Nos. 08-5274 and 08-5298

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER MICHAEL DEAN AND
RICARDO CURTIS LOPEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 924(c)(1)(A)(iii) of Title 18 of the United States Code provides for a ten-year mandatory minimum sentence "if the firearm is discharged" during the commission of an offense defined in Section 924(c)(1)(A), which criminalizes using or carrying a firearm during and in relation to a crime of violence or a drug trafficking crime, or possessing a firearm in furtherance of such a crime. The question presented is whether the sentencing enhancement in Section 924(c)(1)(A)(iii) includes an implicit mens rea requirement that the firearm be discharged intentionally, rather than accidentally or involuntarily.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 517 F.3d 1224.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2008. A petition for rehearing filed by petitioner Lopez was denied on April 15, 2008 (Pet. App. 27a). The petitions for a writ of certiorari were filed on July 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Unless otherwise noted, references to "Pet. App." are to the appendix to the petition in No. 08-5274.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioners were each convicted of conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a), and aiding and abetting each other in the use of a firearm in the commission of that robbery, a violent felony, in violation of 18 U.S.C. 924(c)(1)(A) and 2. Petitioner Dean was sentenced to 220 months of imprisonment, to be followed by five years of supervised release, and petitioner Lopez was sentenced to 198 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-17a.

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

> [A]ny 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, 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). Paragraph (c)(4) defines "brandish" for purposes of subsection (c) to mean "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." 18 U.S.C. 924(c)(4).

2. On November 10, 2004, a masked man carrying a pistol entered the Rome, Georgia, branch of the AmSouth Bank and ordered everyone in the bank to the ground. The robber entered the teller's area. There, he began removing cash from the drawers with one hand, while continuing to hold the pistol in his other hand. At one point, the robber reached over a teller, who was on her knees below her teller station, to remove cash from a teller drawer. While he was removing the cash, he discharged the pistol. The bullet struck a partition between two tellers' work stations, leaving a hole. The robber cursed when the gun fired, as if it had been inadvertent. The robber fled the bank and entered a vehicle waiting outside for his escape. Pet. App. 3a-4a.

A short while later, the police located the get-away vehicle in the parking lot of an apartment complex and determined that the vehicle had been stolen from a used-car dealership the night before. The police also observed petitioner Dean approach the vehicle and look into the driver's window. The police questioned petitioner Dean and arrested him on a probation violation. Gov't C.A. Br. 4-6.

In response to questions, petitioner Dean gave the officers his address in an adjacent apartment complex. When an officer approached the apartment, he observed petitioner Lopez inside the apartment. The officer also observed a pile of money on top of a television, some of which was still wrapped in a bank band. Officers subsequently entered the apartment and arrested petitioner Lopez, whom they found hiding in a bedroom. A search of the apartment uncovered the pistol that had been used in the robbery, a spent shell casing, cash, as well as keys and other materials from the car dealership from which the get-away vehicle had been stolen. Gov't C.A. Br. 6-7, 15.

Before trial, petitioners each confessed to committing the robbery. Each, however, claimed sole responsibility for the robbery and denied any involvement by the other. Pet. App. 4a; Gov't C.A. Br. 7-11.

3. A federal grand jury in the Northern District of Georgia returned a two-count superseding indictment charging each petitioner with conspiring to interfere with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a) (Count One), and aiding and abetting each other in the use of a firearm in the commission of that robbery, a violent felony, in violation of 18 U.S.C. 924(c)(1)(A) and 2 (Count Two). The superseding indictment alleged that the firearm was discharged during the commission of the offense charged in Count Two. Superseding

Indictment 2. Following trial, a jury found petitioners guilty on both counts. Pet. App. 4a.

At sentencing, the probation office recommended that the court find that each petitioner was subject to a ten-year mandatory minimum sentence on Count Two under 18 U.S.C. 924(c)(1)(A)(iii), because the firearm was discharged during the robbery. Lopez Presentence Report ¶ 36; Dean Presentence Report ¶ 36. Petitioners each objected, claiming that the evidence showed that the gun had discharged accidentally and that Section 924(c)(1)(A)(iii) does not apply to accidental discharges. See, e.g., Pet. App. 35a-36a, 41a.

The district court overruled petitioners' objections, holding that Section 924(c)(1)(A)(iii) applies when a firearm is discharged accidentally. Pet. App. 51a-52a. Consistent with that ruling, the court sentenced petitioner Dean to a 100-month sentence on Count One and a consecutive ten-year mandatory minimum sentence on Count Two, for a total sentence of 220 months of imprisonment. The court sentenced petitioner Lopez to a 78-month sentence on Count One and a consecutive ten-year mandatory minimum sentence on Count Two, for a total sentence of 198 months of imprisonment. The court also sentenced each petitioner to five years of supervised release. Id. at 4a-5a, 21a-22a; 08-5298 Pet. App. 3-4.

4. The court of appeals affirmed. Pet. App. 1a-17a. On the question whether Section 924(c)(1)(A)(iii) requires proof of intent to discharge the firearm, the court first stated that the

"[t]estimony at trial supports [petitioner] Dean's assertion that the discharge of the firearm inside the bank was a surprise even to Dean and, thus, was likely accidental." Pet. App. 9a. The court held, however, that because the statute does not require proof that petitioners intended to discharge the firearm, the ten-year minimum under Section 924(c)(1)(A)(iii) applies. Id. at 9a-12a.

The court of appeals reasoned that the text of Section 924(c)(1)(A)(iii) does not impose an intent requirement and that, because clause (c)(1)(A)(iii) defines a sentencing enhancement rather than a criminal offense, the general presumption in favor of inferring mens rea does not apply. Pet. App. 9a-11a (citing United States v. Brantley, 68 F.3d 1283, 1289-1290 (11th Cir. 1995), cert. denied, 516 U.S. 1136 and 517 U.S. 1111 (1996); United States v. Nava-Sotelo, 354 F.3d 1202 (10th Cir. 2003), cert. denied, 541 U.S. 1035 (2004)). The court explained that declining to infer a mens rea requirement for the sentencing enhancement does not risk punishing an innocent defendant because mens rea is already required for the "underlying violent or drug trafficking crime." Id. at 10a.

The court rejected the conclusion of the D.C. Circuit in United States v. Brown, 449 F.3d 154 (2006). Pet. App. 11a-12a. The court explained that, contrary to the reasoning of the D.C. Circuit, the increased mandatory minimum sentences in Section 924(c)(1)(A) do not reflect solely a defendant's increasingly

culpable intent, but also reflect the fact that "discharging a firearm, regardless of intent, presents a greater risk of harm than simply brandishing a weapon without discharging it." Id. at 11a. The court also rejected the D.C. Circuit's reliance on the "general presumption against strict liability in criminal statutes," in light of the "distinction between elements of an offense and sentencing enhancements." Id. at 12a.[2]

ARGUMENT

Petitioners renew their claim (08-5274 Pet. 6-16; 08-5298 Pet. 14-24) that Section 924(c)(1)(A)(iii) includes an implicit mens rea requirement that the firearm was intentionally, rather than accidentally or involuntarily, discharged. The decision below is correct, and further review is not warranted.

1. a. The court of appeals correctly held that the enhancement to the mandatory minimum sentence in Section 924(c)(1)(A)(iii) does not include a mens rea requirement; it requires proof only that the firearm was discharged during the commission of the offense. Whether clause (c)(1)(A)(iii) requires mens rea "is a question of statutory construction." Staples v. United States, 511 U.S. 600, 604 (1994). As such, the starting point, and the ending point if the language is clear, is the text of the provision. See United States v. Gonzales, 520 U.S. 1, 4-6

[2] The court of appeals also rejected petitioners' other claims, see Pet. App. 5a-8a, 12a-17a, none of which is renewed in their petitions in this Court.

(1997) (applying this principle to a prior version of Section 924(c)). Here, the language is "coherent, complete, and by all signs exclusive," Burgess v. United States, 128 S. Ct. 1572, 1580 (2008), and it imposes no requirement that the firearm was discharged intentionally.

As this Court has explained, the opening of Section 924(c)(1)(A) "list[s] the elements of a complete crime." Harris v. United States, 536 U.S. 545, 552 (2002). Clauses (A)(i) through (A)(iii), in turn, alter the applicable mandatory minimum sentences, within the maximum of life imprisonment, depending on the factual circumstances -- five years for any violation of the offense; seven years if the firearm was brandished; and ten years if the firearm was discharged. 18 U.S.C. 924(c)(1)(A)(i)-(iii). Those clauses do not define separate offenses, but instead set out "paradigmatic sentencing factor[s]." Harris, 536 U.S. at 553. As this Court explained, "[t]he statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." See id. at 556. And the text of the "discharge" sentencing factor provides simply that anyone who violates Section 924(c)(1)(A) shall, "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)(iii) (emphasis added). That text requires no proof of any particular mens rea; rather, it calls for a ten-year mandatory minimum if a "certain fact[] [is]

present," namely discharge of the firearm. Harris, 536 U.S. at 553.

Petitioners nevertheless contend (08-5274 Pet. 6, 10-12; 08-5298 Pet. 17-20) that an intent requirement should be read into the statute. They point to this Court's decisions applying the principle that "in the absence of contrary statutory language a criminal statute is presumed to require proof that the criminal act was committed volitionally, not merely by mistake or accident." 08-5274 Pet. 6. They contend that the presumption applies not only to the "actus reus of the crime," Carter v. United States, 530 U.S. 255, 268 (2000), but to sentencing enhancements as well.

The bases for that presumption, however, are lacking here. This Court's cases apply that presumption to the non-jurisdictional elements of a criminal offense "in light of the background rules of common law, * * * in which the requirement of some mens rea for a crime is firmly embedded." Staples, 511 U.S. at 605 (internal citation omitted); see Morissette v. United States, 342 U.S. 246, 252 (1952) ("courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation"). But there is no corresponding "universal and persistent," id. at 250, practice under the common law of requiring a separate mens rea for any facts a judge relies on to increase the sentence within the statutory maximum. Compare United

States v. Balint, 258 U.S. 250, 251-252 (1922) ("[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it."), with Harris, 536 U.S. at 560 ("If the facts judges consider when exercising their discretion within the statutory range are not elements, they do not become as much merely because legislatures require the judge to impose a minimum sentence * * * . These facts, though stigmatizing and punitive, have been the traditional domain of judges; they have not been alleged in the indictment or proved beyond a reasonable doubt."). In the absence of a uniform, longstanding practice in this regard, there is no reason to presume that Congress intended, sub silentio, to include a mens rea requirement in a "paradigmatic sentencing factor," Harris, 536 U.S. at 553, such as the discharge of a firearm during the commission of a violent felony.

Nor, contrary to petitioner Lopez's contention (at 20), is the concern about "criminaliz[ing] a broad range of apparently innocent conduct," Liparota v. United States, 471 U.S. 419, 426 (1985), implicated by the sentencing enhancement here. See Carter, 530 U.S. at 269 ("The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.") (internal quotation marks omitted). The enhancement applies only

when an offender uses or carries a firearm during, or possesses a firearm in furtherance of, the commission of a crime of violence or drug trafficking crime. In that circumstance, the commission of both the underlying drug or violent crime and the firearm offense in Section 924(c)(1)(A) establish the offender's requisite "vicious will." Morissette, 342 U.S. at 251 (internal quotation marks omitted). Moreover, there is no potentially "innocent conduct" associated with using a firearm to commit a violent felony or drug trafficking crime. Once offenders choose to use a gun to commit a violent or drug offense, they "understand the wrongful nature of their act," and the purpose of the intent requirement to distinguish them "from those who do not" has been accomplished; the law "does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful." United States v. X-Citement Video, Inc., 513 U.S. 64, 73 n.3 (1994); see United States v. Feola, 420 U.S. 671, 685 (1975) (noting, in rejecting scienter requirement for assault-victim's status as a federal officer, that "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected").[3]

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[3] For that reason, petitioner Lopez cannot validly rely (at 20) on the Court's concern in Staples that criminalizing possession of a machinegun, absent proof of knowledge of the characteristics that make it a machinegun, would risk criminalizing innocent conduct given the "long tradition of widespread lawful gun ownership by private individuals." Staples, 511 U.S. at 610; see id. at 614-615.

b. Petitioners contend (08-5274 Pet. 7-8; 08-5298 Pet. 15) that "the first two subsections of the statute, the 'use' and 'brandishment' provisions, require proof that the defendant committed the act intentionally," and that "[i]t follows that the third subsection, which is phrased in the same manner, should likewise be interpreted to include a scienter requirement." 08-5274 Pet. 7. That is incorrect.

To begin, clause (i) requires no additional fact or mens rea beyond the commission of the offense; it merely "sets a catchall minimum" for the crime. Harris, 536 U.S. at 552-553. Because it requires no additional mens rea, clause (i) does not support the claim that Congress followed a consistent course of imposing a unique, enhancement-specific mens rea for each clause. Nor does it follow from Congress's inclusion of a mens rea requirement in connection with clause (ii) that there is an implicit mens rea requirement in clause (iii), because clause (iii) "is phrased in the same manner." The claim ignores the fact that the mens rea requirement for clause (ii) does not flow from the language in clause (ii), but from Congress's inclusion of a separate provision defining "brandish." See 18 U.S.C. 924(c)(4). Congress could have defined "discharge" to require mens rea, but it did not, and the word standing alone lacks that connotation. The natural inference is that, when Congress imposed a mens rea requirement, it did so explicitly. And its decision not to do the same as to clause (iii)

must be given effect by the courts in construing the statute. 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 section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.") (alteration in original; internal quotation marks omitted); see Gonzales, 520 U.S. at 5 (applying this principle to a prior version of Section 924(c)).[4]

Nor is there a basis for petitioner Dean's assertion (at 7) that the sole purpose of the enhancements in clauses (i)-(iii) is to provide increased punishment for increased moral culpability. Sentencing considerations routinely reflect not only an offender's relative moral culpability (in the narrow sense in which petitioner Dean uses that phrase), but also the harms resulting from the offense. The sentencing enhancements in Section 924(c)(1)(A)(ii) and (iii) reflect those dual considerations. The enhancement when the firearm is discharged, for instance, reflects not only a sense of increased moral culpability, but the increased risks that death or injury will result, that violence will be used to respond to the

[4] The D.C. Circuit held that this principle did not apply to Section 924(c)(1)(a) because, "[h]aving embarked on a definition, the drafter thought it proper to specify the required intent." United States v. Brown, 449 F.3d 154, 157 (2006). Particularly where the definition and clauses (ii) and (iii) were all enacted in the same legislation, see Pub. L. No. 105-386, 112 Stat. 3469-3470 (1998), this reasoning does not explain why Congress specified no intent for "discharge."

offender, and that victims will be terrorized to an even greater extent when a firearm is discharged than brandished. Even if one assumes for sake of argument that there is no greater moral culpability where a firearm is discharged accidentally, an accidental discharge still implicates the latter three risks and harms.

The D.C. Circuit recognized that clauses (i)-(iii) address "increasingly culpable or harmful conduct," and that, "[t]o be sure, discharges of a firearm are more likely to cause severe injury or even death than mere brandishing." United States v. Brown, 449 F.3d 154, 156-157 (2006). Nevertheless, it relied on a policy argument that, "[n]onetheless, as between an intentional brandishing and a purely accidental discharge, the increment in risk, given the less reprehensible intent, seems inadequate to explain a congressional intent to add three years." Id. at 157. Particularly in the absence of a presumption of a mens rea requirement, the D.C. Circuit's speculation as to how much additional risk of harm or injury Congress thought was sufficient to warrant increasing the mandatory minimum is inadequate to overcome the plain language of the provision, which imposes no intent requirement. Rather, the text indicates that Congress intended to levy increased punishment on all who, as a result of using, carrying, or possessing a loaded firearm during a drug or violent crime, discharge it, whether accidentally or purposefully.

c. Petitioners further assert (08-5274 Pet. 13-14; 08-5298 Pet. 22-24), that the decision below conflicts with this Court's precedents applying the rule of lenity because the statute here, properly construed, is ambiguous. But this Court's review of the correct application of well-established rule-of-lenity principles to this particular statute is not warranted. In any event, for the reasons discussed above, there is no "grievous ambiguity or uncertainty in the statute" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." Muscarello v. United States, 524 U.S. 125, 138-139 (1998) (internal quotation marks omitted).[5]

d. Petitioner Lopez further contends (at 17-18, 21-22) that the decision below is inconsistent with this Court's precedents defining public welfare statutes. That contention is without merit. In the case of public welfare statutes, the question is whether the presumption that criminal offenses include mens rea is overcome by Congress's intent to override the presumption. See generally Staples, 511 U.S. at 605-619. In contrast, as explained

[5] Contrary to petitioner Dean's assertion (at 14), "the very existence of a circuit split on this question of law" does not establish that there is ambiguity triggering application of the rule of lenity. This Court has specifically rejected that proposition. Moskal v. United States, 498 U.S. 103, 108 (1990) ("Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity. * * * If that were sufficient, one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one.") (internal citation omitted).

above, the presumption is inapplicable here because there is no background universal and long-standing practice of requiring mens rea for sentencing factors.

2. Petitioners claim a circuit conflict (08-5274 Pet. 6-9; 08-5298 Pet. 15-17), pointing to the D.C. Circuit's decision in Brown, supra, and the Ninth Circuit's decision in United States v. Dare, 425 F.3d 634 (2005), cert. denied, 548 U.S. 915 (2006), on the one hand, and the court below and the Tenth Circuit, United States v. Nava-Sotelo, 354 F.3d 1202 (2003), cert. denied, 541 U.S. 1035 (2004), on the other. The Ninth Circuit decision in Dare, however, did not fully consider or squarely decide whether clause (iii) includes no mens rea requirement. The court addressed the defendant's claim that clause (iii) requires specific intent, which he claimed was lacking because he was intoxicated. Dare, 425 F.3d at 641-641 n.3. In rejecting that claim in a footnote, the court stated that "a 'discharge' requires only a general intent," and that "[v]oluntary intoxication is not a defense to a general intent offense." Ibid. In light of the footnote's cursory nature, and the fact that a rejection of specific intent was sufficient to resolve the defendant's claim in Dare, it is far from clear that future panels of the Ninth Circuit will feel bound if faced with a claim that no mens rea is required. See United States v. Gonzalez, 262 F.3d 867, 870 & n.1 (9th Cir. 2001) (declining to follow earlier case applying mens rea analysis to Sentencing Guidelines

provision given the decision's absence of "any discussion of a distinction between criminal statutes and guideline enhancements"). Indeed, there is Ninth Circuit authority pointing in the direction of no mens rea. In United States v. Wright, 215 F.3d 1020 (9th Cir.), cert. denied, 531 U.S. 969 (2000), the court held that the Guidelines enhancement in Section 2B3.1(b)(2)(A), which uses almost identical language to that in Section 924(c)(1)(A), applies to accidental discharges. Id. at 1030; see Harris, 536 U.S. at 553-554 (noting connection between the Guidelines enhancements for brandishing and discharging a firearm and Sections 924(c)(1)(A)(ii)-(iii)). And the Ninth Circuit has rejected claims that the presumption of mens rea for criminal offenses applies to sentencing enhancements. See Gonzalez, 262 F.3d at 870; United States v. Lavender, 224 F.3d 939, 941 (9th Cir. 2000) ("Sentencing factors * * * are not separate criminal offenses and as such are not normally required to carry their own mens rea requirement."), cert. denied, 531 U.S. 1098 (2001).

The D.C. Circuit's decision in Brown is in conflict with the decision below. But it is the only circuit decision squarely adopting the view espoused by petitioners, and the en banc court may be willing to revisit the issue if the question recurs and the government seeks en banc review.[6] Moreover, at least as reflected

[6] The government did not petition for rehearing en banc in Brown.

in the reported cases, the specific issue of whether an accidental discharge supports an increase in the mandatory minimum does not arise frequently. Further review is thus unwarranted at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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