No. 08-5274

IN THE
Supreme Court of the United States

CHRISTOPHER MICHAEL DEAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY

The petition for writ of certiorari amply demonstrated the need for this Court's review of the issue of whether 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who "discharge[s]" a firearm during a crime of violence, requires proof of general intent. First, there is a clear split among the circuits on this question, with two courts of appeals holding that proof of general intent is required, *United States* v. *Brown*, 449 F.3d 154, 158 (D.C. Cir. 2006); *United States* v. *Dare*, 425 F.3d 634, 641 n.3 (9th Cir. 2005), *cert. denied*, 548 U.S. 915 (2006), and two courts holding to the contrary, *United States* v. *Dean*, 517 F.3d 1224, 1230 (11th Cir. 2008); *United States* v. *Nava-Sotelo*, 354 F.3d 1202, 1206-07 (10th Cir. 2003). Second, the judgment of the Eleventh Circuit in this case, concluding that the statute applies even absent proof of intent, is flatly inconsistent with prior decisions of this Court, particularly *Carter* v. *United States*, 530 U.S. 255 (2000). Finally, the divide among the courts of appeals means that similarly situated defendants convicted of the same crime will be subject to significantly different sentences merely because they were prosecuted in different jurisdictions.

Nothing in the government's brief in opposition counters the fundamental points that a clear, entrenched 2-2 split exists and that the underlyng decision contravenes this Court's precedents. Instead, the brief argues the merits, contending that its preferred interpretation of § 924(c)(1)(A)(iii) – under which a defendant may be sentenced to a ten-year mandatory minimum sentence for involuntary conduct – is correct. But it is for this Court, not the government, to determine which of two reasonable

interpretations of a criminal statute correctly expresses congressional intent. The very fact that the government devotes the majority of its opposition to arguing the merits of the legal question demonstrates the need for this Court's review.

1. The government concedes that the question presented has divided the circuit courts. Opp. at 17. The Ninth and D.C. Circuits hold that § 924(c)(1)(A)(iii) requires proof that the defendant discharged the firearm intentionally, not merely by mistake or accident. *United States* v. *Brown*, 449 F.3d 154, 158 (D.C. Cir. 2006); *United States* v. *Dare*, 425 F.3d 634, 641 n.3 (9th Cir. 2005), *cert. denied*, 548 U.S. 915 (2006). The Tenth and (now) Eleventh Circuits hold to the contrary that a defendant may be found to have violated § 924(c)(1)(A)(iii) – implicating the ten-year mandatory minimum sentence – even if the discharge was purely accidental and unintentional. *United States* v. *Dean*, 517 F.3d 1224, 1230 (11th Cir. 2008); *United States* v. *Nava-Sotelo*, 354 F.3d 1202, 1206-07 (10th Cir. 2003).

The brief offers little more than speculation that the split might be amerliorated – though not resolved – because the *en banc* D.C. Circuit "*may* be willing to revisit the issue *if* the question recurs and [*if*] the government seeks en banc review." Opp. at 17 (emphasis added). This argument is hardly persuasive. If it were, splits would not be "real" splits unless and until the en banc circuit court's had lined up on different sides of a particular issue – a standard that that this Court does not apply. And in this case, even the Solictor General's speculation is weak, given that the holding of the D.C. Circuit is clear, the panel (Williams, J., joined by Randolph and Tatel, JJ.) was unanimous, and the split was

explicitly ackowledged in the decision. See *Brown*, 449 F.3d at 156-59.

The government similarly argues that the decision of the Ninth Circuit in *United States* v. *Dare*, 425 F.3d 634 (9th Cir. 2005), should be discounted because the court's discussion of § 924(c)(1)(A)(iii) was "cursory" and did not "squarely decide" whether the statute requires proof of general intent. Opp. at 16. To the contrary, the Ninth Circuit unequivocally addressed this point: "We conclude that a 'discharge' [under § 924(c)(1)(A)(iii)] requires only a general intent." 425 F.3d at 641 n.3. There is no reason to believe that "future panels of the Ninth Circuit will [not] feel bound" by this decision, Opp. at 16, or that other federal courts will not view it as an authoritative statement of the Ninth Circuit's position on the issue. Certainly the D.C. Circuit characterized it as such in *Brown*, citing *Dare* as reflecting one side in the extant circuit split on the interpretation of § 924(c)(1)(A)(iii). *Brown*, 449 F.3d at 156.

2. The government also mounts a weak challenge to petitioner's argument that the decision of the Eleventh Circuit runs counter to this Court's opinion in *Carter* v. *United States*, 530 U.S. 255 (2000). That opinion states that, although criminal statutes will be presumed to incorporate a "specific intent" element only when necessary "to separate wrongful from 'otherwise innocent' conduct," they are *always* presumed to require proof of "general intent" (at least absent contrary statutory language). *Id.* at 268-70. As the petition concluded, "[t]he reasoning in *Carter* … controls this case[] and compels an outcome contrary to that of the Eleventh Circuit." Pet. at 11.

Carter earns barely a mention in the government's brief. Much of the government's discussion simply

ignores its holding, arguing (incorrectly) that proof of general intent is not always required but should be implied only when necessary "to separate wrongful from 'otherwise innocent' conduct." Opp. at 10-11. When *Carter* is mentioned, it is quickly discounted on the basis that the presumption of *mens rea* applies only to the *actus reus* of the crime, and not to "sentencing enhancements" like § 924(c)(1)(A)(iii). *Id.* at 9. But the government cites no case from this Court stating this principle, and it ignores the numerous decisions that cast doubt on such formalistic distinctions between "elements" and "enhancements." *E.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 494 (2000) (rejecting distinction between "elements" and "sentencing factors" in Fifth Amendment analysis); *Mitchell* v. *United States*, 526 U.S. 314, 327 (1999) (the Fifth Amendment applies equally to issues concerning "the severity of . . . punishment" as to those concerning "guilt or innocence").

As noted, the remainder of the brief in opposition asserts that § 924(c)(1)(A)(iii) should apply even to involuntary conduct. These arguments, far from undermining the petition for certiorari, actually underscore the need for this Court's review. *Carter* held that a general intent requirement must be applied to criminal statutes in the absence of a specific exception that calls for the application of a higher or lower *mens rea* standard; on its face, that opinion compels an interpretation of § 924(c)(1)(A)(iii) which requires proof of volitional conduct. *Carter*, 530 U.S. at 268-70. To adopt a contrary construction of the statute, as the Eleventh Circuit has done, is to ask the Court to create a new exception or limitation in abrogation of *Carter*. But it is for this Court alone to re-examine and interpret its own decisions. The

fact that lower courts have restricted or obviated *Carter*'s holding, on the rationale espoused by the government here, simply confirms the need for this Court's review.

3. The government's brief also ignores the exceptional importance of this issue. The split among the circuits over the interpretation of § 924(c)(1)(A)(iii) means that similarly situated defendants convicted of the same crime will be subject to an additional three-year mandatory minimum term of imprisonment in the Tenth and Eleventh Circuits merely because those jurisdictions have adopted a construction of the statute contrary to *Carter*. Beyond the obvious and significant deprivation of individual liberty, this result runs counter to the purpose of the Sentencing Reform Act and to the very notion of a fair and uniform national sentencing system. See S. Rep. No. 98-225, at 65 (1983) (noting that the purpose of the Sentencing Reform Act was to eliminate "shameful disparity in criminal sentences" among jurisdictions).

The only objection the government can raise to this point is that, "in the reported cases, the specific issue of whether an accidental discharge supports an increase in the mandatory minimum does not arise frequently." Opp. at 18. But the government offers no support for this speculation, and it certainly ignores the thousands of other cases that are resolved not by trial but by plea bargain, and are never reported.

More fundamentally, by focusing solely on the aggregate effect, the government misses the undeniable and overwhelming impact of this issue on individual defendants, like Mr. Dean. Mr. Dean was convicted of participating in a bank robbery in which a firearm was accidentally discharged, and was

sentenced to a mandatory minimum ten-year term of imprisonment under § 924(c)(1)(A)(iii). Had he been convicted of the same conduct in the Ninth or D.C. Circuits, he would have been subject to only a seven-year mandatory term of imprisonment. His additional three-year term of incarceration is a result of nothing more than the happenstance of where the crime was committed. The government's suggestion that this situation does not arise "frequently" does not justify the devastating consequences of the Eleventh Circuit's rule to Mr. Dean and others like him.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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