

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**

REPLY BRIEF OF PETITIONER

SARAH O'ROURKE SCHRUP SCOTT J. FORSTER*
NORTHWESTERN P.O. Box 102
UNIVERSITY Calhoun, GA 30703
SUPREME COURT (706) 625-1799
PRACTICUM

357 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

February 25, 2009

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. SECTION 924(C)(1)(A)(III) INCORPORATES A GENERAL INTENT ELEMENT ..	1
A. Section 924(c)(1)(A)(iii) Is Modified By “During And In Relation To”	1
B. The Legislative History Supports A General Intent Element.....	7
C. Interpreting § 924(c)(1)(A)(iii) Without A General Intent Element Would Produce Absurd Results.....	9
II. THE PRESUMPTION OF <i>MENS REA</i> APPLIES TO § 924(C)(1)(A)(III).....	12
III. THE RULE OF LENITY REQUIRES THAT § 924(C)(1)(A)(III) BE INTERPRETED TO INCLUDE A GENERAL INTENT ELEMENT	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
<i>Bifulco v. United States</i> , 447 U.S. 381 (1980).....	14
<i>Carter v. United States</i> , 530 U.S. 255 (2000).....	11, 16, 17
<i>Clay v. United States</i> , 537 U.S. 522 (2003).....	6
<i>Gustafson v. Alloyd Co.</i> , 513 U.S. 561 (1995).....	2, 10
<i>Harris v. United States</i> , 536 U.S. 545 (2002).....	4, 7, 12, 13
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987).....	8
<i>Liparota v. United States</i> , 471 U.S. 419 (1985).....	14
<i>Morissette v. United States</i> , 342 U.S. 246 (1952).....	12, 13
<i>Nobelman v. Am. Sav. Bank</i> , 508 U.S. 324 (1993).....	3
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946).....	15
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	4, 5
<i>Smith v. United States</i> , 508 U.S. 223 (1993).....	9, 10
<i>United States v. Brown</i> , 449 F.3d 154 (D.C. Cir. 2006).....	10
<i>United States v. Burke</i> , 888 F.2d 862 (D.C. Cir. 1989).....	14
<i>United States v. Hinckley</i> , 550 F.3d 926 (10th Cir. 2008), <i>petition for cert. filed</i> , No. 08-8696 (U.S. Feb. 9, 2009).....	3
<i>United States v. King</i> , 345 F.3d 149 (2d Cir. 2003).....	17

TABLE OF AUTHORITIES—continued

	Page
<i>United States v. Lanier</i> , 520 U.S. 259 (1997).....	14
<i>United States v. Matos-Quinones</i> , 456 F.3d 14 (1st Cir. 2006).....	15
<i>United States v. Mobley</i> , 956 F.2d 450 (3d Cir. 1992).....	17, 18
<i>United States v. U.S. Gypsum Co.</i> , 438 U.S. 422 (1978).....	14, 19
<i>United States v. X-Citement Video, Inc.</i> , 513 U.S. 64 (1994).....	3, 4
<i>Watson v. United States</i> , 128 S. Ct. 579 (2007).....	4, 5, 6
<i>Williamson v. United States</i> , 512 U.S. 594 (1994).....	13

STATUTES

18 U.S.C. § 924(c).....	2, 4
18 U.S.C. § 3559(c).....	10

LEGISLATIVE HISTORY

S. 191, 105th Cong. § 1 (as introduced Jan. 22, 1997).....	17
H.R. 1488, 104th Cong. § 3 (as introduced Apr. 7, 1995).....	8
<i>Violent and Drug Trafficking Crimes: The Bailey Decision’s Effect on Prosecutions Under 924(c): Hearing Before the S. Comm. on the Judiciary</i> , 104th Cong. (1996).....	9
144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998).....	9

TABLE OF AUTHORITIES—continued

	Page
OTHER AUTHORITIES	
<i>American Heritage Book of English Usage</i> (1996).....	2, 3
3 Norman J. Singer & J.D. Shambie Singer, <i>Sutherland Statutes and</i> <i>Statutory Construction</i> (6th ed. 2003).....	14
U.S. Sentencing Guidelines Manual § 2A2.2(b)(2)	17

REPLY BRIEF

The government's brief is full of sound and fury, but ultimately contributes little. It criticizes petitioner's reading of the statute as stylistically inelegant, his reliance on the presumption of *mens rea* as unprincipled, and his invocation of the rule of lenity as contrived. But it never backs these histrionics with reasoned argument, or provides a basis for rejecting the most reasonable interpretation of the statute, under which § 924(c)(1)(A)(iii) applies only if the firearm was discharged knowingly. And it never explains why the patently absurd results that would flow from its interpretation – which would impose a ten-year mandatory minimum sentence for an accidental discharge – should simply be ignored.

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

Petitioner's opening brief demonstrated that the statutory language and legislative history of § 924(c)(1)(A) lead necessarily to the conclusion that the discharge provision requires proof of a knowing discharge. Pet'r Br. 7-25. The government offers nothing to discount this construction and, in fact, proposes a contrary interpretation that is so absurd as to support adoption of petitioner's construction.

A. Section 924(c)(1)(A)(iii) Is Modified By "During And In Relation To."

The government agrees that the adverbial clause "during and in relation to" in § 924(c)(1)(A) embodies an intent requirement which, if read to modify the verb "discharged" in subparagraph (iii), would demand proof that the discharge was at least knowing. Gov't Br. 13, 15, 33 n.9. It thus concedes a fundamental point: an "accidental" discharge is not

“in relation to” the knowing use of a firearm in the course of a crime. The government argues, however, that “in relation to” cannot apply to the discharge provision in light of (i) rules of style, (ii) other statutory language, and (iii) the statute’s purpose. *Id.* at 11-24. None of these points is valid.

1. The government asserts that the discharge provision cannot be read to include an intent requirement simply because no such requirement appears therein. See *id.* at 12. This position, however, starts from a false premise. The discharge provision does in fact incorporate an intent requirement: the adverbial clause “during and in relation to” – with its intent requirement – appears *in the same sentence* as the phrase “is discharged” in the discharge provision. 18 U.S.C. § 924(c)(1)(A). That clause is placed before the series of verbs representing the conduct targeted by the statute, and is therefore properly read to apply to all of those verbs, including “discharged.” *American Heritage Book of English Usage* 53 (1996). The division of the sentence among several provisions is not, under long-standing precedent of this Court, any basis for ignoring this relationship or assuming congressional intent to divorce the latter verbs from the antecedent adverb. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (“[An] Act of Congress[] should not be read as a series of unrelated and isolated provisions.”).

The government responds that it would have been more stylistically proper for Congress to have placed the modified verbs in closer proximity to the adverbial clause, or to repeat that clause in the latter provisions. Gov’t Br. 15. But Congress need not follow *The Chicago Manual of Style* in drafting legislation. That a statute could have been phrased more cleanly or elegantly is no ground to disregard a

meaning that is otherwise plain, or to adopt an interpretation that is patently unreasonable. See, e.g., *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330-31 (1993) (refusing to read modifying clause as applicable only to immediate antecedent, although “th[at] reading of the clause is quite sensible as a matter of grammar”); see also *United States v. Hinckley*, 550 F.3d 926, 943 (10th Cir. 2008) (“[T]he possibility of misplaced modifiers is real [but such] grammatical heuristics can ‘assuredly be overcome by other indicia of meaning.’”) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)), *petition for cert. filed*, No. 08-8696 (U.S. Feb. 9, 2009). Indeed, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), this Court disregarded standard rules of grammar and read an *adverb* to modify several *nouns* in order to effect clear congressional intent. *Id.* at 68. No such linguistic gymnastics are required here: applying the adverbial clause “during and in relation to” to all subsequent verbs in the sentence, including “brandished” and “discharged,” is reasonable and violates no relevant rules of grammar.¹

That the statute’s verbs appear in both the active and passive voice is immaterial. The meaning or effect of an adverb does not change when the modified verb switches from active to passive voice, and there is no reason to limit the scope of “in relation to” only to verbs appearing in one voice. See *American Heritage, supra*, at 4, 56-59. Certainly nothing suggests that Congress saw a meaningful

¹ Of course, had Congress intended “in relation to” to apply only to “use” and “carry,” it could have easily transposed the adverbial clause *after* the relevant verbs (*i.e.*, “any person who uses or carries a firearm during and in relation to any crime of violence”), in which case there would be little doubt that the clause would not “travel down” to the latter verbs. Gov’t Br. 13.

distinction between active and passive verbs in this context. To the contrary, the statute treats them as interchangeable, defining the passive verb “is brandished” by reference to the active form “brandishes.” 18 U.S.C. § 924(c)(1)(A)(ii), (c)(4). While style guides might advise a parallel structure for the verbs in this series, the most reasonable reading of the statute cannot be defeated merely because Congress might have drafted it better. See, e.g., *X-Citement Video*, 513 U.S. at 68.

Nor is it relevant that another adverbial clause, “in furtherance of,” interrupts the statute’s series of verbs. That clause, as explained in petitioner’s opening brief, is set off from the remainder of the sentence by commas and can therefore be treated as grammatically distinct, neither restricting the scope of “in relation to” nor affecting the interpretation of “brandished” or “discharged.” Pet’r Br. 10-11. And, in any event, because “in relation to” and “in furtherance of” have substantially similar meanings, *id.* at 11 n.4,² the inclusion of the latter clause can hardly be viewed as a reason to limit the former.

2. The government also claims that, even if “in relation to” could be read to modify the brandish and discharge provisions, incorporation of that phrase’s *mens rea* requirement would be inconsistent with the statute’s structure and language. Gov’t Br. 11-13, 18-21. It cites several cases in support, including *Harris v. United States*, 536 U.S. 545 (2002), *Russello v. United States*, 464 U.S. 16 (1983), and *Watson v.*

² Although the government criticizes the suggestion that these phrases “carry substantially the same meaning,” Gov’t Br. 18 n.4, it relies on authorities making this very point, *id.* (citing *United States v. Avery*, 295 F.3d 1158, 1174 (10th Cir. 2002)).

United States, 128 S. Ct. 579 (2007). None of these opinions applies, much less controls, here.

The government brazenly asserts that *Harris* “confirm[s] that the phrase ‘in relation to’ does not modify the sentencing factor of ‘discharge.’” Gov’t Br. 15. *Harris* said no such thing. That opinion explained that the division of § 924(c)(1)(A) into a principal and sub-paragraphs indicates that the brandish and discharge provisions should be deemed “sentencing factors” for purposes of the rights to indictment, trial by jury, and proof beyond a reasonable doubt. 536 U.S. at 556. However, the Court never suggested that this division could or should be viewed as relevant to the statute’s substantive interpretation, much less that it somehow defines the scope of “during and in relation to.” *Harris* simply does not answer the question presented here.

Russello is likewise inapposite. *Russello* said that, “[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.” 464 U.S. at 23 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). This might imply that, because § 924(c) defines “brandish” to require proof of a *particular* intent (“to intimidate”), no similar *particular* intent requirement should be read into the discharge provision (e.g., “to injure”). However, it in no way suggests that a *general* intent requirement should not be read into the discharge provision (or into the brandish provision). Subsequent cases have in fact expressly cautioned against applying *Russello* in this way: *i.e.*, to presume the deliberate exclusion of certain language in one provision based on the inclusion of

qualitatively different language in another. *Clay v. United States*, 537 U.S. 522, 524 (2003) (“The *Russello* presumption . . . grows weaker with each difference in the formulation of the provisions under inspection.”) (quoting *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002)).

Watson is also inapplicable. In holding that receipt of a firearm does not constitute firearm “use” for purposes of § 924(c)(1)(A), the Court distinguished § 924(d)(1) – which lists receipt as a way in which a firearm may “be used” – on the ground that the passive phrasing in the latter provision reflects an “agnosticism . . . about who does the using.” 128 S. Ct. at 584. But the Court never suggested, as the government argues, that a passive phrasing *per se* excludes a *mens rea* requirement or necessarily obviates the otherwise required causal link between the defendant and the proscribed conduct. *Watson* was focused on the meaning of “use,” and cannot inform the scope of the phrase “during and in relation to” or its application to the discharge and brandish provisions of § 924(c)(1)(A).

3. The government agrees that the increasing penalties of § 924(c)(1)(A) are intended, at least in part, to punish increasingly culpable conduct. See Gov’t Br. 21-24. Its proposed construction, however, would deny any role for culpability in many cases. For example, under its view, an individual whose concealed weapon accidentally discharges during a crime would be subject to the ten-year minimum sentence, even though that person would undoubtedly be *less* culpable than one who actively brandishes (or, obviously, purposefully discharges) the firearm during the crime. No explanation is offered by the government for this discrepancy between its interpretation and the statute’s purpose.

Of course Congress *could* have decided to craft a statute which depends solely on risk of harm, without regard to culpability. But § 924(c)(1)(A) is not that statute. It is phrased in terms of individual actions, rather than effects. Indeed, the statute explicitly requires proof of an “[intent] to intimidate” to support application of the “is brandished” provision – rebutting conclusively the government’s suggestion that the passive voice alone reflects congressional “indifferen[ce] as to the mental state . . . of the discharger.” Gov’t Br. 21.

The government cannot salvage its position by calling the discharge provision a mere “sentencing consideration,” or by suggesting that the provision enhances judicial discretion. *Id.* at 21, 24. The discharge provision does not grant discretion; it takes it away. *Harris*, 536 U.S. at 554. A judge faced with a defendant whose firearm had accidentally discharged during a crime would, under the government’s view, be precluded from imposing a sentence of less than ten years’ imprisonment. Gov’t Br. 24. In contrast, under the petitioner’s interpretation, the judge could consider both culpability *and* risk of harm to determine whether the sentence should be less or more than ten years. Only this construction preserves that discretion *and* accords with the statutory language without sacrificing the statute’s purpose.

B. The Legislative History Supports A General Intent Element.

Numerous statements in the committee report and during the debates confirm that Congress expected the ten-year mandatory minimum sentence to apply only when an individual discharges the firearm knowingly. Pet’r Br. 22-24. Unable to counter this evidence directly, the government instead relies on

misdirection and out-of-context quotes to infer a contrary intent. For example, it argues that, because prior proposals to amend § 924(c) expressly included a *mens rea* requirement within the discharge provision, the absence of such a requirement in the enacted version necessarily means Congress intended that no *mens rea* should apply. See Gov't Br. 25-26.

This position, again, overlooks the key distinction between particular and general intent. In the earlier proposals, Congress expressly included a *particular* intent requirement – “with the intent to injure another person.” *E.g.*, H.R. 1488, 104th Cong. § 3 (as introduced Apr. 7, 1995). That this requirement was excluded from the enacted statute does not in any way suggest that Congress wished to exclude a *general* intent requirement from the final version. See *supra* p. 5.

Although Congress did not enact the House version of the bill, which indisputably applied “during and in relation to” to the discharge provision, see Pet'r Br. 19-20; see also Gov't Br. 26-27, it did not clearly “reject” that version, nor did it enact the Senate version wholesale. Rather, the final bill was a *compromise* that incorporated elements from both the House and Senate versions.³ The government's attempt to glean from this a congressional intent to dispense with *mens rea* greatly overreaches; there is simply no indication that members of the Senate disagreed with statements by House members that the brandish and discharge provisions are modified by the “during and in relation to” language. Indeed,

³ For this reason, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), a case in which Congress rejected the Senate version of a bill outright and instead enacted the House bill, is inapposite here. Gov't Br. 27-28.

the only cited difference between the bills was the disparate length of the penalties imposed – the Senate version imposed five to ten years’ imprisonment, while the House version called for ten to twenty years’. See 144 Cong. Rec. H10,330 (daily ed. Oct. 9, 1998) (statement of Rep. Scott).

Moreover, the statement by then-Senator Biden that the statute addresses the risk of “accidental[]” firearm use, cited by the government in support of its position, Gov’t Br. 22, actually supports the contrary conclusion. Senator Biden was talking not about the statute’s discharge provision, but about its possession clause. *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. 11, 14 (1996). He explained that the risk of accidental firearm use justifies imposition of the *base* mandatory minimum sentence; he never suggested that enhanced penalties were necessary to address this risk (in fact, he was opposed to proposed penalty enhancements). *Id.* Put in proper context, this statement accords with petitioner’s interpretation, under which the base sentence applies when the discharge was accidental while the enhanced sentence applies when the discharge was knowing.

C. Interpreting § 924(c)(1)(A)(iii) Without A General Intent Element Would Produce Absurd Results.

The government argues that, because subparagraph (iii) includes “no words of qualification or limitation,” it should apply whenever the firearm is discharged, regardless of who – or even *what* – commits the act. Gov’t Br. 12-13. This is simply nonsensical. “Brandish” and “discharge” represent ways in which a perpetrator “uses” a firearm during an offense. See *Smith v. United States*, 508 U.S. 223,

237-38 (1993); cf. 18 U.S.C. § 3559(c)(2)(D) (defining “firearms use” to include when a firearm is “brandished, discharged, *or otherwise used*”) (emphasis added). Those provisions should therefore apply only when the perpetrator himself brandishes or discharges the firearm. To read the provisions as applying regardless of who or what acts upon the weapon would completely unmoor them from the principal paragraph. See *Gustafson*, 513 U.S. at 570 (counseling against “isolat[ing]” parts of a statute for purposes of interpretation). Indeed, perhaps for this reason, the government has disavowed this very interpretation in other cases. See *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir. 2006) (“[A]t oral argument the government conceded . . . that the statute . . . wouldn’t 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.”).

Taken to its logical end, the government’s construction would render the provision applicable even when the firearm is discharged long before or after the crime. After all, if the discharge provision is not modified by “during and in relation to,” and operates without “qualification or limitation,” Gov’t Br. 13, then there is no basis to infer a temporal restriction (just as, according to the government, there is no basis to infer a causal restriction) on when or how the discharge occurs.

The government disclaims support for such a broad reading, asserting (without citation to authority) that because the brandish and discharge provisions “describe a subset of Section 924(c)(1)(A) offenses . . . [t]he conduct . . . must occur in the course of the offense.” *Id.* at 29. But the government cannot have it both ways. Its proposed statutory construction is

premised on reading subparagraphs (ii) and (iii) in isolation, unqualified by the language in the principal paragraph. *Id.* Now, however, to avoid a concededly absurd construction, it tries to exploit the very link between the principal paragraph and the subparagraphs that it has earlier denied. The government can succeed in this case only by reading the phrase “is discharged” without “qualification or limitation,” *id.* at 12-13, and under that view it must accept that the discharge provision applies regardless of when, where, or how the discharge occurs.

The results that would flow from this interpretation are obviously absurd. For example, the discharge provision would, under the government’s view, apply to a drug dealer who keeps an unloaded and locked firearm in his home if an officer discovers the firearm during a raid, unlocks and loads it, and fires into the air in order to stop a drug transaction (or to protect himself). See *id.* at 29-30. It would also apply – if the discharge provision is not modified by the adverb “during” – if the firearm is discharged weeks (or years) before or after the crime, regardless of whether it is discharged by the defendant, by an unknown or unrelated third party, or even by police. There is simply no basis to assume that Congress could have intended these results.⁴

⁴ The government’s claim that application of the discharge provision does not seem “absurd” under the particular facts of this case, see Gov’t Br. 30, is debatable and, more important, irrelevant. This Court has often recognized that, in interpreting a statute, it is appropriate to look beyond the facts of the particular case and consider how the provision would be applied in other circumstances. *E.g.*, *Carter v. United States*, 530 U.S. 255, 269 (2000) (examining hypothetical situations to construe statute).

The government acknowledges that the discharge provision should apply only when there is some “connection” between the crime and the conduct. *Id.* Rather than reading this language into the statute, it is better to interpret the existing language to reach a similar result, holding that “during and in relation to” modifies the brandish and discharge provisions.

II. THE PRESUMPTION OF *MENS REA* APPLIES TO § 924(C)(1)(A)(III).

The government’s arguments against application of the presumption of *mens rea*, like those concerning the statutory language and legislative history, lack substance. Relying on irrelevant authorities and criticisms, it never addresses the fundamental point that the discharge provision imposes criminal penalties, and under a long line of cases should be strictly construed to include a *mens rea* requirement.

1. It is telling that the government commences its discussion of the presumption of *mens rea* with a case that says nothing about the presumption, *Harris*. *Harris* characterized the principal paragraph of § 924(c)(1)(A) as the “offense” and the brandish and discharge provisions as “sentencing factors.” 536 U.S. at 556. But it never suggested – as the government now argues, see Gov’t Br. 29 – that this distinction has any bearing on the statute’s substantive interpretation. It certainly never said that the latter provisions do not impose “liability” or are not subject to the presumption of *mens rea*. *Harris* simply does not speak to this case.

The government’s broad reading of *Harris* also conflicts with prior decisions of this Court. This Court said in *Morissette v. United States*, 342 U.S. 246 (1952), that the presumption of *mens rea* applies

to statutes that impose “punishment.” *Id.* at 250-51.⁵ There can be no doubt that § 924(c)(1)(A)(iii) falls within this category: it mandates several years additional imprisonment when the defendant is found to have engaged in specific conduct. To refuse to apply the presumption in this case would therefore run afoul of *Morrisette* without in any way advancing the holding in *Harris*.⁶

2. The suggestion that there is no “established common-law tradition” of applying the presumption of *mens rea* to sentencing enhancements, Gov’t Br. 35, is both misleading and inaccurate. The shift to judicial discretion in sentencing did not occur until the mid-19th century, and sentencing factors like § 924(c)(1)(A)(iii) were not introduced until the 1970s and 1980s. *Harris*, 536 U.S. at 558. Few cases have applied the presumption of *mens rea* to sentencing provisions for the simple reason that, until recently, there was no opportunity to do so.

⁵ No support is offered for the government’s semantically dubious, and substantively irrelevant, assertions that *Morrisette*’s reference to “punishment” was merely “shorthand for criminalizing conduct” and that sentencing provisions do not impose “liability.” Gov’t Br. 34 n.10; *cf. Harris*, 536 U.S. at 568 (noting that sentencing factors “bear on punishment”); *Williamson v. United States*, 512 U.S. 594, 604 (1994) (equating reduction in sentence with reduced “criminal liability”).

⁶ The criticism leveled at petitioner’s analogy between the discharge provision and the common law crime of assault, on the grounds that a firearm discharge “manifests a significant increased risk of physical injury” and the discharge provision borrows no common law term of art, *see* Gov’t Br. 32, ignores the traditional definition of assault, *see* Pet’r Br. 28-29 (citing authorities defining assault as conduct manifesting a risk of harm), and cases relying on such analogies despite the absence of borrowed terms of art, *see id.* at 28-29 & n.10 (citing cases).

More fundamentally, even absent a history of cases applying the presumption itself, there does exist a long and established tradition of applying the same principles to provisions affecting sentence and punishment. The presumption of *mens rea* arises from the doctrine of strict construction, closely related to the rule of lenity. See *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978); see also *United States v. Lanier*, 520 U.S. 259, 266 (1997); *United States v. Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989). That doctrine, which states that a criminal statute should be interpreted as narrowly as reasonably possible, is of “ancient” origin and has been consistently applied both to statutes that define criminal conduct and to those that prescribe punishment. 3 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 59:3 (6th ed. 2003). This Court has in fact rejected arguments that the rule of lenity should be limited only to offense-defining elements of a criminal statute. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). There is, in other words, a “universal and persistent” practice of applying the principles underlying the presumption of *mens rea* to sentencing statutes, which clearly supports applying the presumption to § 924(c)(1)(A)(iii).

3. The government also argues that, because an individual subject to § 924(c)(1)(A)(iii) has already been found guilty of a crime, there is no risk of punishing “innocent conduct” and no need to presume a *mens rea* requirement. Gov’t Br. 36-40. It asserts, in essence, that the wrongful intent present in the underlying act – whether the violent or drug trafficking crime or using or carrying a firearm during that crime – can be transferred to the

subsequent act, constituting proof that the latter conduct was also wrongful. For support, it relies on conspiracy cases, such as *Pinkerton v. United States*, 328 U.S. 640 (1946), and statutes permitting punishment for unintended consequences, such as the felony-murder provision. See Gov't Br. 20-22, 39-40.

These authorities provide no support for the government. *Pinkerton* said only that an individual may be held responsible for the acts of a co-conspirator, even if he had no knowledge of them, if the acts were committed in furtherance of the conspiracy. 328 U.S. at 646-47. It did not hold, as the government suggests, that *mens rea* is not required for the underlying acts. To the contrary, an individual may be convicted of an offense under *Pinkerton* only if he or she entered into the conspiracy *intentionally* and the co-conspirator engaged in the offense conduct *intentionally* (or at least knowingly).⁷ See *id.* The same is true in the felony-murder situation: a defendant may be punished for an unintended death resulting from a felony only if he or she committed the felony itself *intentionally*. See *United States v. Matos-Quinones*, 456 F.3d 14, 18 n.2 (1st Cir. 2006).

This is quite a different case. The question here, which the government largely ignores, is whether a

⁷ Indeed, *Pinkerton* principles already animate this case. Both Mr. Dean and Mr. Lopez were convicted of aiding and abetting another in using a firearm based on the finding that one of them had *intentionally* used the firearm. J.A. 136. However, if neither of them had intended to use the firearm, then neither would be liable under *Pinkerton*. 328 U.S. at 646-48; see also Pet'r Br. 8-9 (noting *mens rea* requirement). It is therefore entirely consistent with *Pinkerton* to hold that an accidental and unintentional discharge cannot subject either a defendant or a co-conspirator to liability under § 924(c)(1)(A)(iii).

defendant should be subject to additional *criminal liability* for conduct that is itself *unintentional*. Neither *Pinkerton* nor the other authorities on which the government relies speak to this issue.

The government also says that an “innocent” defendant would not have risked an accidental discharge by carrying a loaded firearm during a crime, or would have at least taken appropriate precautions such as leaving the firearm unloaded or engaging the safety lock. Gov’t Br. 22. But, obviously, an accidental discharge is still possible in these hypotheticals: the perpetrator could mistakenly leave a round in the gun or could improperly engage the safety lock, resulting in an unintentional discharge during the crime. By acknowledging that the defendant’s conduct in these situations is “innocent,” and apparently should not implicate the ten-year mandatory minimum sentence of § 924(c)(1)(A)(iii), the government simply concedes that some *mens rea* requirement must be read into the statute, demanding proof that the firearm was discharged not merely by accident or mistake.

4. Applying the presumption here will not lead to a “disruption . . . of well-settled authority,” or the incorporation of a *mens rea* requirement in every sentencing provision. *Id.* at 40. The presumption mandates only that level of scienter “necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter v. United States*, 530 U.S. 255, 269 (2000). Courts have, on this basis, refused to demand proof that a defendant had knowledge of the particular quantity of drugs, the conduct of a co-conspirator in furtherance of a crime, or the risk of death from a felony. Gov’t Br. 40-41. In all of these cases, the defendant was already engaged in intentional, wrongful conduct – carrying drugs,

participating in a criminal conspiracy, or committing a felony – and his or her lack of knowledge as to the possible additional wrongful consequences of that conduct could not render the underlying conduct “innocent.” *E.g.*, *United States v. King*, 345 F.3d 149, 153 (2d Cir. 2003) (per curiam). This case would in fact present a very different question if subparagraph (iii) had been phrased strictly in terms of consequences rather than conduct: *e.g.*, imposing a minimum sentence if “the death of any person results.” S. 191, 105th Cong. § 1 (as introduced Jan. 22, 1997). There would be grounds to believe, in that circumstance, that no *mens rea* applies since the underlying conduct (*i.e.*, “use” of a firearm during and in relation to a crime) is itself intentional and wrongful. See *Carter*, 530 U.S. at 269-70. In contrast, the statute as written – and interpreted by the government – proscribes conduct (*i.e.*, “discharge”) which is itself not wrongful. *Cf. supra* pp. 10-11 (noting that the government’s construction would cover discharges unrelated to the crime).⁸

⁸ Several fundamental distinctions between § 924(c)(1)(A)(iii) and the United States Sentencing Guidelines likewise suggest that application of the presumption in this case would not necessarily require its application to all Guidelines provisions, many of which also rely on findings of specific conduct. *Cf., e.g.*, U.S. Sentencing Guidelines Manual § 2A2.2(b)(2) (increasing offense level for aggravated assault if “a firearm was discharged”). For example, the Guidelines are promulgated by the United States Sentencing Commission, not passed directly by Congress as law, and for that reason it may be argued that the presumption should not apply to Guidelines provisions. See, *e.g.*, *United States v. Mobley*, 956 F.2d 450, 452-53 (3d Cir. 1992). Also, unlike § 924(c)(1)(A)(iii), the Guidelines are merely advisory and do not mandate the imposition of punishment, and may arguably be viewed as “regulatory” provisions to which the presumption does not apply. See *id.* Finally, there may be evidence that Congress or the Commission did not intend for a

It is the government's position that would result in a doctrinal sea change. That interpretation would, for the first time, limit the presumption solely to "elements" of the offense, and deny its application to an entire class of penal statutes. See, *e.g.*, Gov't Br. 33 & n.9. Rather than take this extraordinary course, the Court should hold that the presumption applies to all criminal provisions and demands incorporation of a *mens rea* requirement in § 924(c)(1)(A)(iii), as the language and history of the statute already suggest.

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

The statute is, at the very least, ambiguous as to whether proof of *mens rea* should be required with respect to § 924(c)(1)(A)(iii). An intent requirement is written into the statute itself ("during and in relation to"), and placed in such a way that it is most reasonably read to apply to the discharge provision. *Supra* pp. 1-7. The legislative history confirms this interpretation, and the presumption of *mens rea* generally supports incorporation of an intent requirement in criminal provisions. *Supra* pp. 7-9, 12-18. There is, in short, every reason to credit petitioner's proposed construction.

The government's only real response is that subparagraph (iii) does not itself contain a *mens rea* requirement. *E.g.*, Gov't Br. 12. But this Court has said on numerous occasions that "far more than the

mens rea requirement to apply to the Guidelines as a whole, or to specific provisions. See *id.* (noting Guidelines amendment eliminating scienter requirement). In any event, whether and how the presumption of *mens rea* applies to the Guidelines will be subject to a different analysis based on considerations that are not implicated here.

simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.” *Gypsum*, 438 U.S. at 437-38. Moreover, as between the competing interpretations offered for § 924(c)(1)(A), only the government’s has been alleged or shown to produce absurd results. *Supra* pp. 9-12. Notwithstanding the government’s bluster, its interpretation is certainly subject to at least reasonable dispute.

“The rule of lenity therefore applies.” Pet’r Br. 38. Section 924(c)(1)(A)(iii) should be interpreted in the manner favorable to the defendant, to require proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary.

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,

SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY
SUPREME COURT
PRACTICUM
357 East Chicago Ave.
Chicago, IL 60611
(312) 503-8576

SCOTT J. FORSTER*
P.O. Box 102
Calhoun, GA 30703
(706) 625-1799

JEFFREY T. GREEN
QUIN M. SORENSON
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

February 25, 2009

* Counsel of Record