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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 leg -- 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 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 it's phrased in the statute. I
3 don't think --

4 CHIEF JUSTICE ROBERTS: So you think it's
5 different -- I don't remember the grammar too well. You
6 think "if 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 --

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

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

24 JUSTICE GINSBURG: But it doesn't say -- it
25 says, "if the gun is discharged." And I think on the

1 government's reading it would cover the police officer
2 who is trying to apprehend a robber and fires a gun.

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

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

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

13 JUSTICE SCALIA: You say under the
14 government's it would? I don't think it would under the
15 government's either. Do you?

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

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

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

21 JUSTICE KENNEDY: That's different.

22 JUSTICE GINSBURG: So it's using the
23 robber's gun, but by the police officer who is
24 apprehending him. In other words, as I understand the
25 government's view, it doesn't matter whether it's the

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

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

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

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

15 JUSTICE GINSBURG: It has very specific --
16 what are the words that define what is brandishing?

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

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

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

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

7 JUSTICE SOUTER: Well, it runs into the
8 problem, which is also a different problem for you, and
9 that is the brandishing must be for the purposes -- for
10 the purpose of intimidating.

11 JUSTICE GINSBURG: Right.

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

23 MR. FORSTER: Your Honor, I would disagree
24 with that simply for this reason. This Court's case law
25 is clear that if Congress wants to do away with the mens

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

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

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

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

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

1 the discharge.

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

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

8 JUSTICE SOUTER: Why? Why?

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

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

19 (Laughter.)

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

22 MR. FORSTER: Your Honor, certainly under
23 the statute the Court has far more authority than the
24 ten years it imposed, and I think Congress is clear that
25 they -- they allowed for substantially larger sentences

1 in such a case. This case obviously just discusses the
2 application of the mandatory minimum.

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

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

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

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

23 CHIEF JUSTICE ROBERTS: That's not my
24 question, really. The question is the problem of proof.
25 Yours is an easy case. Most cases it's not going to be.

1 Most cases when the gun goes off, the robber will be
2 able to say, I didn't intend that it discharged. It
3 was -- it was an accident.

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

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

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

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

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

25 JUSTICE GINSBURG: Isn't it part of the

1 background here that it was proposed at the time these
2 enhancements came into the law, it was proposed that
3 there be a specific state of mind requirement for the
4 discharge of the gun, and that was not enacted?

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

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

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

17 MR. FORSTER: Your Honor, there were various
18 drafts in the House and the Senate that -- that
19 specifically provided the intent requirement. The
20 compromise that came out was basically a disagreement
21 over the penalty, and the language that the Congress
22 used, "during and in relation to," necessarily implies
23 some type of an intent element. I think the circuits
24 are clear on that; it has to be knowing, otherwise it's
25 not during and in relation to.

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

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

12 MR. FORSTER: We don't --

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

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

24 So where -- so there we are. Is there
25 anything else -- there is the post problem that the

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

4 MR. FORSTER: Your Honor --

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

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

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

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

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

24 JUSTICE SCALIA: Which -- it's during the
25 bank robbery.

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

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

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

15 MR. FORSTER: I think that the evidence
16 would suggest that he was reckless --

17 JUSTICE GINSBURG: You accept that --

18 MR. FORSTER: -- but I don't believe that it
19 was knowing. And then I think that --

20 JUSTICE GINSBURG: You say reckless is not
21 enough, it has to be knowing. This is not a mere
22 accident. It's -- this -- the gun was loaded, it wasn't
23 locked, and he's raking in money with one hand, holding
24 the gun with the other. The teller is crouching down.
25 I mean, there was -- there was a pretty substantial risk

1 of something going wrong, right?

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

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

16 That -- that's what all that language
17 "during and relation to" applies to. And then it
18 continues: "Shall," if that "in relation to" exists,
19 "in addition to the punishment provided for such crime:"
20 One, be sentenced to a term of imprisonment of not less
21 than five"; two; and number three, what we're dealing
22 with here, "if the firearm is discharged, be sentenced
23 to a term of imprisonment of not less than ten years."

24 I don't see how that language during and in
25 relation to any crime of violence applies to anything,

1 except the use or carrying of a firearm.

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

7 JUSTICE SCALIA: Why is that? How could you
8 -- how could you make the lack of connection any clearer
9 than by ending the first, the introduction with a dash,
10 and then putting 1, 2, and 3? I mean, it seems to me
11 that it applies to the portion before the dash.

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

20 And I believe that the government basically
21 acknowledges that in their brief, that there has to be
22 -- if there's not some connection -- I think it's page
23 29 of the government's brief. When we discussed the
24 absurd results that might flow from a statute where
25 there is no such connection, what the government says --

1 I believe it's on page 29 -- is that to avoid these
2 absurd results, this connection does exist. But then
3 the next sentence they say: But it doesn't mean there
4 is a mens rea.

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

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

14 MR. FORSTER: Any discharge any other time.

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

17 JUSTICE SCALIA: But that -- excuse me.
18 That's not -- that's not covered. Number 3 only applies
19 to someone who has already been guilty of what's set
20 forth in the prologue.

21 MR. FORSTER: That's the connection that we
22 believe is --

23 JUSTICE SCALIA: And that's the only
24 connection that's necessary. You have to have done what
25 was set forth in the prologue, and it has -- has to be

1 in the course of doing that. But "the course of doing
2 that" means just in the course of using a firearm in
3 connection with the bank robbery.

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

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

16 MR. FORSTER: And -- and I would agree with
17 that, and then when you take this Court's authority in
18 Smith to say that that type use during and in relation
19 to cannot be accidental. And so I go back to the
20 original question Your Honor asked me, did he
21 intentionally brandish it? Clearly. And so we believe
22 that if -- if this case we are here about is fit into
23 Smith, he's on the hook for the seven years under
24 brandish, but because the discharge was accidental, it
25 cannot constitute use under this Court's authority in

1 Smith.

2 JUSTICE STEVENS: Let me ask you a question
3 about that. I thought that "or possesses" was separate
4 from the "uses or carries." Is possession an example of
5 using or carrying or is it as it says -- "or who in
6 furtherance of such crime possesses"? Is that a
7 separate -- separate enhancement?

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

11 JUSTICE STEVENS: Right.

12 MR. FORSTER: -- "carries" with "uses" as in
13 this case as well as later on in the statute
14 "possesses." So it says both.

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

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

18 JUSTICE STEVENS: Or relation to.

19 MR. FORSTER: If it --

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

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

25 JUSTICE STEVENS: Right.

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

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

14 MR. FORSTER: Well --

15 JUSTICE SCALIA: The definition of
16 brandishing, I guess, requires some intent to put
17 another person in fear.

18 MR. FORSTER: Your Honor, I think that you
19 would then have to turn to this Court's -- well, first
20 of all, I think it's the best reading of the statute.
21 It doesn't make sense any other way to say that you can
22 have the gun discharged but not be during and in
23 relation to the underlying crime of violence. It
24 doesn't make sense.

25 Second, I believe that this Court's

1 statutory rules of construction would say that if
2 Congress wanted to do away with the mens rea element in
3 this case, they would have had to have done so
4 expressly. And we don't believe that they did.

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

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

22 JUSTICE GINSBURG: Why -- you say that this
23 background -- that there has to be a state of mind
24 element. And we can accept that that's a general
25 principle, but here we have a provision that does

1 require a state of mind -- specifically requires a state
2 of mind for the possession, for the brandishing, intent
3 to intimidate, but here is this other one that suddenly
4 doesn't. So wouldn't the text of this statute say --
5 the third one, discharging a gun, they didn't mean to
6 have any element because -- any element of mens rea --
7 because they had it in number 1 and 2, and 3 leaves it
8 out.

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

20 One last point is, we believe there's
21 nothing else that Congress would have had to have done
22 to establish a general intent, and if that's true, then
23 I think the very least that could be said about our
24 interpretation is that it would be a reasonable one, in
25 which case lenity principles would then come into play.

1 Mr. Chief Justice, if there's no other
2 questions I would like to reserve the remainder of my
3 time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. FORSTER: Thank you.

6 CHIEF JUSTICE ROBERTS: Ms. Maynard.

7 ORAL ARGUMENT OF DEANNE E. MAYNARD

8 ON BEHALF OF THE RESPONDENT

9 MS. MAYNARD: Mr. Chief Justice, and may it
10 please the Court:

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

16 JUSTICE SCALIA: Does it require that the
17 discharge be during and in relation to the crime? I
18 mean, suppose the bank robber, you know, he sees -- son
19 of a gun, he sees among the customers a man that ran off
20 with his wife a year ago, and he is just overcome with
21 anger, and he -- you know, he takes a shot at this guy.
22 It's not in relation to the bank robbery. Would --
23 would that discharge be covered?

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

1 JUSTICE SCALIA: Yes.

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

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

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

17 CHIEF JUSTICE ROBERTS: So that's the line
18 between is it going on. But assuming the offense is --
19 the bank robbery is still going on, like he's got
20 confederates gathering up the money or something, does
21 that fall under your theory that the gun is discharged?

22 MS. MAYNARD: In our -- under our theory,
23 the -- there must be a temporal connection between the
24 offense for which the defendant is being sentenced,
25 which is a section 924(c) offense, the using or carrying

1 the firearm during and in relation to the bank robbery
2 in your hypothetical or possessing it in furtherance of
3 the bank robbery in your hypothetical.

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

11 But -- but that hypothetical presents
12 questions about the beginning and end of the section
13 924(c) itself, not questions about whether or not the
14 discharge was intentional or accidental.

15 JUSTICE SCALIA: Do you think that --
16 regardless of whether it's intentional or accidental, do
17 you think he has to discharge it or that he has to
18 brandish it? It is the passive voice. Does it mean if
19 anybody discharges it or brandishes it?

20 MS. MAYNARD: Two -- at least two points
21 about that, Your Honor. The passive voice makes clear
22 that Congress cared about the fact of the discharge,
23 that Congress was indifferent as to who discharged the
24 weapon. Because the "is brandished" is also stated in
25 the passive voice, we think Congress was also

1 indifferent as to who brandished the firearm, although
2 there is a separate provision giving content to what it
3 means to brandish, and brandish must be done in order to
4 intimidate. So -- but if a confederate, for example --

5 JUSTICE SCALIA: Grabs it out of his hand
6 and brandishes it.

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

18 CHIEF JUSTICE ROBERTS: So even if the
19 police officer -- the police officer disarms the robber
20 and ten minutes later mishandles the gun and it goes
21 off.

22 MS. MAYNARD: Again, I think that would
23 present questions about whether or not the section
24 924(c) offense was still continuing, if the law
25 enforcement officer has the weapon.

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

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

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

18 MS. MAYNARD: That's true, there may not be
19 very many accidental discharges. But there's no reason
20 to believe Congress wanted courts to engage in the
21 inquiry about whether or not the defendant accidentally
22 discharged the weapon. If this Court were to her -- to
23 hold that accident -- accidental discharges are not
24 covered by the sentencing factor, I think that we would
25 see more claims of accidental discharge.

1 CHIEF JUSTICE ROBERTS: I interrupted your
2 answer.

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

17 And so one might conclude that if the law
18 enforcement officer disarms the robber and then later
19 discharges the weapon, that that fact of a discharge is
20 not part of the manner in which the defendant committed
21 the offense. We don't think that's compelled, by the
22 way.

23 JUSTICE GINSBURG: It would be the same --
24 you would give the same answer if the teller grabbed the
25 gun from the robber and it went off?

1 MS. MAYNARD: If the teller grabs the gun
2 from the robber and it discharges, as long as the
3 section 924(c) offense is continuing, then the firearm
4 is discharged.

5 JUSTICE GINSBURG: But your alternate
6 position would apply to the teller as well as the police
7 officer?

8 MS. MAYNARD: One could reasonably conclude
9 that if the teller discharges it, it is in fact the
10 manner in which the defendant committed the offense.
11 But I do think there's reason to believe Congress may
12 have been concerned about the fact of the discharge by
13 anyone. I mean, what you're talking about is someone
14 who's engaging in inherently dangerous activity. They
15 brought an armed weapon to commit a crime of violence or
16 a drug trafficking crime, and they've handled it in such
17 a way that either it is discharged --

18 JUSTICE BREYER: There is another --

19 JUSTICE SCALIA: We don't really have to
20 decide all this stuff, do we? We just have to decide
21 whether if he discharges it the discharge has to be
22 intentional.

23 MS. MAYNARD: There is no question here,
24 Your Honor, but that it was the robber that discharged
25 the weapon. And in fact the Petitioner testified that:

1 "I pulled the trigger when I was switching the gun from
2 one hand to the other."

3 JUSTICE STEVENS: But it's also uncontested
4 it was accidental, I think.

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

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

13 Is that a correct -- is his background
14 principle correct?

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

19 JUSTICE STEVENS: What's the difference
20 between a sentencing factor that adds five years to a
21 sentence and an element of the crime? There are a lot
22 of us that think that -- you've read Harris and
23 Apprendi. You know there is some debate about whether
24 that really makes all that much difference.

25 MS. MAYNARD: Well, in Harris, which was --

1 in which this Court was interpreting these very
2 sentencing factors here, the Court note -- noted that --

3 JUSTICE STEVENS: Let me -- let me rephrase
4 the question.

5 MS. MAYNARD: Yes.

6 JUSTICE STEVENS: If it were an element of
7 the crime, would you then agree with his background
8 rule?

9 MS. MAYNARD: No, Your Honor, because if it
10 were an element --

11 JUSTICE STEVENS: Then the fact that the
12 sentencing factor is an element really isn't
13 significant.

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

17 JUSTICE STEVENS: But why would it be a
18 harder case for you?

19 MS. MAYNARD: Why would it be a harder case
20 for us? Because if it were a harbor -- hard -- if it
21 were an element of the crime, then it would be an
22 aggravated offense, and then one could debate whether or
23 not the --

24 JUSTICE STEVENS: But in that situation
25 would there be a background rule that we normally think

1 Congress intends to punish intentional conduct?

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

5 JUSTICE STEVENS: So you really then are
6 relying on the difference between an element of the
7 crime and a sentencing factor?

8 MS. MAYNARD: Not -- no, Your Honor, not in
9 this way, because it -- it would -- it would be a more
10 difficult caper -- case for us, I can see, but that you
11 would still be talking about somebody who was engaged in
12 wrongful conduct. There would be no danger.

13 I mean, one of the reasons the Court assumes
14 a mens rea requirement or reads in a mens rea
15 requirement when one's not there, is because of the fear
16 of capturing innocent conduct; but what you would be
17 talking about is someone who has taken a loaded weapon
18 to commit a crime of violence or a drug trafficking
19 crime and used it during in relation to that crime or to
20 possess it in furtherance of that crime, and is already
21 guilty. They are engaged in --

22 CHIEF JUSTICE ROBERTS: It's entirely
23 fortuitous; you have two bank robbers, they both do
24 exactly the same thing, in one case the gun goes off and
25 the other it doesn't. Does that -- does it seem -- does

1 it seem fair to add three years onto the sentence of the
2 one whose gun happens to go off but not on the sentence
3 of the one whose doesn't?

4 MS. MAYNARD: They both engaged in
5 inherently dangerous activity.

6 CHIEF JUSTICE ROBERTS: Yes, they both did.
7 That's my point, they both did exactly the same thing.

8 MS. MAYNARD: And it's common in criminal
9 law to hold criminals responsible for their unintended
10 consequences of their criminal acts, and that's -- in
11 your hypothetical it wouldn't be unusual at all to hold
12 someone liable for the accidental discharge when they've
13 taken a loaded weapon to commit a violent crime, here a
14 bank robbery, and handled it in such a way that it goes
15 off. It's completely reasonable for Congress to
16 conclude --

17 CHIEF JUSTICE ROBERTS: You get three extra
18 years for having bad luck?

19 MS. MAYNARD: Well, no, well they're -- just
20 to be clear, they're both subject to life imprisonment
21 for taking the gun and committing -- and using it to
22 commit the bank robbery. So it's not tacking on three
23 years; it's increasing the minimum; and that is a
24 significant difference, Justice Stevens that this Court
25 has recognized with respect to these various factors in

1 Harris itself, that the -- whether or not there was a
2 discharge.

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

7 MS. MAYNARD: As a practical matter, no,
8 Your Honor. However, had the accidental discharge
9 caused a death, then he would have committed a more
10 serious offense, and that may have been the penalty.
11 But the point is that one is often subject to higher
12 penalties than one might have expected by the unintended
13 consequences of one's criminal act.

14 JUSTICE BREYER: What would you think -- to
15 go back to Justice Stevens' question, I would start with
16 the assumption that, normally, not always, where you
17 have a criminal statute and the crime has elements, that
18 Congress intends that the elements be carried out with a
19 guilty state of mind; I would start with that
20 assumption.

21 Now I would agree with you that sentencing
22 is different, and the reason that it's different is
23 because sentencing often goes up or down depending upon
24 whether the harm that is foreseen does or does not
25 occur, irrespective of the state of mind. So we

1 couldn't apply that normal background rule, in my view.

2 MS. MAYNARD: I think that's correct, Your
3 Honor, and that's our view.

4 JUSTICE BREYER: Now -- now, having done
5 that I wonder if the background rule should come into
6 play once again where a mandatory minimum sentence is at
7 stake, for the reason that if the harm eventuates, there
8 are many ways in which the sentence will go up. If this
9 person had been killed, for example, it becomes a murder
10 in the course of a felony. There are all kinds of other
11 statutes that can aggravate the felony; and if you don't
12 apply the mandatory minimum, the judge still can give
13 him the higher sentence, if he warrants it.

14 But if you apply the mandatory minimum where
15 the judge wouldn't go up, the only impact that has is to
16 take people who the judge and others think fall into the
17 minimal category of bad behavior plus consequences, and
18 force them to have a higher sentence. Now, that would
19 be a rationale for a rule of lenity in mandatory minimum
20 sentencing matters.

21 MS. MAYNARD: But that would be a
22 reconceptualization of the rule of lenity, Justice
23 Breyer.

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

25 MS. MAYNARD: And what, it would be a -- as

1 you said for this Court, in Muscarello, the rule of
2 lenity has never been a rule where the defendant always
3 prevails; and it would be an odd notion to have a more
4 muscular rule of the rule of lenity in the sentencing
5 enhancement context than you have with respect to the
6 crime itself.

7 The whole point of having the mandatory
8 minimum is to take away discretion from judges. What --
9 and the language of the statute here in our view is
10 clear. It says "if the firearm is discharged," and I
11 think it's the present tense that gets you the -- the
12 temporal connection to the crime here. If it is
13 discharged while you are using or carrying it or
14 possessing it, in the offense in the principal
15 paragraph, Congress wanted you to have ten years.

16 JUSTICE BREYER: No, I can't -- I can't --
17 the trouble is I can't find anything in the history of
18 this that really says why they use "is discharged" or
19 used "as opposed to discharges." And I find those very
20 metaphysical, those arguments, unless I -- I can see
21 either something in the history or some functional
22 consideration.

23 MS. MAYNARD: Well, in the blue brief they
24 lay out the House's final version, and we have the
25 House's final version in one of our footnotes. And then

1 they lay out the Senate's final version.

2 And one important distinction, Justice
3 Breyer, between those two versions is that the House's
4 version would have made it active voice, but not only
5 active. But it would have been amenable to the argument
6 that during and in relation to -- discharges, because
7 it's structured different.

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

12 The Senate's version, which put it in the
13 passive voice, said if the firearm is discharged and set
14 a mandatory minimum of 10 years. And I think you can
15 infer from that, Justice Breyer, the -- the current
16 structure allows what you're positing, which is more
17 culpable defendants who intend to discharge the firearm
18 to receive a higher sentence. And one could infer, I
19 think, that the House thinks that should be 20 years.

20 So I think the -- the current structure does
21 allow judges to take into consideration. It just sets
22 the floor. And Congress is entitled to do that, and I
23 think they have clearly done that and then to take out
24 of the realm of debate whether or not the defendant
25 intended to discharge the firearm or didn't mean to

1 discharge the firearm.

2 I would like to -- to say one factual point,
3 which is in the -- in the indictment Petitioner actually
4 was charged with use or carrying. It just seems -- if I
5 could explain, the "use or carry during or in relation
6 to," is one prong, one way in which to commit the
7 principal offense.

8 "Possessing in furtherance" is another way
9 to commit the principal offense. The "use or carry" is
10 not modified by "possession in furtherance of," and
11 "possess" is not modified by -- by "during or in
12 relation to," which is another reason it makes no sense
13 to -- to trail the "during or in relation to" down to
14 the generally applicable sentencing factors.

15 JUSTICE GINSBURG: Is there a difference, a
16 practical difference, between the two formulations?

17 MS. MAYNARD: The legislative -- well, the
18 words are actually different; the text is different; and
19 the legislative history suggests that Congress wanted a
20 beefed-up "in relation to" requirement for possession in
21 order to make sure that incidental possession during --
22 you know, incidental possession while one is also
23 committing a crime wasn't captured. So the "in
24 furtherance of" --

25 JUSTICE STEVENS: What you're saying, to

1 make sure I understand, is that the "in relation to"
2 language modifies both "use" and "possession"?

3 MS. MAYNARD: No, sir. The "in relation to"
4 -- the "during or in relation to" modifier modifies only
5 "use or carry." And if one is charged with a "use or
6 carry" offense, then the government must show that you
7 "used or carried during or in relation to" in the way
8 those words have been given meaning by this Court.

9 If you're charged with possession, the
10 government must show that you possessed the firearm in
11 furtherance of. Now, the -- the "in furtherance of" and
12 the "in relation to" prong have been given similar
13 meanings by the courts, although generally it's thought
14 that the "in furtherance of," like I say, is a sort of
15 beefed up "in relation to" requirement because --

16 JUSTICE BREYER: "Carries," what about
17 "carries"? If a person is carrying the gun in his
18 pocket but he doesn't know it, which could happen, does
19 that fall within "carries" or not?

20 MS. MAYNARD: He would be carrying, Justice
21 Breyer.

22 JUSTICE BREYER: So is he guilty of the
23 first; do we know?

24 MS. MAYNARD: He would be carrying -- if I
25 understood you, he would be carrying. And if he was

1 also committing a crime, he would be carrying -- if he
2 was also committing a crime of violence, he would be
3 carrying it during the crime of violence. But under
4 this Court's decision in Smith, if it were --

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

8 MS. MAYNARD: The statute does say that
9 carrying has to be in relation to --

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

12 MS. MAYNARD: I am sorry. I thought you
13 were asking me a "carry" hypothetical. If you are
14 asking me a "possession" hypothetical --

15 JUSTICE BREYER: No, it's a "carrying." My
16 -- my interest is the -- whoever, blah, blah, blah, for
17 which the person may be prosecuted uses or carries a
18 firearm, or who in furtherance of any such crime
19 possesses a firearm. So I thought that the "in
20 furtherance" does not modify "carry".

21 MS. MAYNARD: It doesn't.

22 JUSTICE BREYER: Okay.

23 MS. MAYNARD: You are right. Okay. I am
24 sorry. I answered --

25 JUSTICE BREYER: So, you know, what happens

1 if the person has the firearm -- he is carrying the
2 firearm in his pocket and doesn't know it? He picked it
3 up from the tailor, and now is -- is there an intent
4 requirement there? Do we know? Did Smith talk about
5 that? Do we know? I mean is there, you know, a state
6 of mind requirement?

7 MS. MAYNARD: It's hard to see how one could
8 meet this Court's definition in Smith for -- for "in
9 relation to," which was to have --

10 JUSTICE BREYER: Smith says "in relation to"
11 and so the carrying has to be in relation to. And since
12 the carrying has to be in relation to, that pretty much
13 --

14 MS. MAYNARD: The underlying --

15 JUSTICE BREYER: -- covers the state of
16 mind.

17 MS. MAYNARD: The carrying had to be in
18 relation to the underlying drug crime or crime of
19 violence. This Court gave content to "in relation to"
20 in Smith to mean have some purpose or effect, facilitate
21 or further the underlying crime, not be by accident or
22 coincidence.

23 The gist of Petitioner's argument here is
24 they want to read that "accident or coincidence"
25 language down to modify "discharge." And structurally

1 that -- that just doesn't work. And if -- if I can make
2 one more point about why it's clear it isn't that, which
3 is that the -- the "in possession in furtherance of
4 requirement" -- I mean one of the things they say in
5 response to our argument is that we are willing to put a
6 temporal limitation on the sentencing factors, but not
7 an "in relation to" --

8 JUSTICE STEVENS: May I just make sure I
9 understand your position? "During and in relation to"
10 modifies the first words it follows. "In furtherance
11 to" modifies "possession." Now, do either "in relation
12 to" or "in furtherance" to it modify the three
13 subsequent subparagraphs?

14 MS. MAYNARD: Definitely not, no.

15 JUSTICE STEVENS: So neither of them
16 applies. So it doesn't have to be "in furtherance of"
17 or "in relation to"?

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

20 JUSTICE STEVENS: None of the sentencing
21 factors require that that factor be in -- either in
22 relation to the crime or in furtherance of the crime?
23 It could be just walking down the street, you happen to
24 have a gun?

25 MS. MAYNARD: Well, you have to be guilty of

1 the principal offense, Justice Stevens, before you get
2 to sentencing factors. So you have to have either --

3 JUSTICE STEVENS: Sentencing factors need
4 not be in relation to the crime nor in furtherance of
5 the crime.

6 MS. MAYNARD: Right. The definitive --

7 JUSTICE SCALIA: It has to be during the
8 crime.

9 MS. MAYNARD: It has to be during and -- but
10 there -- but it's not because the word "during" appears
11 in the principal offense, which is how they would have
12 our argument be. The -- the -- it has to -- the
13 sentencing factor has to occur. First you have to
14 commit the principal -- let me just back up. You have
15 to commit the principal offense.

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

18 MS. MAYNARD: It has to be "during" for
19 three reasons. One, the -- the language of the
20 sentencing factor says if the firearm is discharged.
21 It's in the present tense. So the present tense of the
22 "is discharged" language -- it has to be while you're
23 using, carrying -- "uses, carries, or possesses" is also
24 in the act.

25 The "is discharged" has to happen while

1 you're using, carrying, or possessing. That takes out
2 hypotheticals about, well, it was discharged at the
3 factory before I got it, and law enforcement discharged
4 it well after they took it from me to test the
5 ballistics on it. Those aren't covered because it's not
6 "is discharged" while you're using, carrying or
7 possessing.

8 Secondly, this Court in Harris recognized
9 that these are the types of sentencing factors that one
10 considers when deciding whether a certain fact is
11 present in the manner in which an offense is committed.
12 So the fact has to be present in the commission of the
13 offense. That's just the way this type of sentencing
14 factor operates, and the courts so interpreted these
15 particular sentencing factors in Harris.

16 And we know that it's not because of the
17 "during" in the principal paragraph, Justice Stevens,
18 because there is no "during" element to the "possession"
19 prong. Nevertheless, the sentencing factors apply to
20 that prong, and we would apply temporal in cases that --

21 JUSTICE STEVENS: There is an "in
22 furtherance." There is an "in furtherance of the
23 crime."

24 MS. MAYNARD: Yes, Your Honor, and if you
25 possess a firearm --

1 JUSTICE STEVENS: I want to make sure I
2 understand. You are saying it need not be "during" or
3 -- you said it has to be "during" but not because the
4 statute includes the word "during."

5 MS. MAYNARD: Yes.

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

8 MS. MAYNARD: The "during" comes from the
9 fact that the sentencing factor is in the present tense,
10 and says "is discharged." That means that the "is
11 discharged" must occur while the offense is -- is
12 occurring. So the temporal limitation comes from, and
13 is from, the nature of these types of sentencing
14 factors, which ask: Is this factor present? That's
15 what Congress cared about.

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

19 MS. MAYNARD: Exactly.

20 JUSTICE SCALIA: And the possession could be
21 at any time, before the crime, after the crime,
22 whatever.

23 MS. MAYNARD: Possession -- it would just
24 have to be possession that was in furtherance of an
25 underlying crime. Once you're guilty of that, if the

1 firearm was discharged while you were guilty of that --
2 JUSTICE SCALIA: So you have to import some
3 -- some contemporaneous -- contemporaneous requirement
4 into the 1, 2, and 3.

5 MS. MAYNARD: Some temporal limitation, and
6 the limitation is what -- is that it must be discharged
7 while you're committing the offense for which you're
8 being sentenced when we're looking at sentencing
9 factors, which is set forth in 924(c).

10 JUSTICE SCALIA: What if it's committed when
11 the guy is trying to escape, and the gun goes off
12 accidentally? Is that in -- I mean is that during the
13 crime?

14 MS. MAYNARD: Again, it would turn on -- on
15 -- it wouldn't turn on whether accidental or intentional
16 discharge, Justice Stevens. That would present a
17 difficult hypothetical about whether or not the 924(c)
18 --

19 JUSTICE SCALIA: Two hours later when he got
20 home -- he carried the gun in -- IN furtherance of the
21 crime. He still had it with him all the way through,
22 and the gun went off after he left the bank.

23 MS. MAYNARD: If -- if it were determined
24 that the -- the 924(c) offense, which is the possession
25 in furtherance of crime, were still going on at that

1 point -- in other words he was still possessing it in
2 furtherance of the underlying crime of violence, and it
3 discharges -- then, yes, the sentencing factor, by its
4 plain terms, applies.

5 JUSTICE STEVENS: Then you're telling me
6 that it need not be during as long as it's in
7 furtherance of. So the "in furtherance of" is also
8 incorporated implicitly in the sentencing factors.

9 MS. MAYNARD: Well, the -- no, the "in
10 furtherance of," it -- the inquiry we would be making at
11 sentencing, Justice Stevens, is not was the discharge in
12 furtherance of. You would -- you would -- all you would
13 be asking is, were you still possessing the firearm in
14 furtherance --

15 JUSTICE STEVENS: This must be during?

16 MS. MAYNARD: The discharge must be
17 temporally related to the principal offense, yes,
18 because the discharge is discharged while you're in the
19 course of the principal offense, that's the way these
20 types of sentencing factors --

21 JUSTICE BREYER: I think I got everybody
22 mixed up, because the first sentence of the statute is
23 on the preceding page. And if I start at the beginning,
24 I would discover -- of my memo -- if -- it says, if --
25 in -- who -- any person who during and in relation --

1 during and in relation to any crime of violence or drug
2 trafficking crime, blah, blah, blah, of a certain kind
3 uses or carries a firearm.

4 MS. MAYNARD: Right.

5 JUSTICE BREYER: So there it is right there,
6 or who in furtherance of such a crime possesses shall be
7 sentenced. Okay. So we've got the during and in
8 relation to covering the whole bunch. Then we have to
9 read that into little (ii) and little (iii).

10 MS. MAYNARD: No, Your Honor. I mean, just
11 to make sure I understand what you're say. The "during
12 and in relation to" only modifies the verb "uses or
13 carries"?

14 JUSTICE BREYER: Yes, exactly.

15 MS. MAYNARD: Okay.

16 JUSTICE BREYER: Then we have to read that
17 by implication where it says if the firearm is
18 brandished during or -- you have to imply that.

19 MS. MAYNARD: That's their argument.

20 JUSTICE BREYER: Yeah, that's not your
21 argument?

22 MS. MAYNARD: No, Your Honor.

23 (Laughter.)

24 JUSTICE BREYER: Forget it.

25 (Laughter.)

1 JUSTICE SCALIA: It's not your argument
2 because if that was the only -- if that was the source
3 of the contemporaneous requirement, there would be no
4 contemporaneous requirement for the in furtherance?

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

6 JUSTICE SCALIA: The provision -- the in
7 furtherance provision.

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

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

24 MS. MAYNARD: Well, just to --

25 JUSTICE SCALIA: If it occurs, you know,

1 five hours later while he's escaping, I don't know.

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

3 JUSTICE SCALIA: You don't have to decide
4 that.

5 MS. MAYNARD: It wouldn't have anything to
6 do with whether it intentionally goes off, Justice
7 Stevens. Your hypothetical could still raise a
8 question --

9 JUSTICE STEVENS: The strange thing about
10 this case is we're talking about a category of crimes in
11 which somebody person mistakenly fires the gun, that
12 doesn't happen very often. The whole -- the whole
13 dispute is about really a trivial set of crimes.

14 MS. MAYNARD: Well, I think it's important
15 to recognize, though, that Congress didn't want to open
16 the door to claims that -- that the firearm was
17 discharged accidentally.

18 JUSTICE STEVENS: Sure, when the
19 defendant -- and says I didn't really mean to shoot the
20 guy?

21 MS. MAYNARD: Right. I mean, the -- the
22 fact of a discharge is what Congress is clearly
23 concerned about, and you can tell that from the text.
24 What it did want to say is that in the indictment here
25 he was actually charged with uses, carries, and

1 possesses. The indictment is not perfectly worded. It
2 only has the "during and in relation to," and it -- but
3 the -- the instructions were proper and there were no --
4 the jury instructions in trial were proper and there
5 were no objection to the instructions, but I did want to
6 correct one point about that.

7 And if there are no further questions --

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Four minutes, Mr. Forster.

10 REBUTTAL ARGUMENT OF SCOTT J. FORSTER

11 ON BEHALF OF THE PETITIONER

12 MR. FORSTER: This Court in U.S. Gypsum was
13 very clear when it said that far more than the simple
14 omission of the appropriate phrase of a statutory
15 definition is necessary to justify dispensing with the
16 intent requirement.

17 And our argument is simply this, merely
18 because this might be a sentencing enhancement rather
19 than an element of the offense, this Court never says
20 that the normal rules of statutory construction cease to
21 apply under those circumstances, which means that the
22 mens rea presumption is appropriate in this case, and
23 just like this Court said in the passage I just cited.

24 If Congress wants to dispense with that
25 requirement, they must do so clearly, and they simply

1 did not do that in this case. If they wanted to do
2 that, they could insert the words "intentionally" or
3 "unintentionally discharge," in which case that would be
4 clear. And that simply is not the way this statute
5 reads.

6 The best reading of the statute, I believe,
7 and this is what Your Honor was headed toward, is to
8 read the discharge to require during and in relation to.
9 I just think that's the best --

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

15 MR. FORSTER: But, Your Honor --

16 JUSTICE BREYER: They have during, in
17 relation to and in furtherance of, so their in
18 furtherance of doesn't carry over. The first two do.
19 An accidental discharge is it not in relation to the
20 crime?

21 MR. FORSTER: Not under this Court's
22 authority in Smith. I think Smith is clear, the purpose
23 and effect and not be used by accident.

24 JUSTICE STEVENS: What was the case you
25 cited when you started your rebuttal?

1 MR. FORSTER: U.S. Gypsum.

2 JUSTICE STEVENS: Is that the antitrust
3 case? You caught me by surprise.

4 MR. FORSTER: I believe it is. I believe it
5 is, Your Honor.

6 Mr. Chief Justice, if there are no other
7 questions, I thank the Court.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel,
9 the case is submitted.

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

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