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 OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, AND FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice.

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

amicus curiae in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals. The Association joins in this brief because it believes judges should impose sentences based on the individuals before them, rather than follow arbitrary minimum sentences that have no connection to those defendants' culpability.

Families Against Mandatory Minimums ("FAMM") is a national, nonprofit, nonpartisan organization of 25,000 members. Founded in 1991, FAMM's primary mission is to promote fair and proportionate sentencing policies by challenging inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and selected amicus filings in important cases.

SUMMARY OF ARGUMENT

Under settled law, a presumption of *mens rea* applies to criminal statutes. "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). Criminal statutes, including 18 U.S.C. § 924(c), must be construed in light of this principle. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978).

The government argued in opposition to the petition that the presumption of *mens rea* applies only to

the elements of a crime, not to sentencing enhancements. But sentencing enhancements are "stigmatizing and punitive," *Harris v. United States,* 536 U.S. 545, 560 (2002), and as such fall within the basic rationale that there must ordinarily be "[a] relation between some mental element and punishment." *Morissette v. United States*, 342 U.S. 246, 250-51 (1952). Thus, even if the Court were to conclude that Section 924(c)(1)(A)(iii) does not make explicit that its 10-year sentencing enhancement applies only to knowing or intentional discharges, *mens rea* must nonetheless be presumed, and the enhancement must be read to exclude accidental discharges.

Requiring a "mental element" for enhanced punishment under Section 924(c)(1)(A)(iii) comports well with the traditional judicial discretion under federal law to consider the defendant's blameworthiness in determining the sentence. Here the difference between an accidental and an intentional discharge of a firearm has a direct and significant bearing on the degree of the defendant's blameworthiness. Accordingly, absent clearly expressed intent to the contrary, Congress should not be presumed to have limited the sentencing judge's discretion to consider whether the defendant's discharge of his firearm was intentional or accidental.

Section 924(c)(1)(A)(iii) is at least ambiguous as to whether an accidental discharge requires a 10-year sentencing enhancement, and, indeed, is better read to exclude accidental discharges from the enhancement. The statute establishes an escalating series of increasingly severe penalties for firearm use, with the most severe penalty reserved for discharge of the firearm. With respect to the less severe penalties, it is undisputed that Congress has

required intent. In that context, it is fair to conclude that Congress did not intend to impose the most severe penalty on accidental conduct. Moreover, under the rule of lenity, any ambiguity as to whether some level of intent was required must be resolved in favor of excluding an accidental discharge from the enhancement.

The rule of lenity and the presumption of *mens rea* are closely associated. Both are longstanding canons for construing Congressional intent in criminal statutes in the absence of clear language, and this Court and others have often relied on the rule of lenity to imply a *mens rea* element into a criminal statute. It is settled law that the rule of lenity applies to all criminal statutes, including those imposing mandatory minimum sentences. *Bifulco v. United States,* 447 U.S. 381, 387 (1980). There is no reason to give the presumption of *mens rea* a narrower application.

The government argued in opposition to the petition that Congress' explicit requirement of intent for the less severe penalty for "brandish" in the Act means that Congress did not envision *any* intent requirement for the most severe penalty for "discharge." But Congress required a *particular* intent for the less severe penalties. From that, one might reasonably conclude that Congress found it necessary explicitly to require a specific intent as to the lesser provisions, but assumed that it was not necessary to spell out the background assumption of general intent. Such a conclusion accords with the rule that, while a criminal statute typically must have an explicit requirement for specific intent, general intent is presumed. *Carter v. United States,* 530 U.S. 255, 268-70 (2000). Because imposition of severe criminal punishment for accidental conduct runs

contrary to principles "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil," *Morissette,* 342 U.S. at 250, it cannot be inferred that Congress intended to impose such punishment absent clear language requiring it.

ARGUMENT

I. THE PRESUMPTION OF *MENS REA* APPLIES TO STATUTORY SENTENCING FACTORS AND PRESERVES THE SENTENCING JUDGE'S TRADITIONAL DISCRETION TO CONSIDER WHETHER THE DEFENDANT'S CONDUCT WAS INTENTIONAL

Under federal law, a sentencing judge is required to take into account, among other things, the "circumstances of the offense." 18 U.S.C. § 3553(a)(1). This rule applies unless another statute "specifically" requires otherwise. *Id.* § 3551(a). Where one of those "circumstances" is the discharge of a firearm, normally a sentencing judge would have the discretion to consider whether the defendant intended to fire. Section 924(c)(1)(A)(iii)'s sentencing enhancement for cases in which "the firearm is discharged" does not specifically require a minimum additional sentence of 10 years for an accidental discharge. Accordingly, under Section 3551(a), the statute must not be read to impose such a limitation on the judge's discretion under Section 3553(a) to consider culpability when choosing a sentence. So construed, the Gun Control Act and the Sentencing Reform Act together embrace the traditional presumption of *mens rea.* Congressional intent to curtail a judge's traditional sentencing discretion to consider the defendant's blameworthiness cannot be presumed absent clear language to the contrary.

A. Sentencing Enhancements Fall Within The Rationale Of The *Mens Rea* Presumption That Accidental Conduct Does Not Normally Warrant Severe Criminal Punishment

Amici agree with petitioner's argument that Section 924(c)(1)(A)'s requirement that the firearm be used or carried "in relation to" the underlying crime, or possessed "in furtherance of" that crime, sets forth a *mens rea* requirement that expressly applies to the "discharge" sentencing enhancement. However, even if the Court were to accept the government's position that the statute does not expressly require an intentional discharge, that would not be the end of the matter. "[S]ilence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element . . . ." *Staples v. United States*, 511 U.S. 600, 605 (1994). Intent with respect to culpability-creating facts is a traditional element of *mens rea*, and it is generally presumed absent a clear Congressional statement to the contrary. *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 70 (1994); *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). Because "the discharge of the firearm inside the bank was a surprise even to Dean and, thus, was likely accidental," Pet. App. 9a, that intent was absent here.

The Court "must construe the statute in light of the background rules of the common law." *Staples*, 511 U.S. at 605. One of those "firmly embedded" rules is "the requirement of some *mens rea* for a crime." *Id.* While the court of appeals acknowledged that the presumption of *mens rea* is a bedrock rule for construing criminal statutes, it concluded that it applies only to the elements of a crime, not to sentencing enhancements. Pet. App. 9a-10a. That dis-

tinction cannot hold. Sentencing enhancements are "stigmatizing and punitive." *Harris*, 536 U.S. at 560. "They must be strictly construed, and strict liability should not be presumed." *United States v. Burke,* 888 F.2d 862, 866 n.5 (D.C. Cir. 1984). They fall within the basic rationale of the presumption of *mens rea*—a belief that is "universal and persistent in mature systems of law" that there should be "[a] relation between some mental element and punishment." *Morissette*, 342 U.S. at 250-51.

The government argued in opposition to the petition that a defendant who has been found guilty of the underlying crime is no longer an innocent person and thus *mens rea*—which it claims is intended solely to separate the innocent from the guilty—is no longer relevant. But *mens rea* requirements do more than separate the guilty from the innocent; they establish levels of culpability and punishment. (That is why, for example, premeditated murder is punished more severely than negligent homicide.) Where, as here, the statute requires additional punishment based on conduct beyond that required for conviction of the offense, the background presumption that the defendant must have intended that conduct, or at least have caused it knowingly, applies with full force. Otherwise, there would be no "relation between some mental element and punishment," a result courts should not lightly presume Congress intended. *Id.*

B. Congress Should Not Be Presumed To Have Limited The Sentencing Judge's Traditional Discretion To Consider The Defendant's Blameworthiness

The presumption of *mens rea* arose historically in the context of whether a crime had been committed, rather than in the context of whether the judge

properly exercised his sentencing discretion. That is because defining the elements of a crime is all that criminal statutes traditionally did, and sentencing issues did not reach the appellate courts. Indeed, legislative mandates for increased punishment based on judicial findings of sentence-enhancing facts is a "new trend," first recognized by this Court in 1986. *United States v. Booker*, 543 U.S. 220, 236 (2005), discussing *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986); *Harris,* 536 U.S. at 560 (minimum sentence statutes "were for the most part the product of the 20th century, when legislatures first asserted control over the sentencing judge's discretion.").

This Court's view of such statutes as constitutional, so long as they impose a minimum sentence without increasing the statutory maximum, has depended in part on preservation of the traditional role of judges in determining sentences. *McMillan*, 477 U.S. at 91 ("Sentencing courts have traditionally heard evidence and found facts" without a prescribed burden of proof.); *Harris,* 536 U.S. at 560 (finding facts that are relevant to sentencing but are not elements of the crime "ha[s] been the traditional domain of judges."). The government distorts these cases by reading them to *undermine* the sentencing judge's traditional discretion to consider whether the defendant acted intentionally with respect to alleged aggravating circumstances in the manner in which the crime was committed.

"[U]nusual blameworthiness in the manner employed in committing a crime" is an element within the traditional judicial sentencing authority. *Booker,* 543 U.S. at 235. An interpretation of Section 924(c)(1)(A)(iii) that limits the judge's traditional sentencing discretion to consider the defendant's degree of blameworthiness with respect to the manner

in which the crime was committed should not be adopted absent clear legislative language. Such an interpretation certainly is not required by *Harris* or *McMillan,* which were intended to preserve, not to limit, the traditional discretion of sentencing judges.

Congress requires judges to impose a sentence that is "sufficient, but not greater than necessary" to satisfy the purposes of sentencing, *i.e.,* just punishment, deterrence, incapacitation and rehabilitation, 18 U.S.C. § 3553(a), unless "otherwise specifically provided." *Id.,* § 3551(a). In determining a particular sentence, judges must also take into account "the nature and circumstances of the offense." 18 U.S.C. § 3553(a). These requirements accord with the longstanding federal sentencing tradition of considering "every convicted person as an individual and every case as . . . unique." *Gall v. United States*, 128 S. Ct. 586, 598 (2007), quoting *Koon v. United States,* 518 U.S. 81, 113 (1996). To interpret Section 924(c)(1)(A)(iii) to require a 10-year sentencing enhancement when a firearm "is discharged" regardless of whether the discharge is intentional or accidental would contradict the general Congressional policy of individualized sentencing. Such an interpretation requires much more explicit language than Congress has used here.

Of course, mandatory minimum sentencing statutes necessarily limit the discretion of sentencing judges, and must be enforced within constitutional limits. But that does not settle the question of how these statutes should be construed. The Sentencing Reform Act answers that question, in part, by removing mandatory minimums from discretionary sentencing under Section 3553(a) only to the extent "specifically" provided for in the mandatory minimum statute. 18 U.S.C. § 3551(a). Since Section

924(c)(1)(A)(iii) does not "specifically" require imposition of the increased mandatory minimum even in the absence of intent, it must be construed not to limit the judge's sentencing discretion in that way.

C. Consideration Of *Mens Rea* Is Especially Important Under Section 924(c) Because The Minimum Sentence Is Imposed In The Vast Majority Of Cases

In *Harris,* Justice Thomas observed that "almost all persons sentenced for violations of 18 U.S.C. § 924(c)(1)(A) are sentenced to 5, 7, or 10 years' imprisonment." *Harris*, 536 U.S. at 578 (Thomas, J., dissenting). As Justice Thomas pointed out, the Sentencing Guidelines provided (and still provide) that, in cases under Section 924(c), with irrelevant exceptions, "the guidelines sentence is the minimum term of imprisonment required by statute." U.S. Sentencing Commission, Guidelines Manual § 2K2.4(b). The availability of upward departures was limited; "departures are not available in every case, and in fact are unavailable in most." *Booker*, 543 U.S. at 234; *see United States v. Bazile,* 209 F.3d 1205 (10th Cir. 2000) (reversing life sentence under Section 924(c)(1)(C)(i) because district court had not used proper upward departure methodology).

Even after *Booker*, in the era of advisory guidelines, any upward departure requires a "justification . . . sufficiently compelling to support the degree of the variance." *Gall*, 128 S. Ct. at 597. Sentencing judges "must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id.* at 597 n.6. Current sentencing statistics continue to reflect that in the vast majority of cases the statutory minimum sentence (which, as noted, is also the Guideline sentence) is

still the sentence imposed.[2] Under this regime, where the statutory minimum sentence determines the sentence imposed in the vast majority of cases, it is particularly important to apply the presumption of *mens rea* to the statutory definition of the conduct that triggers the minimum sentence.

D. The Rule Of Lenity Independently Applies To Sentencing Factors And Requires An Ambiguous Criminal Statute To Be Read Favorably To The Defendant

Amici agree with petitioner that, once the statute as a whole is considered, Section 924(c) must be

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[2] Current sentencing data for all federal criminal cases indicates that *Booker* has not resulted in any significant increase in above-guideline sentences. In fiscal year 2007, courts sentenced above the guideline range in only 1.7% of all cases. U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics, Fiscal Year 2007 (Table N, National Comparison of Sentence Imposed and Position Relative to the Guideline Range, Fiscal Year 2007) *at* http://www.ussc.gov/ANNRPT/2007/SBTOC07.htm.

The above data concern all federal sentences. *Amici* also have reviewed U.S. Sentencing Commission monitoring data for fiscal years 2003-2006 concerning sentences under Section 924(c) (either alone or in combination with other counts). The percentage of sentences above the guideline range in these cases was 1.21%. The rate was 1.37% pre-*Booker* and 1.04% post-*Booker*. This data was obtained from the Interuniversity Consortium for Political and Social Research, which is the public repository for the annual "Monitoring of Federal Criminal Sentences" data files from the U.S. Sentencing Commission. Paul J. Hofer, J.D., Ph.D., former Senior Policy Analyst at the U.S. Sentencing Commission and current Adjunct Assistant Professor at Johns Hopkins University, obtained and analyzed the 924(c) data.

The lower rate of upward departures for 924(c) cases than others is consistent with the longstanding judicial discomfort with mandatory minimum sentencing laws.

read in favor of a *mens rea* requirement for the discharge enhancement. But to the extent that any ambiguity remains, the rule of lenity "demand[s] resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422 (1990). Like the presumption of *mens rea*, the rule of lenity is an important "background principle" against which criminal statutes are interpreted. *X-Citement Video, Inc.,* 513 U.S. at 71; *Liparota v. United States,* 471 U.S. 419, 427 (1985).

The rule of lenity reinforces application of the presumption of *mens rea* to the sentencing enhancement in Section 924(c)(1)(A)(iii). The rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco,* 447 U.S. at 387; *see also Ladner v. United States,* 358 U.S. 169, 178 (1958) (rule of lenity applies to any question of statutory interpretation that would "increase the penalty that [the statute] places on an individual"); *United States v. Granderson,* 511 U.S. 39, 54 (1994); *United States v. R.L.C.,* 503 U.S. 291, 305-06 (1992). The rule of lenity has a strong link to the *mens rea* presumption, having served as a basis for "read[ing] a state of mind component into an offense even when the statutory definition did not in terms so provide." *U.S. Gypsum Co.,* 438 U.S. at 437. *See also Liparota,* 471 U.S. at 427-28 (relying on rule of lenity to extend the specified "knowing" *mens rea* requirement to all material elements of the statute.); *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994) (rule of lenity would resolve any doubt as to scope of statutory "willfulness" requirement). The strong link between the rule of lenity and the presumption of *mens rea*, the fact that both are bedrock canons for construing criminal statutes that are less than clear, and the undoubted application of the former to sen-

tencing enhancements, strongly suggest that the latter also applies to sentencing enhancements.

The rule of lenity alone would provide an ample basis for resolving any ambiguity in Section 924(c)(1)(A)(iii) in favor the defendant. When there are two reasonable interpretations of a criminal statute, one favoring the defense and the other the prosecution, under the rule of lenity "the tie must go to the defendant." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008). As shown below, petitioner's interpretation of Section 924(c)(1)(A)(iii) is at least reasonable and in fact is the better reading of the statutory text. Even if the government's interpretation were also deemed reasonable, the petitioner's interpretation must prevail.

II. IF AMBIGUOUS, SECTION 924(c)(1)(A)(iii) MUST BE CONSTRUED TO EXCLUDE ACCIDENTAL DISCHARGE OF A FIREARM FROM THE REQUIREMENT OF AN ADDITIONAL SENTENCE.

A. The Statutory Language Is At Least Ambiguous

Amici agree with petitioner that the plain language of Section 924(c)(1) is best read as requiring *mens rea* for the 10-year sentencing enhancement for discharging a firearm. Section 924(c)(1) establishes an escalating series of required additional penalties for persons who commit any crime of violence or drug trafficking crime: (i) if "during and in relation to" the underlying crime the person "uses or carries a firearm," or in furtherance of the crime "possesses a firearm," the minimum additional sentence is 5 years; (ii) if "the firearm is brandished," the minimum additional sentence is 7 years; and (iii) if "the firearm is discharged," the minimum additional sen-

tence is 10 years. 18 U.S.C. § 924(c)(1). It is undisputed that proof of intent is required for the first item in this series. *Smith v. United States*, 508 U.S. 223, 237-38 (1993). It is also well-established that the second item of the series requires specific intent. 18 U.S.C. § 924(c)(4)(defining "brandish" to require an intent to intimidate).

In these circumstances, it is reasonable (or at the very least plausible) to read the third item of the series—"is discharged"—also to require some form of intent. Such a reading is supported by the canon that "a word is known by the company it keeps" (*noscitur a sociis)*—a canon that "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to Acts of Congress." *Dolan v. U.S. Postal Serv.,* 546 U.S. 481, 486 (2006), quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). In *Dolan* the Court applied the canon because a broader reading of the final term in the statutory list would have produced an "odd" result. *Dolan,* 546 U.S. at 487. Similarly here, it would be odd—to say the least—to conclude that in an escalating series of increasingly severe penalties, Congress intended to reserve the most severe penalty for an unintended act, while imposing lesser penalties on intentional acts.

The term "discharged" must be "understood against the background of what Congress was attempting to accomplish." *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575 (1995), quoting *Reves v. Ernst & Young,* 494 U.S. 56, 63 (1990). In the context of a series of increasingly severe penalties for criminal conduct associated with firearms, interpreting the most severe penalty as reserved for unintentional conduct would "giv[e] unintended breadth" to the statute. *Dolan,* 546 U.S. at 486, quoting *Jarecki*, 367

U.S. at 307. Indeed, that Congress imposed the most severe penalty of the statute where the firearm is "discharged" lends additional support to the conclusion that it did not intend to eliminate *mens rea*. *Staples*, 511 U.S. at 619 ("the penalty attached to § 5861(d) suggests that Congress did not intend to eliminate a *mens rea* requirement for violation of the section.").

The government offers a competing interpretation, which notes that Section 924(c)(1) specifically requires an intent element for the "brandish" item in the penalty series. Because this language is missing from the "discharge" item, the government argues, it should be inferred that intent is not required.

There are, however, two difficulties with this argument. First, as the D.C. Circuit has explained, the statutory definition of "brandish" is "broader than the dictionary definition, as it (Congress' definition) includes uses of a gun invisible to the person threatened so long as the perpetrator somehow makes its presence known." *United States v. Brown,* 449 F.3d 154, 157 (D.C. Cir. 2006). "Having embarked on a definition, the drafter thought it proper to specify the required intent." *Id.* The "brandish" definition is perfectly understandable on its own terms, without drawing the negative inference of an implicit purpose not to require intent for the "discharge" enhancement.

Moreover, the statutory definition of "brandish" requires a particular intent—*i.e.*, an intent to "intimidate." 18 U.S.C. § 924(c)(4). If any negative inference were drawn from this language, it would be that Congress did not intend to require specific intent for the "discharge" enhancement. There is no basis for a negative inference that Congress also did not intend to require at least a general intent to dis-

charge the firearm, but instead intended to penalize accidental conduct. Indeed, such an inference would run counter to *Carter*, 530 U.S. at 268-70, which held that a criminal statute must explicitly require specific intent, but will be presumed to require general intent.

Even if the government's interpretation were deemed reasonable, it is not the only reasonable interpretation. As noted, in the context of a series of penalties of escalating severity, it is at least plausible to read the most severe penalty as applying only to intentional conduct. Where "the statute is reasonably susceptible to divergent interpretation," the statute is ambiguous and the Court should "adopt the reading that accords with traditional understandings and basic principles." *Gutierrez de Martinez v. LaMagno*, 515 U.S. 417, 434 (1995). Here a reading that a ten-year sentencing enhancement requires some form of intentional conduct accords with the traditional understanding and basic principle that criminal penalties are linked to intentional conduct, and that escalating penalties are premised on escalating egregiousness of the underlying conduct. In addition, the rule of lenity—which, as previously noted, applies to sentencing enhancements—requires resolution of any ambiguity in the defendant's favor. *Bifulco*, 447 U.S. at 387.

B. The Legislative History Supports The Conclusion That The Discharge Enhancement Requires Intent

The sentencing enhancements in Section 924(c)(1)(A) were enacted in response to this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995). Indeed, the amendment adopting these enhancements was described as "the Bailey Fix Act." 144 Cong. Rec. S126670 (daily ed. Oct. 16, 1998)

(statement of Sen. DeWine). When *Bailey* was decided, Section 924(c) imposed a 5-year minimum term on a person who "uses or carries" a firearm during and in relation to a crime of violence or drug trafficking crime. The statute had no sentencing enhancement for brandishing or discharge. *Bailey* construed the term "uses" to require that "the firearm was actively employed during the commission of the crime." *Bailey,* 516 U.S. at 147. The Court explained that "active employment" includes "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire a firearm." *Id.* at 148.

The Congressional "fix" was twofold. First, it lowered the requirement for the five-year minimum sentence by imposing it on a person who "possesses a firearm" in furtherance of a crime of violence or drug trafficking crime. Second, it separated out three of the elements that the *Bailey* opinion had listed as being examples of "use"—*i.e.*, "brandishing," "displaying" and "firing"—and made them the occasion for additional sentencing enhancements of 7 and 10 years, respectively.[3] Pub. L. 105-386, § 1, 112 Stat. 3469 (1998), amending 18 U.S.C. § 924(c).

In the previous version of Section 924(c), "brandishing," "displaying," and "firing"—as types of "use"—were subject to the intent requirement implicit in the statutory requirement that the use be "in relation to" a crime of violence or a drug trafficking crime. *Smith*, 508 U.S. 237-38. Although it expanded the basis for the 5-year enhancement, Congress' decision to single out more serious types of

[3] Congress included "displaying" in its definition of "brandish," thus incorporating it into the 7-year brandishing enhancement. 18 U.S.C. § 924(c)(4).

firearm use (and types of firearms) for enhanced punishment in no way suggested a desire to lower the level of intent previously required to punish these three types of firearm use, or to remove the intent requirement altogether. Instead, having expanded the basis for imposition of the 5-year sentence, Congress simply deemed it appropriate to provide for enhanced sentences for more egregious types of firearm "use." There is no reason to suppose that Congress also sought to remove the intent requirement that previously had applied to this conduct and impose the harshest sentence for an accidental occurrence.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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