

18 U.S.C. § 924(C)(1)(A)(III) DOES NOT REQUIRE PROOF OF INTENT TO DISCHARGE A FIREARM IN ORDER TO IMPOSE A TEN-YEAR SENTENCING ENHANCEMENT ON A DEFENDANT:
DEAN V. UNITED STATES

CRIMINAL LAW—SENTENCING—The Supreme Court of the United States held that it is not necessary to prove that a defendant intentionally discharged a firearm during a bank robbery in order for a ten-year minimum sentencing enhancement to be applied.

Dean v. United States, 129 S. Ct. 1849 (2009).

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I. THE *DEAN* DECISION

On November 10, 2004, a masked, armed Christopher Michael Dean (“Dean”) entered a bank, yelled at everyone to get on the ground, and moved toward the teller area.¹ He first removed money from the drive-through teller drawer while holding the gun with his right hand.² As he proceeded to take money from the head teller station, his gun discharged, harming no one.³ Dean cursed and ran out of the bank.⁴

Dean and his codefendant, Ricardo Lopez (“Lopez”), were charged with conspiracy to commit a robbery affecting interstate commerce in violation of the Hobbs Act, 18 U.S.C. § 1951(a).⁵ They were also charged with one count of aiding and abetting each other in the

1. *Dean v. United States*, 129 S. Ct. 1849, 1852 (2009).

2. *United States v. Dean*, 517 F.3d 1224, 1227 (11th Cir. 2008).

3. *Id.*

4. *Id.*

5. *Dean*, 129 S. Ct. at 1852. The Hobbs Act states, [w]hoever in any way or degree . . . affects commerce . . . by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (2009).

discharge of a pistol during an armed robbery, which violated 18 U.S.C. § 924(c)(1)(A)(iii) (2009)⁶ and 18 U.S.C. § 2 (2009).⁷ Dean's case was initially brought before the United States District Court for the Northern District of Georgia.⁸ The jury convicted Dean and Lopez on one count of conspiring to interfere with interstate commerce by robbery, and one count of aiding and abetting one another in the discharge of a pistol during an armed robbery.⁹

Following their convictions, Dean and Lopez appealed to the United States Court of Appeals for the Eleventh Circuit.¹⁰ The court held that § 924(c)(1)(A)(iii) did not require intent.¹¹ Dean petitioned the United States Supreme Court for certiorari.¹² The Court addressed the issue of whether § 924(c)(1)(A)(iii), which provides a minimum ten-year sentencing enhancement for the discharge of a firearm, included an intent element, or if the sentencing

6. *Id.* The statute provides the following:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . 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) (2009).

7. *Id.* The statute provides the following:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (2009). Dean was sentenced to 100 months for the first count and 120 months as to the second count, to be served consecutively. *Dean*, 517 F.3d at 1227. Lopez was sentenced to 78 months on the first count and 120 months as to count two, also to be served consecutively. *Id.*

8. *Dean*, 517 F.3d at 1224.

9. *Id.*

10. *Dean*, 129 S. Ct. at 1852. Lopez and Dean appealed on the basis that the sentencing enhancement in § 924(c)(1)(A)(iii) requires the prosecution to prove that Dean intended to fire the gun. *Id.* Because Dean did not intend to discharge the firearm, Dean and Lopez argue that subsection (iii) should not have been applied to their case. *Id.*

11. *Dean*, 517 F.3d at 1229. Despite the fact that the firing of the gun was accidental, the court affirmed both the convictions and the sentences. *Id.* at 1232.

12. *Dean*, 129 S. Ct. at 1853. A conflict among the circuits was created when the Eleventh Circuit Court of Appeals held that proof of intent was not required to apply the sentencing enhancement in § 924(c)(1)(A)(iii). *Id.* See *United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006) (holding that it is necessary to prove intent to discharge to apply the sentencing enhancement). The Court granted certiorari to resolve the split. *Dean*, 129 S. Ct. at 1853.

enhancement applied when the discharge of the firearm was accidental.¹³ The majority¹⁴ held that the statute did not require proof of Dean's intent to discharge the firearm in order for the ten-year sentence enhancement to apply.¹⁵

Chief Justice Roberts delivered the opinion of the Court by first examining the language of the statute.¹⁶ The Court explained that § 924(c)(1)(A)(iii) does not contain words of limitation, and terms will not be read into a statute that do not appear on its face.¹⁷ Additionally, Congress's use of the passive voice is indicative of the fact that subsection (iii) does not require proof of intent; the act happened without regard to who performed it and therefore without regard to the intent or the culpability of the actor.¹⁸

Dean alleged that an intent element is contained in the opening paragraph of § 924(c)(1)(A), and this element should modify the sentencing enhancements.¹⁹ Dean further argued that failing to recognize "intent" would lead to absurd results.²⁰ The Court disagreed.²¹ In the alternative, Dean contended that the statute's silence on the issue of intent requires a ruling

13. *Id.*

14. *Id.* at 1849. The majority included Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, Alito and Chief Justice Roberts. Justice Stevens and Justice Breyer dissented. *Id.*

15. *Id.* at 1856.

16. *Id.* at 1853 (citing *Williams v. Taylor*, 120 S. Ct. 1479, 1487 (2000)).

17. *Dean*, 129 S. Ct. at 1853. See *Bates v. United States*, 522 S. Ct. 23, 29 (1997) in which the Supreme Court refused to read "intent to defraud" into a statute because the Court "resist[s] reading words or elements into a statute that do not appear on its face." *Id.*

18. *Id.* (citing *Watson v. United States*, 128 S. Ct. 579, 584 (2007)).

19. *Id.* at 1854. Dean argued that the language "in relation to" in 18 U.S.C. § 924(c)(1)(A) means that "the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of an accident or coincidence." *Id.* (citing *Smith v. United States*, 508 S. Ct. 223 (1993)). Thus, Dean argued that "during and in relation to" modifies all of the verbs in the statute, including "discharge," such that the sentencing enhancement could only apply if Dean had intentionally fired the gun. *Id.* Because the discharge was accidental, Dean argued, it is not "in relation to" the underlying crime. *Id.*

20. *Id.*

21. *Id.* The Court argued that "in relation to" and "in furtherance of" do not modify the verbs "brandished" or "discharged" because they are in a different subsection and a different voice. *Id.* Therefore, the Court concluded that "in relation to" should not be extended to modify "discharged." *Id.* Dean argued that the discharge clause does not establish any temporal or causal boundaries. *Id.* Thus, without an intent element read into the statute, the sentencing enhancement would apply despite who committed the act, when the act was committed, and why the act was committed. *Id.* The Court concluded that the language of the statute should not be stretched to imply an intent requirement. *Id.*

in his favor.²² The Court concluded that Congress must expressly indicate whether a particular element of a crime is one that requires *mens rea*.²³

The majority acknowledged that while it is unusual to punish someone for consequences of accidental conduct, it is not so for unintended consequences of unlawful acts.²⁴ Dean was already convicted of non-accidental unlawful conduct, as he committed armed robbery.²⁵ The sentencing enhancement in subsection (iii) takes into consideration the risk of harm inherent in the way that such crimes are carried out, and the offender is responsible for assuming this risk.²⁶ The Court concluded that if an individual carries a gun while committing a felony, he or she must assume the risk that the gun might accidentally discharge and cause direct or indirect injury to bystanders.²⁷

Lastly, Dean argued that the statute is ambiguous and any question in that regard should therefore be resolved in his favor in accordance with the rule of lenity.²⁸ The Court, however, concluded that the statute is unambiguous,²⁹ and affirmed the judgment of the Court of Appeals for the Eleventh Circuit.³⁰

22. *Dean*, 129 S. Ct. at 1854. Dean's contention is on the basis that criminal prohibitions require that the government must prove a criminal defendant's intent unless Congress states that intent does not need to be proven. *Id.* Congress, Dean argued, did not make it clear in 18 U.S.C. § 924(c)(1)(A)(iii) that proof of intent was not required. *Id.*

23. *Id.* at 1855. "[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Staples v. United States*, 511 S. Ct. 600, 606 (1994).

24. *Id.* The Court cites the felony-murder rule, which provides that if a defendant commits a homicide unintentionally while carrying out another felony, the defendant can be convicted of murder. *Id.* (citing 18 U.S.C. § 1111). Similar in principle, the Court also cites the Sentencing Guidelines, United States Sentencing Commission, Guidelines Manual § 2A2.2(b)(3) (Nov. 2008) (USSG) and § 2D2.3.

25. *Id.* (citing *Smith v. United States*, 508 S. Ct. 223 (1993)).

26. *Id.*

27. *Dean*, S. Ct. at 1855.

28. *Id.* The rule of lenity is defined as "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." BLACK'S LAW DICTIONARY 1449 (9th ed. 1990).

29. *Id.* at 1856. The Court held that Dean's argument that the statute is ambiguous does not render it so ambiguous as to invoke the rule of lenity. *Id.*

30. *Id.* The Court concluded that 18 U.S.C. § 924(c)(1)(A)(iii) does not require proof of

Justice Stevens and Justice Breyer wrote dissenting opinions.³¹ Justice Stevens opined that Dean should not be criminally liable for the accidental discharge of his firearm absent a showing of intent, as the accident did not cause harm.³² Justice Stevens first looked at the structure of § 924(c)(1)(A).³³ He determined that § 924(c)(1)(A)(iii) only applies when a gun is intentionally fired because the statute increases the penalty for more culpable conduct.³⁴ Justice Stevens noted that proof of intent is clearly required in subsections (i) and (ii).³⁵ Because subsection (iii) imposes the greatest sentencing enhancement, it should be applied for the intentional discharge of a firearm, an offense that requires a greater level of culpability than “carrying” or “brandishing.”³⁶

Justice Stevens observed that legislative history supports the application of subsection (iii) only if the act was intentional.³⁷ He continued by mentioning that if there is no clear indication that Congress intended to create a strict liability offense, courts should require proof of intent for provisions that require sentencing enhancements.³⁸

Lastly, Justice Stevens noted that the majority’s examples of those punished for the unintended consequences of their unlawful acts all involved enhanced penalties for additional

intent to discharge a gun in the course of a violent or drug trafficking crime. *Id.* Thus, the sentencing enhancement applies regardless of whether the discharge was intentional or accidental. *Id.*

31. *Id.* at 1849.

32. *Dean*, 129 S. Ct. at 1856 (Stevens, J., dissenting).

33. *Id.* at 1857.

34. *Id.* Justice Stevens noted that the lesser sentencing enhancements for carrying and brandishing in subsection (i) and (ii) require proof of intent, thus the natural reading of subsection (iii) would be to require proof of intent because it provides additional punishment for a more culpable act. *Id.*

35. *Id.*

36. *Id.*

37. *Dean*, 129 S. Ct. at 1856 (Stevens, J., dissenting). The Court in *Bailey v. United States* held that “use” of a firearm required “active employment” such as “brandishing, displaying, bartering, striking with, and . . . firing or attempting to fire.” 116 S.Ct. 501, 503 (1995). In response to this holding, Congress amended § 924(c)(1) by adding sentencing enhancements for brandishing a gun or discharging a gun in addition to making it an offense to possess a gun in furtherance of one of the enumerated offenses. *Id.* See Pub.L. 105-386, § 1(2)(1), 112 Stat. 3469.

38. *Id.* at 1858 (Stevens, J., dissenting).

harm that occurred.³⁹ In those situations, either Congress or the Sentencing Commission made it clear that a defendant would be punished regardless of his or her *mens rea*.⁴⁰ Justice Stevens distinguished § 924(c)(1)(A)(iii) from these cases by noting that subsection (iii) punishes the discharge of a firearm regardless of whether or not harm occurred.⁴¹ Moreover, subsection (iii) does not explicitly state that a defendant will be punished regardless of his or her *mens rea*.⁴²

Next, Justice Breyer wrote that subsection (iii) is ambiguous and should be construed in Dean's favor according to the rule of lenity.⁴³ He stated that a criminal statute must provide fair warning of the law and the consequences of prohibited actions.⁴⁴ Justice Breyer determined that it was better for a sentencing judge to err on the side of caution by excluding those instances that Congress meant to include, rather than wrongly including them.⁴⁵

II. THE HISTORY BEHIND THE *DEAN* DECISION

In general, sentencing enhancement statutes allow for increased sentences when certain criteria are present.⁴⁶ These statutes do not create a separate crime, but rather, increase the possible sentence based upon some aspect of the defendant's conduct during the commission of the crime.⁴⁷ Sentencing enhancement statutes include a number of factors.⁴⁸

39. *Id.* at 1859 (Stevens, J., dissenting) (citing the felony-murder rule, 18 U.S.C. § 1111 and USSG § 2A2.2(b)(3) (increasing offense level of aggravated assault depending on the extent of injury)).

40. *Id.* (Stevens, J., dissenting).

41. *Id.*

42. *Dean*, 129 S. Ct. at 1859.

43. *Id.* at 1860 (Breyer, J., dissenting).

44. *Id.* (citing *United States v. Bass*, 404 U.S. 336, 348 (1971)).

45. *Id.* (Breyer, J., dissenting). Exclusive interpretation permits a sentencing judge to impose a sentence similar to the sentence required by statute, but because of the court's interpretation of the statute's language, is not legislatively required. *Id.* On the contrary, an inclusive interpretation requires an extra ten-year sentence for individuals who Congress may not have desired to punish so harshly. In those instances, the court is unable to impose a lesser sentence. *Id.*

46. 24 C.J.S. *Criminal Law* § 2104 (2009). Sentencing enhancements do not punish a defendant for a crime of which he was convicted. *Id.* Sentencing enhancements increase the sentence because of how the defendant committed the crime of which he was already convicted. *Id.*

47. *Id.*

48. *Id.* The following are examples of factors that could justify enhancement under

Several federal appellate courts⁴⁹ have addressed the issue of whether this particular sentence enhancement, § 924(c), violates the Second Amendment of the Constitution.⁵⁰ Although the Second Amendment confers an individual the right to possess a firearm, that right is not absolute and may be restricted.⁵¹ In *District of Columbia v. Heller*, the Supreme Court concluded that a citizen has a right to possess a gun, but noted the longstanding prohibition for felons and mentally ill individuals.⁵² Additionally, it recognized that firearms may be excluded in places such as schools and government buildings.⁵³

Section 924(c) was enacted as part of the Gun Control Act of 1968, which provided a mandatory sentence of one to ten years for unlawfully carrying a firearm while committing a federal felony.⁵⁴ Sixteen years later, Congress passed the Comprehensive Crime Control Act of

certain statutes:

[T]he nature of the injury inflicted, or the fact that the accused committed the crime at a time when the accused had a certain custodial status, or willfully failing to appear in court as required while on bail, or that the accused is a dangerous offender. The defendant's history of criminal activity may be sufficient by itself to support an enhanced sentence.

Id.

49. See *United States v. Helton*, 86 Fed. Appx. 889, 892 (6th Cir. 2004) (holding that Second Amendment rights may be subject to reasonable limitations and that § 924(c) is such a reasonable limitation); see also *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (holding that although the Second Amendment does protect individual rights,

that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.);

see also *United States v. Farmer*, 1 F.3d 1234 (4th Cir.) (1993) (holding that § 924(c) does not prohibit people from keeping and bearing arms; it prohibits people from using a gun in furtherance of a drug trafficking crime). The Supreme Court has also held that the right to bear arms is "subject to certain well-recognized exceptions, arising from the necessities of the case" and is therefore not infringed by laws that prohibit carrying concealed weapons. *Robertson v. Baldwin*, 17 S.Ct. 326, 329 (1897).

50. The language of the Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. CONST. amend. II.

51. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008). The Court stated that "the Second Amendment conferred an individual right to keep and bear arms. Of course, the right was not unlimited. . . . [T]hus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any* sort of confrontation. . . ." *Id.*

52. *Id.* at 2816.

53. *Id.* at 2816-17. The Court also noted that this list of prohibitions is not exhaustive. *Id.* at 2817.

54. Gun Control Act of 1968, Pub. L. No. 90-618, tit. I, § 102, 82 Stat. 1213, 1223-24 (codified at 18 U.S.C. § 924(c)(1)(A) (2006)). Congress has amended the statute several times since its inception.

1984,⁵⁵ which further amended the statute by creating a five-year sentence for using a firearm in the course of a violent federal crime.⁵⁶ In 1986, Congress passed the Firearms Owners' Protection Act,⁵⁷ which amended § 924(c) to clarify that the Gun Control Act of 1968 was not intended to place undue restrictions on the lawful possession and use of guns.⁵⁸ In 1998, Congress responded to the Supreme Court's holding in *Bailey v. United States*⁵⁹ by amending § 924(c), thereby making it a crime to possess a gun in furtherance of one of the enumerated offenses.⁶⁰ In addition, Congress enacted sentencing enhancements for discharging and brandishing a firearm.⁶¹ This broad, new language enabled prosecutors to seek a ten-year sentencing enhancement for an unintentional discharge of a gun.⁶² Prior to the Supreme Court's

See Angela LaBuda Collins, Note, *The Latest Amendment to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court's Interpretation of the Statute*, 48 CATH. U. L. REV. 1319, 1319 n.7 (1999) (noting that § 924(c) has been amended six times in ten years).

55. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II § 1005, 98 Stat. 2028, 2138 (codified at 18 U.S.C. § 924 (2006)).

56. *Id.* The amendment changed § 924(c) to the following:

Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried. . . .

Id.

57. Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a), 100 Stat. 449, 459 (1986) (codified at 18 U.S.C. § 924(c)(1)(A) (2006)).

58. *See*, *Bryan v. United States*, 524 U.S. 184, 189 (1998) (explaining the history of the firearm statute). Congress added a *mens rea* requirement to § 924(a) which, depending on the violation, required that the offender act knowingly or willfully. *Id.* Until the 1998 amendment, § 924(c) was interpreted as having a separate *mens rea* from § 924(a). *See* *United States v. Santeramo*, 45 F.3d 622, 623-24 (2d Cir. 1995) (holding that the prosecution must prove that that defendant had knowledge of the use of the firearm to establish that he violated § 924(c)).

59. *Bailey v. United States*, 516 S. Ct. 137 (1995). In *Bailey*, the Court held that "use" under § 924(c)(1) required an "active employment" of the gun which includes, "brandishing, displaying, bartering, striking with . . . and . . . firing or attempting to fire." *Id.* at 148.

60. *See* Pub.L. 105-386, § 1(2)(1), 112 Stat. 3469. The advocates of this amendment recognized the need for harsher penalties to discourage drug traffickers and those committing violent crimes from arming themselves. *See Gun Control Issues: Hearing on S. 191—Criminal Use of Guns Before the S. Comm. On the Judiciary*, 105th Cong. (1997) (statement of Thomas G. Hungar available at 1997 WL 235739)).

61. *Id.*

62. 18 U.S.C. § 924 (a)(1)(c)(iii) (2009).

decision in *Dean*,⁶³ four federal appellate courts interpreted the discharge provision in § 924(c)(1)(A)(iii).⁶⁴

In *United States v. Nava-Sotelo*,⁶⁵ the Tenth Circuit held that proof of intent was not necessary in order to subject the defendant to the sentencing enhancement.⁶⁶ Here, defendant Aldaberto Nava-Sotelo (“Nava-Sotelo”) was carrying a gun while he attempted to free his brother, an inmate at a federal prison, while his brother was being escorted from a dental clinic by two prison officers.⁶⁷ A struggle ensued between the officers and Nava-Sotelo, and Nava-Sotelo’s gun accidentally discharged into the ground.⁶⁸ He was charged with multiple violations, one which was possession, use, or discharge of a firearm during a crime of violence in violation of § 924(c)(1)(A)(iii).⁶⁹ Nava-Sotelo argued that, under this statute, he should only receive a seven-year consecutive sentence, because the discharge of the gun was not intentional.⁷⁰ The Tenth Circuit disagreed, and found that because the discharge provision was a sentencing enhancement and not an element of the offense, intent need not be proven for the ten-year sentencing enhancement to be imposed.⁷¹

63. 129 S. Ct. 1849 (2009).

64. *See* *United States v. Dean*, 517 F.3d 1224 (11th Cir. 2008) (holding that intent was not required to apply a ten-year sentencing enhancement for the discharge of a firearm); *United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006) (holding that intent was required to apply a ten-year sentencing enhancement for the discharge of a firearm); *United States v. Dare*, 425 F.3d 634 (9th Cir. 2005) (holding that general intent was required to apply a ten-year sentencing enhancement for the discharge of a firearm); *United States v. Nava-Sotelo*, 354 F.3d 1202 (10th Cir. 2003) (holding that intent was not required to apply a ten-year sentencing enhancement).

65. *Nava-Sotelo*, 354 F.3d at 1202.

66. *Id.* at 1206. The Tenth Circuit concluded that because the discharge provision of § 924(c) is a sentencing factor and not an element of the crime, prosecution did not have to prove that Nava-Sotelo intentionally discharged his gun. *Id.*

67. *Id.* at 1203.

68. *Nava-Sotelo*, 354 F.3d at 1203. The court noted that Nava-Sotelo’s finger was on the trigger of the gun when it went off. *Id.*

69. *Id.* at 1204. Nava-Sotelo was also charged with two counts of kidnapping an officer of the United States while in the performance of official duties, which violated 18 U.S.C. § 1201(a)(5) (2009); two counts of assault on an officer of the United States while in the performance of official duties, which violated 18 U.S.C. § 111(a)(1) (2009); and one count of instigating or assisting an escape of a federal inmate, which violated 18 U.S.C. § 752(a). *Id.* Nava-Sotelo pled guilty to all six counts. *Id.*

70. *Id.* If the firearm is brandished, the mandatory sentence is seven years. § 924(c)(1)(A)(ii).

71. *Id.* at 1206. The court noted that accountability was strict, and that it does not matter if

In 2005, the Ninth Circuit decided *United States v. Dare*.⁷² The issue in this case was whether the imposition of a ten-year sentencing enhancement imposed by judicial fact-finding using a preponderance of the evidence standard violated the defendant's Sixth Amendment rights.⁷³

Defendant Stephen Dare was drinking at a local bar when his friend ("Casey") arrived with someone Dare did not know.⁷⁴ The man was in fact a drug informant, to whom Dare sold marijuana.⁷⁵ The three men went to the defendant's residence, where he retrieved a loaded gun and asked if anyone wanted to shoot it outside.⁷⁶ After Casey and the informant declined, Dare went outside and shot the gun into the air.⁷⁷ The District Court for the District of Montana found that the shotgun was discharged in conjunction with a drug transaction and sentenced Dare to ten years imprisonment under § 924(c)(1)(A)(iii).⁷⁸ Dare argued because he was intoxicated he could not have intentionally fired the gun.⁷⁹ The Ninth Circuit rejected Dare's argument, holding that the statute only requires general intent.⁸⁰

In *United States v. Brown*,⁸¹ the D.C. Circuit Court was faced with the same issue faced by the *Nava-Sotelo*⁸² court, namely, whether the accidental discharge of a gun requires the

the defendant did not intend to fire the weapon; the fact that the weapon was fired was controlling. *Id.* (citing *United States v. King*, 345 F.3d 149 (2d Cir. 2003) (holding that drug dealers do not need to know the type and quantity of drugs in their possession to be subject to certain sentencing enhancements in a certain statute); *United States v. Gonzalez*, 262 F.3d 867, 870 (9th Cir. 2001) (concluding that a *mens rea* requirement should not be applied to the United States Sentencing Guidelines)).

72. *Dare*, 425 F.3d at 634.

73. *Id.* at 636.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Dare*, 425 F.3d at 636.

78. *Id.* at 638.

79. *Id.* at 641 n.3.

80. *Id.* General intent is "the intent to perform an act even though the actor does not desire the consequences that result." BLACK'S LAW DICTIONARY 881 (9th ed. 1990).

81. 449 F.3d 154 (D.C. Cir. 2006).

82. 354 F.3d at 1202.

application of a ten-year sentencing enhancement.⁸³ The court found that the statute requires the defendant to have acted with general intent in order for the sentencing enhancement to apply.⁸⁴ In *Brown*, the defendant was robbing a bank when his gun accidentally discharged.⁸⁵ He was apprehended by police shortly after leaving the bank.⁸⁶ No one on the scene claimed to be physically harmed.⁸⁷

The court explained that because the subsections of § 924(c)(1)(A) penalize increasingly culpable conduct, and because subsection (ii) requires a separate intentional act, the ten-year minimum sentencing enhancement is reserved for the most culpable act—intentionally discharging a gun.⁸⁸ Therefore, the D.C. Circuit joined the Ninth Circuit in *Dare*,⁸⁹ holding that the discharge provision required specific intent.⁹⁰

In 2008, the Eleventh Circuit Court of Appeals decided *Dean* and found that the discharge of Dean’s gun was likely accidental.⁹¹ Here, the court relied upon the reasoning in *Nava-Sotelo* and its own decision in *United States v. Brantley*.⁹² In *Brantley*, the defendant was in possession of a semi-automatic weapon that, unknown to him, had been illegally altered into a

83. *Brown*, 449 F.3d at 155.

84. *Id.* at 158. The D.C. Circuit’s holding in *Brown* is consistent with the holding in *Dare*, 425 F.3d at 641 n.3. *See* *United States v. Lewis*, 780 F.2d 1140, 1142-1143 (4th Cir. 1986) (stating “[i]n the absence of an explicit statement that a crime requires specific intent, courts often hold that only general intent is needed.”).

85. *Brown*, 449 F.3d at 155.

86. *Id.*

87. *Id.*

88. *Id.* at 157. The court proceeded to explain the following:

[D]ischarges of a firearm are more likely to cause severe injury or even death than mere brandishing (though in cases where they actually do so the defendant would virtually always become independently guilty of another, major substantive offense). Nonetheless, 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 (or five years if the discharge occurs without brandishing).

Id.

89. 425 F.3d at 634.

90. *Brown*, 449 F.3d at 158.

91. 517 F.3d at 1224.

92. *Id.*

fully automatic firearm.⁹³ The court held that the defendant had to have knowledge that the firearm was modified in order to be found convicted of violating 26 U.S.C. § 5861(d).⁹⁴ Relying upon *Brantley*, the *Dean* court distinguished § 5861(d)'s intent requirement from the intent requirement of § 924(c).⁹⁵ The court was concerned that by removing the *mens rea* from § 5861(d), an innocent individual, i.e., one who was unaware that the firearm was prohibited, could be subject to conviction.⁹⁶ However, the court did not have the same concern when it came to § 924(c) because under that statute, the government must first prove an underlying violent or drug trafficking offense before the sentencing enhancement can come into play.⁹⁷ Ultimately, the court held that it was not necessary for the government to prove that the discharge was intentional in order for the ten-year sentencing enhancement to apply under § 924(c).⁹⁸

III. AN ANALYSIS OF THE *DEAN* DECISION

The implications of *Dean* are far-reaching. All courts are now required to apply the ten-year minimum sentencing enhancement if a firearm is discharged during a drug trafficking crime or a crime of violence, regardless of the defendant's intent.⁹⁹ Given the split in the circuit courts, it is not surprising to find the differing views expressed by the majority and the two dissenters.

93. 68 F.3d 1283 (11th Cir. 2005).

94. *Id.* at 1290. In *Dean*, the court explained the difference in intent requirements between § 924(c) and § 5861(d):

This Court differentiated the intent requirements of § 5861 and § 924(c) because it was concerned that removing the *mens rea* requirement from § 5861 could punish an innocent individual who did not realize the firearm was prohibited. We did not have the same fear of punishing an unknowing individual under § 924(c) because imposition of that sentencing enhancement first demands the government prove the defendant engaged in an underlying violent or drug trafficking crime, which will have its own *mens rea* requirement.

Dean, 517 F.3d at 1229 (citing *Brantley*, 68 F.3d at 1289-90).

95. *Dean*, 517 F.3d at 1229.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Dean*, 129 S. Ct. at 1856.

As the majority concluded, a defendant who chooses to enter a bank with a loaded gun and with the intention of robbing the bank assumes the risk that his gun may accidentally discharge. He or she is subject to a sentencing enhancement because of that risk.¹⁰⁰ The enhancement applies for the way in which the crime which was committed, and because the crime's *mens rea* has been established, further proof of intent is not required. In other words, this sentencing enhancement is a sentencing factor, not an element of a crime for which a *mens rea* requirement would be appropriate.¹⁰¹ Accordingly, the Court is correct in holding that an intent element is not required in order to apply § 924(c)(1)(A)(iii).

Furthermore, the sentencing enhancements do not threaten to turn innocent behavior into criminal behavior. In 1998, Congress rewrote § 924(c) by separating the substantive crime from the sentencing enhancements and dividing the sentencing enhancements into different subsections. Thus, in order to be subject to the sentencing enhancements in § 924(c), the defendant had to have already demonstrated "vicious will" by committing the predicate violent crime.¹⁰²

Moreover, Justice Stevens' dissenting opinion notes the fact that there is no indication that Congress intended to create a strict liability enhancement, and that where there is no such clear indication, courts should presume that provisions mandating enhanced sentences require proof of intent.¹⁰³ Strict liability offenses do not require proof of intent because an offender is

100. *Id.* at 1851. The Supreme Court stated that a gunshot, whether accidental or not, increases the risk that the people in the surrounding area will be injured, that they will panic, or that they will respond to the gunshot with violence. *Id.*

101. Sentencing factors are to be determined by the judge while offense elements which are part of the substantive crime are to be determined by the jury. *United States v. Harris*, 122 S. Ct. 2406, 2414 (2002).

102. *Dean*, 129 S. Ct. at 1851. The majority stated that it is not unusual to punish individuals for the unintended consequences of their unlawful actions, and that even if the discharge was intentional, the defendant is still not blameless. *Id.*

103. *Id.* at 1858-59. Justice Stevens stated that he would apply this presumption to avoid harshly penalizing an offender who did not have a guilty mind, but rather, a clumsy hand. *Id.* at 1859.

responsible for the harm caused regardless of his or her *mens rea*.¹⁰⁴ Although Dean may have accidentally discharged the gun, he was certainly not blameless, as he was already guilty of unlawful conduct: the commission of armed robbery. The majority correctly concluded that the way in which § 924(c) is constructed prevents an offender from receiving a sentencing enhancement without first being found guilty of an underlying unlawful act.

Although the majority opinion's reasoning is sound, there has been some discussion among Supreme Court Justices regarding the unfair effects of minimum sentencing factors.¹⁰⁵ Justice Breyer has commented that minimum sentencing enhancements remove discretion from judges when the particular circumstances of the case warrant a lesser punishment for the defendant.¹⁰⁶ This is indeed a legitimate concern. Due to the evolving nature of the interpretation of § 924(c)(1)(A), it would not be surprising to see the statute amended to accommodate rare or exceptional circumstances. The Supreme Court granted *certiorari* in *Dean* in order to eliminate the disparity between the Circuits.¹⁰⁷ Thus, some may believe that reintroducing a subsection that allows for judicial discretion may not be desirable.

Following *Dean*, a defendant whose gun discharges during a violent crime faces a minimum ten-year sentence regardless of whether he intended the gun to discharge. As the majority stated, those criminals desiring to avoid the penalty for an accidental discharge can take precautions such as locking or unloading the gun, handling it carefully during the crime, leaving the gun at home, or not committing the crime in the first place. Indeed, criminals may be less

104. BLACK'S LAW DICTIONARY 998 (9th ed. 1990). Strict liability is defined as "[l]iability that does not depend on actual negligence or intent to harm" *Id.*

105. *See Harris v. United States*, 122 S. Ct. 2406, 2420 (2002) (recognizing that the criticism surrounding mandatory minimum sentences is sound).

106. *Dean*, 129 S. Ct. at 1860 (Breyer, J., dissenting).

107. Petition for a Writ of Certiorari at 3, *Dean v. United States*, 129 S. Ct. 1849 (2008) No. 08-5274. "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." *Id.*

likely to carry a gun, or hopefully, less likely to commit the crime in the first place due to the great repercussions that can result from a gun's accidental discharge.

Even if this sentencing enhancement deters a number of individuals from carrying guns while engaging in violent crimes or drug trafficking offenses, the deterrent effect may be difficult to quantify. It is not probable, however, that individuals committing or planning to commit such crimes will be aware of the sentencing enhancement that would apply as a result of their actions. In other words, the deterrent effect of § 924(c)(1)(A) is likely to be minimal.

Furthermore, it will be interesting to see whether the Supreme Court's decision in *Dean* will affect other criminal statutes that determine if sentencing enhancements apply when a defendant did not intend the action prohibited by the statute.

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