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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-5274, Dean v. United States. Mr. Forster.

ORAL ARGUMENT OF SCOTT J. FORSTER
ON BEHALF OF THE PETITIONER

MR. FORSTER: Thank you, Your Honor.

Mr. Chief Justice, and may it please the Court:

The issue before the Court in this case is whether the discharge provision of 924(c) carries with it some requirement of intent. We believe that the answer to this question is yes. And to that end, we would cite to the -- to the text of the statute itself as well as the history involved, the presumption of mens rea that is inherent in all statutes such as this Court's case law has been clear on as well as the principle of the rule of lenity, if we get to that point, and if the Court deems that there is some type of ambiguity.

JUSTICE GINSBURG: Mr. Forster, there are three levels under this: Possession, brandishing, and if the gun is discharged. You -- you don't quarrel with the notion that Dean at least brandished this gun?

1 MR. FORSTER: We -- we do not dispute that,
2 Your Honor. No, he clearly intentionally brandished the
3 weapon.

4 JUSTICE GINSBURG: So we're talking about a
5 three-year difference between brandishing and if the gun
6 is discharged?

7 MR. FORSTER: Yes, Your Honor, that's
8 exactly right. And the statute in 924 requires that the
9 use of the firearm be during and in relation to the
10 underlying crime of violence, which in this case is a
11 bank robbery. And we believe that the proper reading of
12 the statute would require that the discharge also be
13 done during and in relation to the underlying crime of
14 violence. Otherwise, the statute simply would not make
15 any sense.

16 CHIEF JUSTICE ROBERTS: I think one of the
17 stronger arguments against you is the use of the passive
18 voice. It doesn't say anybody who discharges a firearm.
19 It says "a firearm is discharged." And that seems to me
20 to take it away from the element of intent that you're
21 trying to focus on.

22 MR. FORSTER: Your Honor, I think that it's
23 a transitive verb the way it's used. By definition, it
24 would have some object. Someone would have had to have
25 discharged the weapon. And so I think that the Court's

1 cases on mens rea and so forth would continue to apply,
2 even given the way that the -- that it's phrased in the
3 statute. I don't think that --

4 CHIEF JUSTICE ROBERTS: So you think it's
5 different -- I don't remember the grammar too well. You
6 think "a firearm is discharged" is different than
7 "firearm discharges"; is that your point?

8 MR. FORSTER: I'm not sure it would make a
9 difference in this case, Your Honor, because I don't
10 think there's any -- I think that by definition the
11 Court would have to ask itself who discharged the
12 weapon. I don't think you can just use the word
13 "discharge" in a vacuum. It has to be during and in
14 relation --

15 CHIEF JUSTICE ROBERTS: Well, I'm not sure
16 that's right. I mean, if in fact the bank robber tries
17 to flee, and the security guard is forced to use his
18 firearm, increasing the danger to everybody else in the
19 bank, I'm not sure this statute wouldn't cover that as
20 well.

21 MR. FORSTER: Your Honor, I don't believe
22 the statute would, because the individual who would be
23 charged with it would not himself had "during" or "and
24 in relation to" the underlying crime of violence.

25 JUSTICE GINSBURG: But it doesn't say -- it

1 says, "if the gun is discharged." And I think on the
2 government's reading, it would cover the police officer
3 who is trying to apprehend the robber and fires a gun.

4 MR. FORSTER: Yes, Your Honor, I think under
5 the government's theory that would be true. But I think
6 that would open up --

7 JUSTICE SCALIA: Excuse me. What -- what --
8 I guess I'm not following this. You say it would be
9 true that if the blank -- if the bank guard fires his
10 own gun when -- when the bank robber is fleeing, that
11 would come within this?

12 MR. FORSTER: No, Justice Scalia, not under
13 our reading. I think --

14 JUSTICE SCALIA: No, you say under the
15 government's it would? I don't think it would under the
16 government's either. Do you?

17 JUSTICE KENNEDY: You have to use or carry
18 the firearm before -- before section 2 even applies.

19 JUSTICE GINSBURG: But it's the police
20 officer who snatches the gun.

21 JUSTICE SCALIA: Ah, that's different, yes.

22 JUSTICE KENNEDY: That's different.

23 JUSTICE GINSBURG: So it is using the
24 robber's gun, but by the police officer who is
25 apprehending him. In other words, as I understand the

1 government's view, it doesn't matter whether it's the
2 police officer. It has to be the gun of the robber, but
3 it doesn't matter whether it's the robber or the police
4 officer who discharges it.

5 MR. FORSTER: That's true, ma'am.

6 JUSTICE SCALIA: And I guess it's also the
7 government's view -- and this is even weirder -- that it
8 doesn't matter who brandishes the gun. So the bank --
9 the bank guard grabs the gun and brandishes the gun, and
10 that also gets additional time served for the bank
11 robber. It doesn't seem fair.

12 MR. FORSTER: Your Honor, I don't believe
13 that the -- that the hypothetical of the guard waving
14 the gun around -- I don't think that would meet the
15 definition of "brandish" the way 924 defines it.

16 JUSTICE GINSBURG: So it has a very specific
17 -- what are the words that define what is brandishing?

18 MR. FORSTER: Justice Ginsburg, "brandish"
19 is defined under the statute a couple of different ways.
20 The -- the dictionary definition of "brandish," which is
21 to grab something and wave it around, is certainly
22 contained in that.

23 But the definition goes further. The
24 definition also says that if I, for example, make known
25 that I have a gun, if I pass a note saying I have a gun,

1 that would also be brandishing under the statute.

2 JUSTICE GINSBURG: I -- I didn't think the
3 government or anybody was reading the definition of
4 brandishing to include a police officer.

5 MR. FORSTER: The way the government's brief
6 -- well, with regards to brandish, Your Honor, I don't
7 know that the government goes that far.

8 JUSTICE SOUTER: Well, they've run into the
9 problem, which is also a different problem for you, and
10 that is the brandishing must be for the purposes of --
11 for the purpose of intimidating.

12 JUSTICE GINSBURG: Right.

13 JUSTICE SOUTER: So that's probably going to
14 eliminate the case in which the officer grabs the
15 felon's gun. So the problem that it seems to me that it
16 creates for you is that "brandish" is specifically
17 defined to have that particular intentional element.
18 There is, however, no definition of -- of the -- of the
19 term in question here, which suggests that they did not
20 have any discharge -- that they did not have any --
21 any -- any intent to impose an intent requirement. When
22 they do it, they know how to do it. In this case. They
23 didn't do it.

24 MR. FORSTER: Your Honor, I would disagree
25 with that simply for this reason: This Court's case law

1 is clear that if Congress wants to do away with the mens
2 rea element, they must affirmatively do so. And I don't
3 think that it's proper to say that because there's a
4 specific definition of "brandish," therefore they meant
5 discharge to be basically strict liability.

6 JUSTICE SOUTER: Why is it improper? I
7 mean, it may not be conclusive, but it seems to me
8 evidence that points in that direction.

9 MR. FORSTER: Your Honor, I think that that
10 would be disregarding the presumption of mens rea that
11 exists pursuant to this Court's case law as well as the
12 requirement --

13 JUSTICE SOUTER: We have -- we have lots of
14 cases in which it makes sense to disregard that
15 presumption, and -- and nobody thinks twice about it, I
16 mean, accomplice liability being an example.

17 There are -- there are lots of State crimes
18 in which it is dispensed with, reckless driving, death
19 resulting. And in all of those cases, what in effect
20 the rationale is that the -- that the individual who is
21 being charged has created a risk. No one can control
22 that risk, including himself, but he bears the
23 responsibility for, if you will, bad luck if the risk is
24 realized. And that is the rationale for -- for holding
25 him liable for discharge here without any particular

1 knowing or -- or intentional act in making the
2 discharge.

3 So why doesn't that make sense, and why is
4 that not an answer to the usual presumption that there
5 will be a specific state of mind required?

6 MR. FORSTER: Your Honor, I don't think this
7 statute is driven by consequence. And as I understand
8 Your Honor's hypothetical --

9 JUSTICE SOUTER: Why? Why?

10 MR. FORSTER: Because the words that the
11 statute uses are directly focused to the -- to the
12 conduct of the defendant: "Possess, use, brandish,
13 discharge," as opposed to, for example, carjacking.

14 JUSTICE SCALIA: Well, this is conduct. I
15 mean, it isn't just bad luck. This is -- what we have
16 here is a negligent bank robber. I mean, he has left
17 the safety off, okay, and -- and trips the gun. I mean,
18 bank robbing is bad enough, but negligent bank robbing
19 is something --

20 (Laughter.)

21 JUSTICE SCALIA: -- is something that should
22 be punished more severely.

23 MR. FORSTER: Your Honor, certainly under
24 the statute the court had far more authority than the 10
25 years it imposed, and I think Congress is clear that

1 they -- they allowed for substantially larger sentences
2 in such a case. This case obviously just discusses the
3 application of the mandatory minimum.

4 CHIEF JUSTICE ROBERTS: Your -- your
5 argument would give rise to very serious problems of
6 proof. Every time a gun goes off, the bank robber would
7 be able to say it was an accident. I mean, we had a
8 particularly klutzy robber here that everybody agrees it
9 was an accident, but, you know, in many cases it won't
10 be clear.

11 Yes, I was pointing the gun at the person,
12 but I didn't mean to fire it. It just went off. And
13 he's sad about it just as everyone else is. And that
14 would get to the jury in every case.

15 Just because it was easy here doesn't mean
16 it's going to be easy every time to draw a line. And it
17 gets back to Justice Souter's point. If you pose the
18 risk that the gun is going to go off, that's
19 additionally punishable conduct.

20 MR. FORSTER: Your Honor, obviously -- I
21 mean, the risk certainly does go up. But as I -- as I
22 think the statute is written, it's not driven by what
23 the risk is. As I say, as opposed to --

24 CHIEF JUSTICE ROBERTS: That's not my
25 question, really. The question is the problem of proof.

1 Yours is an easy case. Most cases it's not going to be.
2 Most cases, when the gun goes off, the robber will be
3 able to say, I didn't intend that it discharged. It
4 was -- it was an accident.

5 MR. FORSTER: Your Honor, I don't believe a
6 jury would be -- would make that decision, because under
7 this Court's authority in Harris, that would be for the
8 judge; and -- and obviously criminals would make these
9 claims, and it would be --

10 JUSTICE SCALIA: Excuse me? That would be
11 for the judge?

12 MR. FORSTER: Under this Court's authority
13 in Harris, Your Honor, brandish and discharge are not
14 elements of the offense that must be indicted and proved
15 to a jury. They are sentencing elements -- or
16 enhancements, if you will, that -- that would be up to
17 the judge, and that's this Court's Harris ruling.

18 JUSTICE ALITO: Doesn't that undermine your
19 argument that there's a presumption that a mens rea has
20 to apply, since this is just a sentencing element?

21 MR. FORSTER: Your Honor, I don't believe
22 so. This Court has never said that merely because it is
23 a sentencing enhancement, rather than an element of the
24 offense, that somehow the statutory rules of
25 construction cease to apply.

1 JUSTICE GINSBURG: Isn't it part of the
2 background here that it was proposed at the time these
3 enhancements came into the law. It was proposed that
4 there be a specific state of mind requirement for the
5 discharge of a gun, and that was not enacted?

6 MR. FORSTER: I didn't hear the -- I'm
7 sorry, Your Honor.

8 JUSTICE GINSBURG: I thought that part of
9 the legislative history was that there were proposals --
10 I mean, there is a rather sharp difference between
11 "possess" -- yes, you have to have a knowledge, intent
12 element -- "brandishing," very clear, for purposes of
13 intimidation -- then "discharge" has no -- it's just
14 that the gun is discharged.

15 Weren't there proposals to include something
16 like what was included for the other two, that is, that
17 there be an intent requirement?

18 MR. FORSTER: Your Honor, there were various
19 drafts in the House and the Senate that -- that
20 specifically provided the intent requirement. The
21 compromise that came out was basically a disagreement
22 over the penalty, and the language that the Congress
23 used, "during and in relation to," necessarily implies
24 some type of an intent element. I think the circuits
25 are clear on that; it has to be knowing, otherwise it's

1 not during and in relation to.

2 And so I believe that the choice of language
3 that Congress uses -- there has to be the connection, we
4 believe, between the use -- during and in relation to
5 and the discharge. Otherwise the statute makes no
6 sense, because it wouldn't be triggered by anything.

7 JUSTICE BREYER: Why? I can't get anywhere
8 with the language, to tell you the truth. I could read
9 it either way. It -- the House language is the same.
10 The person "discharges," yes, but what if he discharges
11 it accidentally? Is the accidental case or unintended
12 case meant to be covered or not meant to be covered?

13 MR. FORSTER: We don't --

14 JUSTICE BREYER: And you don't get anywhere
15 -- I just can't get anywhere with the language. The
16 reason they put the "is discharged" is probably for
17 parallelism. It was a drafting section in the Senate,
18 and they do their job in a stylistic way. I found
19 nothing that suggests anything other than that.

20 So -- so where am I? Sometimes a person who
21 discharges the weapon accidentally is really much worse
22 than the one who does it purposely. Purposely, he
23 shoots at the ceiling; accidentally, he kills a person
24 dead; okay? So I mean, I can't get too far with that.

25 So where -- so there we are. Is there

1 anything else -- there is the proof problem that the
2 Chief Justice mentioned. Is there anything else you can
3 say to me, who really doesn't see it one way or the
4 other way in this statute?

5 MR. FORSTER: Your Honor --

6 JUSTICE BREYER: Would you say, look, this
7 is why you win?

8 MR. FORSTER: Your Honor, in the committee
9 reports and so forth, I think it's pretty clear that
10 they did not intend an unintentional or an accidental
11 discharge to be covered.

12 JUSTICE BREYER: Why -- why do you think
13 that? I mean, it is absolutely true that a person who
14 is a bank robber and has a gun and has already shown it,
15 and it goes off accidentally is -- has caused a
16 tremendous harm in certain cases, which traditionally
17 has been thought meriting a higher sentence.

18 And it is also true that he doesn't have the
19 same state of mind as the one who does it purposely.
20 That is true, too. Both are true. And so now what
21 should I do? I know what you want me to do, but why?

22 MR. FORSTER: Your Honor, the requirement --
23 we think that the discharge, again, must be during and
24 in relation to. There has to be that connection. And
25 --

1 JUSTICE SCALIA: Which -- it's during the
2 bank robbery.

3 JUSTICE BREYER: It's in relation to the --
4 I mean, you know, in a sense it is, and in a sense it
5 isn't; same problem.

6 MR. FORSTER: I don't think this case --
7 this Court's case law would support a finding that an
8 accidental use would have been in relation to. That's
9 this Court's ruling in Smith.

10 JUSTICE GINSBURG: Well, there's accidents
11 and accidents. And couldn't one say, looking at this
12 that, well, we will -- the State will find that the
13 culpability that we will attribute to this statute is
14 reckless? If recklessness were the requirement,
15 certainly the facts of this case would fit, would they
16 not?

17 MR. FORSTER: I think that the evidence
18 would suggest that he was reckless --

19 JUSTICE GINSBURG: You accept that --

20 MR. FORSTER: -- but I don't believe that it
21 was knowing. And I -- and then I think that --

22 JUSTICE GINSBURG: You say reckless is not
23 enough; it has to be knowing. This is not a mere
24 accident. It's -- this -- the gun was loaded, it wasn't
25 locked, and he's raking in money with one hand, holding

1 the gun with the other. The teller is crouching down.
2 I mean, there was -- there was a pretty substantial risk
3 of something going wrong, right?

4 MR. FORSTER: Absolutely, there was. But I
5 think this Court's authority in Smith talks about the --
6 the intent element that is inherent in this. It has to
7 be purposeful, it has -- it cannot be by accident, and
8 that's what this Court ruled in Smith.

9 JUSTICE SCALIA: Why? You place a lot of
10 reliance on this "during and in relation to" any -- any
11 crime of violence or drug trafficking crime. But that's
12 -- that's in the prologue, and it applies only to the
13 matter covered in the prologue -- to wit, "During and in
14 relation to any crime of violence or drug trafficking
15 crime, for which the person may be prosecuted in a court
16 of the United States, uses or carries a firearm or in
17 furtherance of any such crime possesses a firearm."

18 That's -- that's what all that language
19 "during and in relation to" applies to. And then it
20 continues: "Shall" -- if that "in relation to" existed
21 -- "in addition to the punishment provided for such
22 crime" -- "(i) be sentenced to a term of imprisonment of
23 not less than 5"; (ii) -- and number (iii) -- what we're
24 dealing with here -- "if the firearm is discharged, be
25 sentenced to a term of imprisonment of not less than 10

1 years."

2 I don't see how that language "during and in
3 relation to any crime of violence" applies to anything,
4 except the use or carrying of a firearm.

5 MR. FORSTER: Justice Scalia, sir, we
6 believe that the proper -- that the better reading would
7 be some connection between those two, between the
8 discharge and the underlying -- the during and relation
9 to.

10 JUSTICE SCALIA: Why is that? How could you
11 -- how could you make the lack of connection any clearer
12 than by ending the first -- the introduction with a
13 dash, and then putting (i), (ii), and (iii)? I mean, it
14 seems to me that it applies to the portion before the
15 dash.

16 MR. FORSTER: Your Honor, if that were the
17 -- if that were the interpretation, then it would lead
18 to what we consider to be some of the absurdities as far
19 as the results go. If there is no connection between
20 "during and in relation to" -- as I will refer to it as
21 "the connection" -- in absence of that connection, any
22 number of different things could occur, and that
23 connection is what makes this statute make sense.

24 And I believe that the government basically
25 acknowledges that in their brief, that there has to be

1 -- if there's not some connection -- I think it's page
2 29 of the government's brief. That when we discussed
3 the absurd results that might flow from a statute where
4 there is no such connection, what the government says --
5 I believe it's on page 29 -- is that to avoid these
6 absurd results, this connection does exist. But then
7 the next sentence they say: But it doesn't mean there
8 is a mens rea.

9 And it seems to me that what the government
10 wants in that case is the "during and in relation to"
11 has to apply to "discharge" to avoid the absurd results,
12 but yet they don't want Smith to go along with it. And
13 Smith said that during and in relation to is purposeful,
14 has to have an effect, and it can't be done by accident.

15 JUSTICE SCALIA: How would -- how would a
16 discharge not be during and in relation to? Give me an
17 example of -- of what you're worried about.

18 MR. FORSTER: Any discharge any other time.

19 JUSTICE BREYER: He sees a duck fly by the
20 window and he's a hunter.

21 JUSTICE SCALIA: But that -- excuse me.
22 That's not -- that's not covered. Number (iii) only
23 applies to someone who has already been guilty of what's
24 set forth in the prologue.

25 MR. FORSTER: That's the connection that we

1 believe exists.

2 JUSTICE SCALIA: And that's the only
3 connection that's necessary. You have to have done what
4 was set forth in the prologue, and it has -- has to be
5 in the course of doing that. But "the course of doing
6 that" means just in the course of using a firearm in
7 connection with the bank robbery.

8 MR. FORSTER: Your Honor, I don't think
9 that's the -- the best way to read it. I think it has
10 to be during and in relation to the bank robbery.

11 JUSTICE GINSBURG: The -- the "use or carry"
12 certainly has to be in relation -- during and in
13 relation to, but that's step one. So he already is
14 using and carrying or carrying in relation to the bank
15 robbery. And then -- so that's the starting premise.
16 That excludes all your things about "years before" or
17 "years after" he carried -- he carried a gun. You --
18 step one narrows it to the person who uses or carries a
19 gun in connection with a bank robbery.

20 MR. FORSTER: And -- and I would agree with
21 that, and then when you take this Court's authority in
22 Smith to say that that type use during and in relation
23 to cannot be accidental. And so I go back to the
24 original question Your Honor asked me, did he
25 intentionally brandish it? Clearly. And so we believe

1 that if -- if this case we are here about is fit into
2 Smith, he's on the hook for the seven years under
3 brandish, but because the discharge was accidental, it
4 cannot constitute use under this Court's authority in
5 Smith.

6 JUSTICE STEVENS: Let me ask you a question
7 about that. I thought that "or possesses" was separate
8 from the "uses or carries." Is possession an example of
9 using or carrying or is it as it says -- "or who in
10 furtherance of such crime possesses"? Isn't that a
11 separate -- separate enhancement?

12 MR. FORSTER: I don't know that I would use
13 the word "enhancement," Your Honor. The principal body
14 of 924 --

15 JUSTICE STEVENS: Right.

16 MR. FORSTER: -- carries with it "uses" as
17 in this case as well as later on in the statute
18 "possesses." So it says both. `

19 JUSTICE STEVENS: But merely possessing is
20 enough to get the first enhancement of five years.

21 MR. FORSTER: If it is in furtherance --

22 JUSTICE STEVENS: Or relation to.

23 MR. FORSTER: If it's --

24 JUSTICE STEVENS: The "uses or carries"
25 doesn't -- doesn't necessarily apply to the possession.

1 MR. FORSTER: The -- I believe, under the
2 reading of the statute, Your Honor, they're separate.
3 He could have been charged arguably with possession --

4 JUSTICE STEVENS: Right.

5 MR. FORSTER: -- in furtherance of, but he
6 wasn't. He was charged with using during and in
7 relation to the underlying crime of violence.

8 JUSTICE SCALIA: Why do we have to find that
9 the phrase "if a firearm is brandished" and the later
10 phrase "if a firearm is discharged" require intentional
11 brandishing and intentional discharging? Why can't we
12 limit it by saying, oh, of course it means if the
13 firearm is brandished by the bank robber or by the felon
14 or if it's discharged by the felon, but leaving it quite
15 undetermined whether it has to be intentionally
16 discharged, or even intentionally brandished for that
17 matter.

18 MR. FORSTER: Well --

19 JUSTICE SCALIA: The definition of
20 brandishing, I guess, requires some intent to put
21 another person in fear.

22 MR. FORSTER: Your Honor, I think that you
23 would then have to turn to this Court's -- well, first
24 of all, I think it's the best reading of the statute.
25 It doesn't make sense any other way to say that you can

1 have the gun discharged but not be during and in
2 relation to the underlying crime of violence. It
3 doesn't make sense.

4 Second, I believe that this Court's
5 statutory rules of construction would say that if
6 Congress wanted to do away with the mens rea element in
7 this case, they would have had to have done so
8 expressly. And we don't believe that they did.

9 Now, every circuit that has discussed the
10 requirement of "during and in relation to" has found a
11 knowledge requirement, that you can't not know the gun
12 is there, for example. There has to be the knowledge
13 requirement. And that this Court's authority in Smith
14 suggests or says clearly that it cannot be used
15 accidentally.

16 So now the question becomes this: If the
17 Court decides that during -- that the discharge must be
18 during and in relation to, and when the Court does that
19 it takes its own authority in Smith to say that it has
20 to be purposeful, it has to have the effect of the
21 commission of the crime, now is -- would the use in this
22 case be subject to Smith? And Smith was clear that
23 accidental discharge simply -- or accidental use, rather
24 -- it didn't talk about discharge exactly -- but that
25 accidental use would never be, because it --

1 JUSTICE GINSBURG: Why -- you say that this
2 background principle, that there has to be a state of
3 mind element -- and we can accept that that's a general
4 principle. But here we have a provision that does
5 require a state of mind -- specifically requires a state
6 of mind for the possession, for the brandishing, intent
7 to intimidate, but here is this other one that suddenly
8 doesn't. So wouldn't the text of this statute say --
9 well, the third one, discharging a gun, they didn't mean
10 to have any element because -- any element of mens rea
11 -- because they had it in number (i) and (ii), and (iii)
12 leaves it out.

13 MR. FORSTER: Your Honor, if -- I believe
14 such an interpretation would basically mean that that
15 silence would be interpreted as a strict liability, that
16 silence with regards to the specific intent requirement
17 would mean the Congress meant that no intent was
18 necessary. And that's simply never what these cases
19 from this Court have held. There is the presumption
20 that Congress operates against, and if they wish to
21 eliminate the mens rea element, they must do so
22 expressly. And we simply do not believe that it -- that
23 it happened in this case.

24 One last point is, we believe there's
25 nothing else that Congress would have had to have done

1 to establish a general intent, and if that's true, then
2 I think the very least that could be said about our
3 interpretation is that it would be a reasonable one, in
4 which case lenity principles would then come into play.

5 Mr. Chief Justice, if there's no other
6 questions, I would like to reserve the remainder of my
7 time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 MR. FORSTER: Thank you.

10 CHIEF JUSTICE ROBERTS: Ms. Maynard.

11 ORAL ARGUMENT OF DEANNE E. MAYNARD

12 ON BEHALF OF THE RESPONDENT

13 MS. MAYNARD: Mr. Chief Justice, and may it
14 please the Court:

15 By its terms, the sentencing factor in
16 section 924(c)(1)(A)(iii) contains no mens rea
17 requirement. Rather, it requires a certain fact to be
18 present in the course of the section 924(c) offense,
19 namely that the firearm is discharged.

20 JUSTICE SCALIA: Does it -- does it require
21 that the discharge be during and in relation to the
22 crime? I mean, suppose the bank robber, you know, he
23 sees -- son of a gun, he sees among the customers a man
24 that ran off with his wife a year ago, and he is just
25 overcome with anger, and he -- you know, he takes a shot

1 at this guy. It's not in relation to the bank robbery.
2 Would -- would that discharge be covered?

3 MS. MAYNARD: As long as the discharge
4 occurs while the 924(c) offense is going on --

5 JUSTICE SCALIA: Yes.

6 MS. MAYNARD: -- yes, Justice Scalia, it
7 would -- it would apply. The "during and in relation
8 to" language from the principal paragraph is part of the
9 offense, but it does not carry down to the separate
10 sentencing factors.

11 CHIEF JUSTICE ROBERTS: What about the
12 police come in and say, "Drop it"; he says, "Oh, my
13 robbery's over"; he drops it, and it goes off?

14 MS. MAYNARD: That case might present a
15 question about whether or not, once he drops it in
16 compliance with a lawful order to do so, he is still
17 committing the section 924(c) offense. If the section
18 924(c) offense is deemed to be over at that point, then,
19 no, the firearm would not -- the fact would not have
20 been present while the course of the section 924(c) --

21 CHIEF JUSTICE ROBERTS: All right. So
22 that's the line between is it going on. But assuming
23 the offense is -- the bank robbery is still going on,
24 like he's got confederates gathering up the money or
25 something, does that fall under your theory that the gun

1 is discharged?

2 MS. MAYNARD: In our -- under our theory,
3 the -- there must be a temporal connection between the
4 offense that -- for which the defendant is being
5 sentenced, which is a section 924(c) offense, the using
6 or carrying the firearm during and in relation to the
7 bank robbery in your hypothetical or possessing it in
8 furtherance of the bank robbery in your hypothetical.

9 If one concluded that because the bank
10 robbery continued, even though he was no longer using or
11 carrying the firearm or no longer possessing it, that
12 the 924(c) offense also continued, and the firearm
13 discharges when he drops it, then, yes, the firearm is
14 discharged while the section 924(c) offense is ongoing,
15 and, yes, the mandatory minimum would apply.

16 But -- but that hypothetical presents
17 questions about the beginning and end of the section
18 924(c) itself, not questions about whether or not the
19 discharge was intentional or accidental.

20 JUSTICE SCALIA: Do you think that --
21 regardless of whether it's intentional or accidental, do
22 you think that he has to discharge it or that he has to
23 brandish it? It is the passive voice. Does it mean if
24 anybody discharges it or brandishes it?

25 MS. MAYNARD: Two -- at least two points

1 about that, Your Honor: The passive voice makes clear
2 that Congress cared about the fact of a discharge, that
3 Congress was indifferent as to who discharged the
4 weapon. Because the "is brandished" is also stated in
5 the passive voice, we think Congress was also
6 indifferent as to who brandished the firearm, although
7 there is a separate provision giving content to what it
8 means to brandish, and brandish must be done in order to
9 intimidate. So -- but if a confederate, for example --

10 JUSTICE SCALIA: Grabs it out of his hand
11 and brandishes it.

12 MS. MAYNARD: -- and brandishes it in order
13 to intimidate the victims in the bank, then, yes, both
14 of them would be subject to the brand -- to the
15 brandishing enhancement. And even if one thought that
16 the language in the -- in the sentencing factor, "if the
17 firearm is discharged," applied only to the defendant's
18 conduct, which -- that's not our position, and we think
19 that clearly -- it clearly encompasses others --
20 ordinary liability rules under Pinkerton and aiding and
21 abetting principles would hold a confederate liable for
22 discharge by another.

23 CHIEF JUSTICE ROBERTS: So even a police
24 officer -- the police officer disarms the robber and 10
25 minutes later mishandles the gun and it goes off.

1 MS. MAYNARD: Again, I think that would
2 present questions about whether or not the section
3 924(c) offense was still continuing, if the law
4 enforcement officer has the weapon.

5 CHIEF JUSTICE ROBERTS: Well, assuming it
6 is. I mean, he has got the one guy neutralized, but the
7 others are still, you know, under the teller's window,
8 and that isn't over. So then the guy who is captured
9 already gets an extra three years because the officer
10 mishandled the gun?

11 MS. MAYNARD: If the section 924(c) offense
12 is -- is -- is ongoing and if the firearm is discharged,
13 the mandatory minimum sentence applies. One might
14 conclude that if third parties take the weapon and
15 discharge it -- and, by the way, I do believe these are
16 purely hypotheticals. They point to no case where
17 that's actually been the case -- but --

18 CHIEF JUSTICE ROBERTS: Well, there probably
19 aren't a lot of cases where the bank robbers are such
20 klutzes that they're fumbling with the gun and it goes
21 off, either.

22 (Laughter.)

23 MS. MAYNARD: That's true. There may not be
24 very many accidental discharges, but there's no reason
25 to believe Congress wanted courts to engage in the

1 inquiry about whether or not the defendant accidentally
2 discharged the weapon. If this Court were to -- to hold
3 that accident -- accidental discharges are not covered
4 by the sentencing factor, I think that we would see more
5 claims of accidental discharge.

6 CHIEF JUSTICE ROBERTS: I interrupted your
7 answer.

8 MS. MAYNARD: About the third -- if one is
9 concerned about the actions of third parties who are not
10 confederates in any way taking the weapon -- and we do
11 believe it does under the statute's language need to be
12 the firearm that is the basis of the section 924(c)
13 offense, and not someone else's firearm. But if -- if
14 -- in other words, not the security guard's firearm. If
15 the firearm is discharged by a third party -- causes you
16 concern, one could conclude that that is not the manner
17 in which the defendant committed the offense. And that
18 this Court's decision in Harris described this type of
19 sentencing factor, these very sentencing factors, as the
20 kind of factor that one looks at: Is a fact present in
21 the manner in which the defendant committed the offense?

22 And so one might conclude that if the law
23 enforcement officer disarms the robber and then later
24 discharges the weapon, that that fact of a discharge is
25 not part of the manner in which the defendant committed

1 the offense. We don't think that's compelled, by the
2 way.

3 JUSTICE GINSBURG: It would be the same --
4 you would give the same answer if the teller grabbed the
5 gun from the robber and it went off?

6 MS. MAYNARD: If the teller grabs the gun
7 from the -- from the robber and it discharges, as long
8 as the section 924(c) offense is continuing, then the
9 firearm is discharged. But --

10 JUSTICE GINSBURG: But your alternate
11 position would apply to the teller as well as the police
12 officer?

13 MS. MAYNARD: One could reasonably conclude
14 that if the teller discharges it isn't a fact in the
15 manner in which the defendant committed the offense.
16 But I do think there's reason to believe Congress may
17 have been concerned about the fact of the discharge by
18 anyone. I mean, what you're talking about is someone
19 who's engaging in inherently dangerous activity. They
20 brought an armed weapon to commit a crime of violence or
21 a drug trafficking crime, and they've handled it in such
22 a way that either it is discharged --

23 JUSTICE BREYER: There is another --

24 JUSTICE SCALIA: We don't really have to
25 decide all this stuff, do we? We just have to decide

1 whether, if he discharges it, the discharge has to be
2 intentional.

3 MS. MAYNARD: There is no question here,
4 Your Honor, but that it was the robber that discharged
5 the weapon. And in fact the Petitioner testified that:
6 "I pulled the trigger when I was switching the gun from
7 one hand to the other."

8 JUSTICE STEVENS: But it's also uncontested
9 it was accidental, I think.

10 MS. MAYNARD: We have not challenged that it
11 was accidental. But I think that it --

12 JUSTICE STEVENS: What do you say to your
13 opponent's argument -- I don't know if it's right or not
14 -- but that there's sort of a background rule that
15 generally we assume, when Congress prohibits conduct, it
16 means intentional conduct; and normally if they don't
17 mean that, they make it rather clear in the statute.

18 Is that a correct -- is his background
19 principle correct?

20 MS. MAYNARD: I don't think so, Justice
21 Stevens, with respect to sentencing factors. I think
22 there's no case in which this Court has indicated -- and
23 no common law principles --

24 JUSTICE STEVENS: What's the difference
25 between a sentencing factor that adds five years to a

1 sentence and an element of the crime? There are a lot
2 of us who think that -- you've read Harris and Appendi.
3 You know there's -- that there's some debate about
4 whether that really makes all that much difference.

5 MS. MAYNARD: Well, in Harris, which was --
6 in which this Court was interpreting these very
7 sentencing factors here, the Court note -- noted that --

8 JUSTICE STEVENS: Let me -- let me rephrase
9 the question.

10 MS. MAYNARD: Yes.

11 JUSTICE STEVENS: If it were an element of
12 the crime, would you then agree with his background
13 rule?

14 MS. MAYNARD: No, Your Honor, because if it
15 were an element --

16 JUSTICE STEVENS: Then the fact that the
17 sentencing factor is an element really isn't
18 significant.

19 MS. MAYNARD: I think it might be a harder
20 case for us if it were an element of the crime, but it
21 wouldn't be an element that would be necessary.

22 JUSTICE STEVENS: But why would it be a
23 harder case for you?

24 MS. MAYNARD: Why would it be a harder case
25 for us? Because if it were a harbor -- hard -- if it

1 were an element of the crime, then it would be an
2 aggravated offense, and then one could debate whether or
3 not the --

4 JUSTICE STEVENS: But in that situation,
5 would there be a background rule that we normally think
6 Congress intends to punish intentional conduct?

7 MS. MAYNARD: I think there is a background
8 rule with respect to the definition of criminal offenses
9 that Congress intends some mens rea.

10 JUSTICE STEVENS: So you really then are
11 relying on the difference between an element of the
12 crime and a sentencing factor?

13 MS. MAYNARD: Not -- no, Your Honor, not in
14 this way, because it -- it would -- it would be a more
15 difficult -- case for us, I can see, but that you would
16 still be talking about somebody who was engaged in
17 wrongful conduct. There would be no danger.

18 I mean, one of the reasons the Court assumes
19 a mens rea requirement, or reads in a mens rea
20 requirement when one's not there, is because of the fear
21 of capturing innocent conduct. But what you would be
22 talking about is someone who has taken a loaded weapon
23 to commit a crime of violence or a drug trafficking
24 crime and used it during and in relation to that crime
25 or to -- possessed it in furtherance of that crime and

1 is already guilty. They are engaged in --

2 CHIEF JUSTICE ROBERTS: It's entirely
3 fortuitous. You have two bank robbers. They both do
4 exactly the same thing. In one case, the gun goes off;
5 and the other, it doesn't. Does that -- does it seem --
6 does it seem fair to add three years onto the sentence
7 of the one whose gun happens to go off but not on the
8 sentence of the one whose doesn't?

9 MS. MAYNARD: They both engaged in
10 inherently dangerous activity.

11 CHIEF JUSTICE ROBERTS: Yes, they both did.
12 That's my point.

13 MS. MAYNARD: Right.

14 CHIEF JUSTICE ROBERTS: They both did
15 exactly the same thing.

16 MS. MAYNARD: And it's common in criminal
17 law to hold criminals responsible for their unintended
18 consequences of their criminal acts, and that's -- in
19 your hypothetical it wouldn't be unusual at all to hold
20 someone liable for the accidental discharge when they've
21 taken a loaded weapon to commit a violent crime, here a
22 bank robbery, and handled it in such a way that it goes
23 off. It's completely reasonable for Congress to
24 conclude --

25 CHIEF JUSTICE ROBERTS: You get three extra

1 years for having bad luck?

2 MS. MAYNARD: Well, no -- well, they're --
3 just to be clear, they're both subject to life
4 imprisonment for taking the gun and committing -- and
5 using it to commit the bank robbery. So it's not
6 tacking on three years; it's increasing the minimum.
7 And that is a significant difference, Justice Stevens
8 said this Court has recognized with respect to these
9 various factors in Harris itself, that the -- whether or
10 not there was a discharge is --

11 CHIEF JUSTICE ROBERTS: Well, is this guy
12 likely to get life for a bank robbery -- the gun
13 accidentally goes off? I don't know whether it's his
14 first offense or not.

15 MS. MAYNARD: As a practical matter, no,
16 Your Honor. However, had the accidental discharge
17 caused a death, then he would have committed a more
18 serious offense, and that may have been the penalty.
19 But the point is that one is often subject to higher
20 penalties than one might have expected by the unintended
21 consequences of one's criminal act.

22 JUSTICE BREYER: What would you think -- to
23 go back to Justice Stevens's question. I would start
24 with the assumption that, normally, not always, where
25 you have a criminal statute and the crime has elements,

1 that Congress intends that the elements be carried out
2 with a guilty state of mind. I would start with that
3 assumption.

4 And I would agree with you that sentencing
5 is different, and the reason that it's different is
6 because sentencing often goes up or down depending upon
7 whether the harm that is foreseen does or does not
8 occur, irrespective of the state of mind. So we
9 couldn't apply that normal background rule, in my view.

10 MS. MAYNARD: I think that's correct, Your
11 Honor --

12 JUSTICE BREYER: All right. All right.

13 MS. MAYNARD: -- and that's our view.

14 JUSTICE BREYER: Now -- now, having done
15 that I wonder if the background rule should come into
16 play once again where a mandatory minimum sentence is at
17 stake, for the reason that if the harm eventuates, there
18 are many ways in which the sentence will go up. If this
19 person had been killed, for example, it becomes a murder
20 in the course of a felony. There are all kinds of other
21 statutes that can aggravate the felony. And if you
22 don't apply the mandatory minimum, the judge still can
23 give him the higher sentence, if he warrants it.

24 But if you apply the mandatory minimum where
25 the judge wouldn't go up, the only impact that has is to

1 take people who the judge and others think fall into the
2 minimal category of bad behavior plus consequences, and
3 force them to have a higher sentence. Now, that would
4 be a rationale for a rule of lenity in mandatory minimum
5 sentencing matters.

6 MS. MAYNARD: But that would be a
7 reconceptualization of the rule of lenity, Justice
8 Breyer.

9 JUSTICE BREYER: Yes, it would. It would.

10 MS. MAYNARD: And one -- it would be a -- as
11 you said for this Court, in Muscarello, the rule of
12 lenity has never been a rule where the defendant always
13 prevails. And it would be an odd notion to have a more
14 muscular rule of lenity in the sentencing enhancement
15 context than you have with respect to the crime itself.

16 The whole point of having the mandatory
17 minimum is to take away discretion from judges. What --
18 and the language of the statute here in our view is
19 clear. It says "if the firearm is discharged," and I
20 think it's the present tense that gets you the -- the
21 temporal connection to the crime here. If it is
22 discharged while you are using or carrying it or
23 possessing it, in the offense in the principal
24 paragraph, Congress wanted you to have 10 years.

25 JUSTICE BREYER: No, I can't -- I can't --

1 the trouble is I can't find anything in the history of
2 this that really says why they use "is discharged" or
3 used -- as opposed to "discharges." And I find those
4 very metaphysical, those arguments, unless I -- I can
5 see either something in the history or some functional
6 consideration.

7 MS. MAYNARD: Well, in the blue brief, they
8 lay out the House's final version, and we have the
9 House's final version in one of our footnotes. And then
10 they lay out the Senate's final version.

11 And one important distinction, Justice
12 Breyer, between those two versions is that the House's
13 version would have made it active voice, but not only
14 active, but it would have been amenable to the argument
15 that "during and in relation to" modifies "discharges,"
16 because the structure was different.

17 But the House would have set the penalty for
18 a discharge at 20 years. Okay. That's -- you can infer
19 from that that the House thought an intentional
20 discharge should subject you to 20 years.

21 The Senate's version, which put it in the
22 passive voice, said "if the firearm is discharged" and
23 set a mandatory minimum of 10 years. And I think you
24 can infer from that, Justice Breyer, the -- the current
25 structure allows what you're positing, which is more

1 culpable defendants who intend to discharge the firearm
2 to receive a higher sentence. And one could infer, I
3 think, that the House thinks that should be 20 years.

4 So I think the -- the current structure does
5 allow judges to take into consideration. It just sets
6 the floor. And Congress is entitled to do that, and I
7 think they have clearly done that and then to take out
8 of the realm of debate whether or not the defendant
9 intended to discharge the firearm or didn't mean to
10 discharge the firearm.

11 I would like to -- to say one factual point,
12 which is in the -- in the indictment Petitioner actually
13 was charged with use or carrying. It just seems -- if I
14 could explain, the "use or carry during or in relation
15 to," is one prong, one way in which to commit the
16 principal offense.

17 "Possessing in furtherance" is another way
18 to commit the principal offense. The "use or carry" is
19 not modified by "possession in furtherance of," and
20 "possess" is not modified by -- by "during or in
21 relation to," which is another reason it makes no sense
22 to -- to trail the "during or in relation to" down to
23 the generally applicable sentencing factors.

24 JUSTICE GINSBURG: Is there a difference, a
25 practical difference, between the two formulations?

1 MS. MAYNARD: The legislative -- well, the
2 words are obviously different; the text is different;
3 and the legislative history suggests that Congress
4 wanted a beefed-up "in relation to" requirement for
5 possession in order to make sure that incidental
6 possession during -- you know, incidental possession
7 while one was also committing a crime wasn't captured.
8 So the "in furtherance of" --

9 JUSTICE STEVENS: What you're saying, to
10 make sure I understand, is that the "in relation to"
11 language modifies both "use" and "possession"?

12 MS. MAYNARD: No, sir. The "in relation to"
13 -- the "during or in relation to" modifier modifies only
14 "use or carry." And if one is charged with a "use or
15 carry" offense, then the government must show that you
16 "used or carried during or in relation to" in the way
17 those words have been given meaning by this Court.

18 If you're charged with possession, the
19 government must show that you possessed the firearm in
20 furtherance of. Now, the -- the "in furtherance of" and
21 the "in relation to" prong have been given similar
22 meanings by the courts, although generally it's thought
23 that the "in furtherance of," like I say, is a sort of
24 beefed-up "in relation to" requirement -- requires a --

25 JUSTICE BREYER: "Carries" -- what about

1 "carries"? Is the -- if a person is carrying a gun in
2 his pocket but he doesn't know it, which could happen,
3 does that fall within "carries" or not?

4 MS. MAYNARD: He would be carrying, Justice
5 Breyer.

6 JUSTICE BREYER: So is he guilty of the
7 first; do we know?

8 MS. MAYNARD: He would be carrying -- if I
9 understood you, he would be carrying. And if he was
10 also committing a crime, he would be carrying -- if he
11 was also committing a crime of violence, he would be
12 carrying it during the crime of violence.

13 JUSTICE BREYER: Yes.

14 MS. MAYNARD: But under this Court's
15 decision in Smith, if it were --

16 JUSTICE BREYER: The carrying has to be --
17 although the statute doesn't say it, Smith says the
18 carrying has to be in relation to the crime.

19 MS. MAYNARD: The statute does say carrying
20 has to be in relation to --

21 JUSTICE BREYER: It does?

22 MS. MAYNARD: Yes.

23 JUSTICE BREYER: I thought it just said "who
24 in furtherance of any such crime possesses a firearm."

25 MS. MAYNARD: I am sorry. I thought you

1 were asking me a "carry" hypothetical. If you are
2 asking me a "possession" hypothetical --

3 JUSTICE BREYER: No, it's a "carrying." My
4 -- my interest is the -- whoever, blah, blah, blah, for
5 which the person may be prosecuted uses or carries a
6 firearm, or who in furtherance of any such crime
7 possesses a firearm. So I thought that the "in
8 furtherance" does not modify "carry".

9 MS. MAYNARD: It doesn't.

10 JUSTICE BREYER: Okay.

11 MS. MAYNARD: You are right. Okay. I am
12 sorry. I answered --

13 JUSTICE BREYER: So, you know, what happens
14 if the person has the firearm -- he is carrying the
15 firearm in his pocket and doesn't know it? He picked it
16 up from the tailor, and now is -- is there an intent
17 requirement there? Do we know? Did Smith talk about
18 that? Do we know? I mean, is there, you know, a state
19 of mind requirement?

20 MS. MAYNARD: It's hard to see how one could
21 meet this Court's definition in Smith for --

22 JUSTICE BREYER: See, I look at Smith --

23 MS. MAYNARD: -- for "in relation to," which
24 was to have --

25 JUSTICE BREYER: Smith says "in relation to"

1 and so the carrying has to be in relation to. And since
2 the carrying has to be in relation to, that pretty much
3 --

4 MS. MAYNARD: The underlying --

5 JUSTICE BREYER: -- covers the state of
6 mind.

7 MS. MAYNARD: The carrying has to be in
8 relation to the underlying drug crime or crime of
9 violence. This Court gave content to "in relation to"
10 in Smith to mean have some purpose or effect, facilitate
11 or further the underlying crime, not be by accident or
12 coincidence.

13 The gist of Petitioner's argument here is
14 they want to read that "accident or coincidence"
15 language down to modify "discharge." And structurally
16 that -- that just doesn't work.

17 And if -- if I can make one more point about
18 why it's clear it isn't that, which is that the -- the
19 "in possession in furtherance of requirement" -- I mean
20 one of the things they say in response to our argument
21 is that we are willing to put a temporal limitation on
22 the sentencing factors, but not an "in relation to" --

23 JUSTICE STEVENS: May I just make sure I
24 understand your position? "During and in relation to"
25 modifies the first words that follow it. "In

1 furtherance to" modifies "possession." Now, do either
2 "in relation to" or "in furtherance" modify the three
3 subsequent subparagraphs?

4 MS. MAYNARD: Definitely not, no.

5 JUSTICE STEVENS: So neither of them
6 applies. So it doesn't have to be "in furtherance of"
7 or "in relation to"?

8 MS. MAYNARD: The -- the sentencing factors
9 are set out separately. And you don't get to them --

10 JUSTICE STEVENS: None of the sentencing
11 factors require that that factor be in -- either in
12 relation to the crime or in furtherance of the crime?
13 It could be just walking down the street, you happen to
14 have a gun?

15 MS. MAYNARD: Well, you have to be guilty of
16 the principal offense, Justice Stevens, before you get
17 to the sentencing factors. So you have to have either
18 --

19 JUSTICE STEVENS: But the sentencing factors
20 need not be in relation to the crime nor in furtherance
21 of the crime.

22 MS. MAYNARD: Right. The definitive --

23 JUSTICE SCALIA: It has to be during the
24 crime.

25 MS. MAYNARD: It has to be during and -- but

1 there -- but it's not because the word "during" appears
2 in the principal offense, which is how they would have
3 our argument be. The -- the -- it has to -- the
4 sentencing factor has to occur. First you have to
5 commit the principal -- let me just back up. You have
6 to commit the principal offense. So, you've used --

7 JUSTICE STEVENS: Why does it have to be
8 "during"? It -- it doesn't in the statute?

9 MS. MAYNARD: It has to be "during" for
10 three reasons: One, the -- the language of the
11 sentencing factor says "if the firearm is discharged."
12 It's in the present tense. So the present tense of the
13 "is discharged" language -- it has to be while you're
14 using, carrying -- "uses, carries, or possesses" is also
15 in the act.

16 The "is discharged" has to happen while
17 you're using, carrying, or possessing. That takes out
18 hypotheticals about, well, it was discharged at the
19 factory before I got it, and law enforcement discharged
20 it well after they took it from me to test the
21 ballistics on it. Those aren't covered because it's not
22 "is discharged" while you're using, carrying, or
23 possessing.

24 Secondly, this Court in Harris recognized
25 that these are the types of sentencing factors that one

1 considers when deciding whether a certain fact is
2 present in the manner in which an offense is committed.
3 So the fact has to be present in the commission of the
4 offense. That's just the way this type of sentencing
5 factor operates, and the Court so interpreted these
6 particular sentencing factors in Harris.

7 And we know that it's not because of the
8 "during" in the principal paragraph, Justice Stevens,
9 because there is no "during" element to the "possession"
10 prong. Nevertheless, the sentencing factors apply to
11 that prong, and we would apply temporal limitations to
12 them.

13 JUSTICE STEVENS: There is an "in
14 furtherance." There's an "in furtherance of the crime."

15 MS. MAYNARD: Yes, Your Honor, and if you
16 possess a firearm --

17 JUSTICE STEVENS: I want to make sure I
18 understand. You are saying it need not be "during" or
19 -- you said it has to be "during" but not because the
20 statute includes the word "during."

21 MS. MAYNARD: Yes.

22 JUSTICE STEVENS: Well, what does -- where
23 does the "during" come from then?

24 MS. MAYNARD: The "during" comes from the
25 fact that the sentencing factor is in the present tense,

1 and says "is discharged." That means that the "is
2 discharged" must occur while the offense is -- is
3 occurring. So the temporal limitation comes from -- and
4 is from the nature of these types of sentencing factors,
5 which ask: Is this fact present? That's what Congress
6 cared about.

7 JUSTICE SCALIA: And you say it can't come
8 from the prologue, because if it came from the prologue,
9 it wouldn't apply to the mere possession.

10 MS. MAYNARD: Exactly.

11 JUSTICE SCALIA: And the possession could be
12 at any time, before the crime, after the crime,
13 whatever.

14 MS. MAYNARD: Possession -- it would just
15 have to be possession that was in furtherance of an
16 underlying crime. Once you're guilty of that, if the
17 firearm was discharged while you were guilty of that --

18 JUSTICE SCALIA: So you have to import some
19 -- some contemporaneous -- contemporaneous requirement
20 into the (i), (ii), and (iii).

21 MS. MAYNARD: Some temporal limitation, and
22 the limitation is what -- is that it must be discharged
23 while you're committing the offense for which you're
24 being sentenced when we're looking at sentencing
25 factors, which is -- as set forth in 924(c).

1 JUSTICE STEVENS: Well, what if it's
2 committed when the guy is trying to escape, and the gun
3 goes off accidentally? Is that in -- I mean is that
4 during the crime?

5 MS. MAYNARD: Again, it would turn on -- on
6 -- it wouldn't turn on whether accidental or intentional
7 discharge, Justice Stevens. That would present a
8 difficult hypothetical about whether or not the 924(c)
9 --

10 JUSTICE STEVENS: No, but assume that two
11 hours later when he's -- when he got home, he carried
12 the gun in -- in furtherance of the crime. He still had
13 it with him all the way through, and the gun went off
14 after he left the bank.

15 MS. MAYNARD: If -- if it were determined
16 that the -- the 924(c) offense, which is the possession
17 in furtherance of a crime, were still going on at that
18 point -- in other words, he was still possessing it in
19 furtherance of the underlying crime of violence, and it
20 discharges -- then, yes, the sentencing factor, by its
21 plain terms, applies.

22 JUSTICE STEVENS: But then you're telling me
23 that it need not be during as long as it's in
24 furtherance of. So the "in furtherance of" is also
25 incorporated implicitly in the sentencing factors.

1 MS. MAYNARD: Well, the -- no, the "in
2 furtherance of," it -- the inquiry we would be making at
3 sentencing, Justice Stevens, is not was the discharge in
4 furtherance of. You would -- you would -- all you would
5 be asking is, were you still possessing a firearm in
6 furtherance --

7 JUSTICE STEVENS: The discharge must be
8 during?

9 MS. MAYNARD: The discharge must be
10 temporally related to the principal offense, yes,
11 because the discharge is -- is discharged while you're
12 in the course of the principal offense. That's the way
13 these types of sentencing factors --

14 JUSTICE BREYER: I think I got everybody
15 mixed up, because the first sentence of the statute is
16 on the preceding page. And if I start at the beginning,
17 I would discover -- of my memo -- if -- it says, if --
18 in -- who -- any person who during and in relation --
19 during and in relation to any crime of violence or drug
20 trafficking crime, blah, blah, blah, of a certain kind
21 uses or carries a firearm.

22 MS. MAYNARD: Right.

23 JUSTICE BREYER: So there it is right there.

24 MS. MAYNARD: The "during and" --

25 JUSTICE BREYER: "Or who in furtherance of

1 such a crime possesses shall be sentenced." Okay. So
2 we've got the during and in relation to covering the
3 whole bunch. Then we have to read that into (ii) and
4 (iii).

5 MS. MAYNARD: No, Your Honor. I mean, just
6 to make sure I understand what you're saying. The
7 "during and in relation to" only modifies the verbs
8 "uses or carries"?

9 JUSTICE BREYER: Yes, exactly.

10 MS. MAYNARD: Okay. The two --

11 JUSTICE BREYER: Then we have to read that
12 by implication where it says "if the firearm is
13 brandished during or" -- you have to imply that.

14 MS. MAYNARD: That's their argument.

15 JUSTICE BREYER: Yes. That's not your
16 argument?

17 MS. MAYNARD: No, Your Honor.

18 (Laughter.)

19 JUSTICE BREYER: Forget it.

20 (Laughter.)

21 JUSTICE SCALIA: It's not your argument
22 because if that was the only -- if that was the source
23 of the contemporaneous requirement, there would be no
24 contemporaneous requirement for the "in furtherance"?

25 MS. MAYNARD: That's right. And also --

1 JUSTICE SCALIA: The provision -- "in
2 furtherance" provision --

3 MS. MAYNARD: The reason we don't believe
4 that's the correct reading is because, as this Court
5 indicated in Harris, the principal offense -- the
6 principal paragraph sets forth the complete crime, and
7 it ends with "shall." So once you do the things in the
8 principal for crime, you're guilty. And then the only
9 question is, what shall your sentence be?

10 JUSTICE SCALIA: And, of course, some of
11 these difficult hypotheticals such as the one that
12 Justice Stevens put about the gun going off while the --
13 while the individual is escaping, that's going to be a
14 problem whether you adopt your interpretation or the --
15 or the Petitioner's interpretation. Even if you assume
16 that it has to be during and in relation to, it's still
17 going to be a problem. Is this -- is this during and in
18 relation to the crime --

19 MS. MAYNARD: Well, just to be --

20 JUSTICE SCALIA: -- if it occurs, you know,
21 five hours later while he's escaping? I don't know.

22 MS. MAYNARD: Just to be clear about --

23 JUSTICE SCALIA: We don't have to decide
24 that, do we?

25 MS. MAYNARD: It wouldn't have anything to

1 do with whether or not it intentionally went off,
2 Justice Stevens. Your hypothetical could still raise a
3 question --

4 JUSTICE STEVENS: The strange thing about
5 this case is we're talking about a category of crimes in
6 which somebody mistakenly fires the gun. That doesn't
7 happen very often. The whole -- the whole dispute is
8 about really a trivial set of crimes.

9 MS. MAYNARD: Well, I think it's important
10 to recognize, though, that Congress didn't want to open
11 the door to claims that -- that the firearm was
12 discharged accidentally.

13 JUSTICE STEVENS: Sure. The defendant gets
14 up and says, I didn't really mean to shoot the guy.

15 MS. MAYNARD: Right. I mean, the -- the
16 fact of a discharge is what Congress was clearly
17 concerned about, and you can tell that from the text.
18 What I did want to say is that in the indictment here he
19 was actually charged with uses, carries, and possesses.
20 The indictment is not perfectly worded. It only has the
21 "during and in relation to" in it, but the -- the
22 instructions were proper and there were no -- the jury
23 instructions at trial were proper and there were no --
24 no objection to the instructions, but I did want to
25 correct one point about that.

1 And if there are no further questions --

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Four minutes, Mr. Forster.

4 REBUTTAL ARGUMENT OF SCOTT J. FORSTER

5 ON BEHALF OF THE PETITIONER

6 MR. FORSTER: This Court in U.S. Gypsum was
7 very clear when it said that far more than the simple
8 omission of the appropriate phrase of a statutory
9 definition is necessary to justify dispensing with the
10 intent requirement.

11 And our argument is simply this: Merely
12 because this might be a sentencing enhancement, rather
13 than an element of the offense, this Court never said
14 that the normal rules of statutory construction cease to
15 apply under those circumstances, which means that the
16 mens rea presumption is appropriate in this case. And
17 just like this Court said in the passage I just cited,
18 if Congress wants to dispense with that requirement,
19 they must do so clearly, and they simply did not do that
20 in this case. If they wanted to do that, they could
21 insert the words "intentionally" or "unintentionally
22 discharge," in which case that would be clear. And that
23 simply is not the way this statute reads.

24 The best reading of the statute, I believe,
25 and this is what Your Honor was headed toward, is to

1 read the discharge to require during and in relation to.
2 I just think that's the best --

3 JUSTICE BREYER: Is that helping? I mean,
4 this did take place during, and you would have thought
5 when something goes off accidentally, it's in relation
6 to. I mean, you know, I can imagine an argument to the
7 contrary, but it isn't obvious. It just is --

8 MR. FORSTER: But, Your Honor --

9 JUSTICE BREYER: It just is -- they have
10 "during," "in relation to," and "in furtherance of." So
11 their -- in furtherance of doesn't carry over. The
12 first two do. An accidental discharge -- is it not in
13 relation to the crime?

14 MR. FORSTER: Not under this Court's
15 authority in Smith. I think Smith is clear. It must
16 have purpose and effect and not be used by accident.

17 JUSTICE STEVENS: What was the case you
18 cited when you started your rebuttal?

19 MR. FORSTER: U.S. Gypsum.

20 JUSTICE STEVENS: Is that the antitrust
21 case? You caught me by surprise.

22 MR. FORSTER: I believe it is. I believe it
23 is, Your Honor.

24 Mr. Chief Justice, if there are no other
25 questions, I thank the Court.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel,
2 the case is submitted.

3 (Whereupon, at 12:06 p.m., the case in the
4 above-entitled matter was submitted.)

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