applies to every sentencing enhancement. *Staples*, 511 U.S. at 606-07 (noting that the presumption does not apply to "regulatory" statutes or when Congress clearly intended to dispense with *mens rea*). Nor does it mean that, when the presumption applies, it will always require proof of knowledge of the *facts* relevant to the enhancement, for example the value of stolen property or quantity of drugs. Rather, in many cases (as this one), proof of knowledge as to the *actus reus* alone – *i.e.*, proof of intentional conduct – will suffice to "separate wrongful conduct from 'otherwise innocent conduct.'" *Carter*, 530 U.S. at 269.

The presumption of *mens rea* mandates that at least a general intent requirement be read into § 924(c)(1)(A)(iii). *Carter*, 530 U.S. at 268-69; see also *U.S. Gypsum*, 438 U.S. at 442. Knowledge as to the *actus reus* of the provision will ensure that the statute does not punish non-culpable behavior, and accords with the admonition that “a court [should] read into a statute only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter*, 530 U.S. at 269. This interpretation also instantiates the fundamental principle that a person who acts not volitionally, but only by accident or reflex, cannot be deemed morally blameworthy and should not be punished criminally for his or her conduct.¹⁶

III. THE RULE OF LENITY REQUIRES THAT § 924(C)(1)(A)(III) BE INTERPRETED TO INCLUDE A GENERAL INTENT ELEMENT.

The language and structure of the statute, its legislative history, and the presumption in favor of *mens rea* all require that § 924(c)(1)(A)(iii) be interpreted to incorporate a general intent element. However, even if the provision could yet be deemed ambiguous, the rule of lenity mandates that it be construed to require proof that the firearm was discharged knowingly.

¹⁶ Justice Holmes perhaps put it best: “[E]ven a dog distinguishes between being stumbled over and being kicked.” Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881); see also, e.g., Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* § 3.2(c) (2d ed. 1986) (“[I]t is clear that criminal liability requires that the activity in question be voluntary.”); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 338 (1996) (“It is axiomatic that criminal liability presupposes a ‘voluntary act.’”).

“The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *Santos*, 128 S. Ct. at 2025. It is based on the principles that a defendant should not be subject to punishment for conduct which is not clearly proscribed and that authority to extend criminal liability is vested not in the courts but in Congress. *Id.*; see *Ladner v. United States*, 358 U.S. 169, 177-78 (1958) (“We should not derive criminal outlawry from some ambiguous implication.”) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). When a criminal statute is reasonably subject to two interpretations, one which favors the defense and one which favors the prosecution, “the tie must go to the defendant.” *Santos*, 128 S. Ct. at 2025; see *Bifulco*, 447 U.S. at 387 (“[T]his principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.”); *Ladner*, 358 U.S. at 178 (same).

The only textual argument that the government can make in support of its interpretation is that § 924(c)(1)(A)(iii) does not include an explicit “knowingly” modifier immediately antecedent to the phrase “is discharged.” However, this argument overlooks the *mens rea* element inherent in the phrase “in relation to,” which – as the text and legislative history make clear – Congress intended would apply to the discharge provision. H.R. Rep. No. 105-344, at 3, 12. It also ignores the presumption of *mens rea*, which requires a scienter element to be read into the provision even if not contained in the statute’s express terms. *U.S. Gypsum*, 438 U.S. at 438 (“[F]ar more than the simple omission of the appropriate phrase from the statutory definition is

necessary to justify dispensing with an intent requirement.”). Even if the government’s construction could be viewed as reasonable, it is certainly not without doubt.

The rule of lenity therefore applies. *Bifulco*, 447 U.S. at 400 (“[T]o the extent that doubts remain, they must be resolved in accord with the rule of lenity.”); see *United States v. Granderson*, 511 U.S. 39, 54 (1994) (“[W]here text, structure, and history fail to establish that the Government’s position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”). That doctrine compels that § 924(c)(1)(A)(iii) be interpreted to require proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary.

* * *

The firearm discharge of which Christopher Michael Dean was found guilty was accidental. It therefore did not satisfy the *mens rea* requirement of § 924(c)(1)(A)(iii) and could not have triggered the ten-year mandatory term of imprisonment to which Mr. Dean was sentenced.

CONCLUSION

For these reasons, the Court should reverse the decision of the Court of Appeals for the Eleventh Circuit with instructions to vacate the judgment of the District Court and remand for resentencing.

Respectfully submitted,

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