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Gun Crimes

Most first-year criminal law casebooks do not include a chapter on gun crimes. That is a bit strange. The number of gun crimes in the United States each year is quite large — in 2019, more than 150,000 persons were arrested for illegal weapons possession. Moreover, that number does *not* include those arrested for some other crime who also happen to be carrying a gun. Many crimes involve the use, or at least the possession (and therefore the threatened or potential use), of guns. The Bureau of Justice Statistics estimates that about half of all robberies, a quarter of all assaults, and one-twelfth of all rapes and sexual assaults, are committed by an assailant who is armed. Surely most drug sellers also are armed, if only to help protect the merchandise. In many such instances, the presence of the gun will lead to enhanced criminal charges or enhanced penalties.

We have already encountered a number of cases involving gun crimes. Think back to *Marrero* (at page 161), involving state-law permits to carry a handgun; *Lopez* (at page 253), involving the federal crime of gun possession in a school zone; *Staples* (at page 268), involving mandatory federal registration of machine guns; *Bryan* (at page 283), involving federal licensing requirements for gun sellers; and *Rehaif*, at page 304, involving weapons possession by an alien illegally in the United States.

As we have seen with drug crimes, both the states and the federal government are deeply involved in the investigation and prosecution of gun crimes. The U.S. Code includes a relatively comprehensive set of firearm regulations that (1) prohibits the private ownership of some extremely dangerous weapons altogether (such as sawed-off shotguns with barrels shorter than 18 inches); (2) requires the registration of some firearms, as well as imposing various procedural requirements (such as background checks) for some firearm sales; (3) prohibits certain persons (including felons and those convicted of certain domestic assaults) from possessing firearms; (4) prohibits the transfer of firearms to a juvenile; and (5) provides for increased sentences for the use or possession of a gun in connection with some federal crimes (such as drug felonies or violent crimes). State firearm laws vary widely, but often include restrictions on the possession, method of carrying (i.e., concealed or open), possession in some locations (such as in some government buildings), discharge under some circumstances (such as within city limits unless in self-defense), and use or possession of a gun in connection with some other crimes. States also frequently impose their own registration and permit requirements, which can be quite complicated.

One key difference between gun crimes and the other kinds of crimes we have studied thus far is that gun crimes trigger (sorry!) a special constitutional concern. The Second Amendment to the U.S. Constitution provides: “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” For more than 200 years, the application of the Second Amendment to private citizens not serving in an official “state militia” was unclear. Then, in District of Columbia v. Heller, 554 U.S. 570 (2008), the U.S. Supreme Court held that the Second Amendment *does* protect the gun rights of private citizens — at least in connection with “common” firearms that can be used for traditionally lawful purposes, such as self-defense. And in McDonald v. City of Chicago, 561 U.S. 742 (2010), the Court decided that the Second Amendment (which, like the rest of the Bill of Rights, originally was enacted *solely* to limit the powers of the then newly created federal government) is a “fundamental” right that limits the powers of state governments as well. In short, it is now clear that the Second Amendment can affect judicial decisions about the scope (sorry!) of many gun crimes.

This chapter is divided into two sections. Section A deals with “stand-alone” gun crimes — meaning gun crimes (based on various kinds of conduct, including possession, failure to register, public display, use, and discharge) that can be prosecuted independently of any other crime that the defendant might be committing at the same time. Section B is about gun “enhancements” — meaning statutes that bump up an underlying criminal charge, or that increase the defendant’s sentence, based on the involvement of a gun in connection with the commission of another crime. As you will see, each category of gun crime raises its own interesting set of issues. Keep in mind that this chapter is not meant to be a comprehensive survey of gun crimes or the legal issues they present; that would require a separate book. Here, our aim (sorry!) is only to introduce the subject.

A. STAND-ALONE GUN CRIMES

Voisine v. United States

Supreme Court of the United States

579 U.S. ___ (2016)

Justice KAGAN delivered the opinion of the Court.

Federal law prohibits any person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C. §922(g)(9). That phrase is defined to include any misdemeanor committed against a domestic relation that necessarily involves the "use . . . of physical force." §921(a)(33)(A). The question presented here is whether misdemeanor assault convictions for reckless (as contrasted to knowing or intentional) conduct trigger the statutory firearms ban. We hold that they do.

I

Congress enacted §922(g)(9) some 20 years ago to "close [a] dangerous loophole" in the gun control laws. United States v. Castleman, 572 U.S. ___, ___ (2014) (quoting United States v. Hayes, 555 U.S. 415, 426 (2009)). An existing provision already barred convicted felons from possessing firearms. See §922(g)(1). But many perpetrators of domestic violence are charged with misdemeanors rather than felonies, notwithstanding the harmfulness of their conduct. And "[f]irearms and domestic strife are a potentially deadly combination." *Hayes*, 555 U.S., at 427. Accordingly, Congress added §922(g)(9) to prohibit any person convicted of a "misdemeanor crime of domestic violence" from possessing any gun or ammunition with a connection to interstate commerce. And it defined that phrase, in §921(a)(33)(A), to include a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, that "has, as an element, the use or attempted use of physical force."

Two Terms ago, this Court considered the scope of that definition in a case involving a conviction for a knowing or intentional assault. See *Castleman*, 572 U.S., at ___-___. In *Castleman*, we initially held that the word "force" in §921(a)(33)(A) bears its common-law meaning, and so is broad enough to include offensive touching. We then determined that "the knowing or intentional application of [such] force is a 'use' of force." But we expressly left open whether a reckless assault also qualifies as a "use" of force — so that a misdemeanor conviction for such conduct would trigger §922(g)(9)'s firearms ban. The two cases before us now[*] raise that issue.

Petitioner Stephen Voisine pleaded guilty in 2004 to assaulting his girlfriend in violation of §207 of the Maine Criminal Code, which makes it a misdemeanor to "intentionally, knowingly or recklessly cause[ ] bodily injury or offensive physical contact to another person." Me. Rev. Stat. Ann., Tit. 17-A, §207(1)(A). Several years later, Voisine again found himself in legal trouble, this time for killing a bald eagle. See 16 U.S.C. §668(a). While investigating that crime, law enforcement officers learned that Voisine owned a rifle. When a background check turned up his prior misdemeanor conviction, the Government charged him with violating 18 U.S.C. §922(g)(9).[1]

Petitioner William Armstrong pleaded guilty in 2008 to assaulting his wife in violation of a Maine domestic violence law making it a misdemeanor to commit an assault prohibited by §207 (the general statute under which Voisine was convicted) against a family or household member. See Me. Rev. Stat. Ann., Tit. 17-A, §207-A(1)(A). A few years later, law enforcement officers searched Armstrong's home as part of a narcotics investigation. They discovered six guns, plus a large quantity of ammunition. Like Voisine, Armstrong was charged under §922(g)(9) for unlawfully possessing firearms.

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[*] [*Voisine* was decided together with the companion case of Armstrong v. United States. — EDS.]

1. In United States v. Hayes, 555 U.S. 415, 418 (2009), this Court held that a conviction under a general assault statute like §207 (no less than one under a law targeting only domestic assault) can serve as the predicate offense for a §922(g)(9) prosecution. When that is so, the Government must prove in the later, gun possession case that the perpetrator and the victim of the assault had one of the domestic relationships specified in §921(a)(33)(A). See id., at 426.

Both men argued that they were not subject to §922(g)(9)'s prohibition because their prior convictions (as the Government conceded) could have been based on reckless, rather than knowing or intentional, conduct. The District Court rejected those claims. Each petitioner then entered a guilty plea conditioned on the right to appeal the District Court's ruling.

The Court of Appeals for the First Circuit affirmed the two convictions. . . . Voisine and Armstrong filed a joint petition for certiorari, and shortly after issuing *Castleman*, this Court (without opinion) vacated the First Circuit's judgments and remanded the cases for further consideration in light of that decision. On remand, the Court of Appeals again upheld the convictions. . . . We granted certiorari to resolve a Circuit split over whether a misdemeanor conviction for recklessly assaulting a domestic relation disqualifies an individual from possessing a gun under §922(g)(9). We now affirm.

II

The issue before us is whether §922(g)(9) applies to reckless assaults, as it does to knowing or intentional ones. To commit an assault recklessly is to take that action with a certain state of mind (or *mens rea*) — in the dominant formulation, to "consciously disregard[ ]" a substantial risk that the conduct will cause harm to another. ALI, Model Penal Code §2.02(2)(c); Me. Rev. Stat. Ann., Tit. 17-A, §35(3) (adopting that definition); see Farmer v. Brennan, 511 U.S. 825-837 (1994) (noting that a person acts recklessly only when he disregards a substantial risk of harm "of which he is aware"). For purposes of comparison, to commit an assault knowingly or intentionally (the latter, to add yet another adverb, sometimes called "purposefully") is to act with another state of mind respecting that act's consequences — in the first case, to be "aware that [harm] is practically certain" and, in the second, to have that result as a "conscious object." Model Penal Code §§2.02 (2)(a)-(b); Me. Rev. Stat. Ann., Tit. 17-A, §§35(1)-(2).

Statutory text and background alike lead us to conclude that a reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under §922(g)(9). Congress defined that phrase to include crimes that necessarily involve the "use . . . of physical force." §921(a)(33)(A). Reckless assaults, no less than the knowing or intentional ones we addressed in *Castleman*, satisfy that definition. Further, Congress enacted §922(g)(9) in order to prohibit domestic abusers convicted under run-of-the-mill misdemeanor assault and battery laws from possessing guns. Because fully two-thirds of such state laws extend to recklessness, construing §922(g)(9) to exclude crimes committed with that state of mind would substantially undermine the provision's design.

A

Nothing in the word "use" — which is the only statutory language either party thinks relevant — indicates that §922(g)(9) applies exclusively to knowing or intentional domestic assaults. Recall that under §921(a)(33)(A), an offense counts as a "misdemeanor crime of domestic violence" only if it has, as an element, the "use" of force. Dictionaries consistently define the noun "use" to mean the "act of employing" something. Webster's New International Dictionary 2806 (2d ed. 1954) ("[a]ct of employing anything"); Random House Dictionary of the English Language 2097 (2d ed. 1987) ("act of employing, using, or putting into service"); Black's Law Dictionary 1541 (6th ed. 1990) ("[a]ct of employing," "application"). On that common understanding, the force involved in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. See *Castleman*, 572 U.S., at ___ ("[T]he word 'use' conveys the idea that the thing used (here, 'physical force') has been made the user's instrument" (some internal quotation marks omitted)). But the word "use" does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Or, otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.

Consider a couple of examples to see the ordinary meaning of the word "use" in this context. If a person with soapy hands loses his grip on a plate, which then shatters and cuts his wife, the person has not "use[d]" physical force in common parlance. But now suppose a person throws a plate in anger against the wall near where his wife is standing. That hurl counts as a "use" of force even if the husband did not know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate would ricochet and

injure his wife. Similarly, to spin out a scenario discussed at oral argument, if a person lets slip a door that he is trying to hold open for his girlfriend, he has not actively employed ("used") force even though the result is to hurt her. But if he slams the door shut with his girlfriend following close behind, then he has done so — regardless of whether he thinks it absolutely sure or only quite likely that he will catch her fingers in the jamb. Once again, the word "use" does not exclude from §922(g)(9)'s compass an act of force carried out in conscious disregard of its substantial risk of causing harm. . . .

In sum, Congress's definition of a "misdemeanor crime of violence" contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly "use[s]" force, no less than one who carries out that same action knowingly or intentionally. The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms.

B

So too does the relevant history. As explained earlier, Congress enacted §922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors — just like those convicted of felonies — from owning guns. See *Castleman*, 572 U.S., at ___, ___; *Hayes*, 555 U.S., at 426-427. Then, as now, a significant majority of jurisdictions — 34 States plus the District of Columbia — defined such misdemeanor offenses to include the reckless infliction of bodily harm. See Brief for United States 7a-19a (collecting statutes). That agreement was no coincidence. Several decades earlier, the Model Penal Code had taken the position that a *mens rea* of recklessness should generally suffice to establish criminal liability, including for assault. See §2.02(3), Comments 4-5, at 243-244 ("purpose, knowledge, and recklessness are properly the basis for" such liability); §211.1 (defining assault to include "purposely, knowingly, or recklessly caus[ing] bodily injury"). States quickly incorporated that view into their misdemeanor assault and battery statutes. So in linking §922(g)(9) to those laws, Congress must have known it was sweeping in some persons who had engaged in reckless conduct. See, e.g., United States v. Bailey, 9 Pet. 238, 256 (1835) (Story, J.) ("Congress must be presumed to have legislated under this known state of the laws"). And indeed, that was part of the point: to apply firearms restrictions to those abusers, along with all others, whom the States' ordinary misdemeanor assault laws covered.

What is more, petitioners' reading risks rendering §922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness — that is, inapplicable even to persons who commit that crime knowingly or intentionally. Consider Maine's statute, which (in typical fashion) makes it a misdemeanor to "intentionally, knowingly or recklessly" injure another. Me. Rev. Stat. Ann., Tit. 17-A, §207(1)(A). Assuming that provision defines a single crime (which happens to list alternative mental states) — and accepting petitioners' view that §921(a)(33)(A) requires at least a knowing *mens rea* — then, under Descamps v. United States, 570 U.S. ___ (2013), *no* conviction obtained under Maine's statute could qualify as a "misdemeanor crime of domestic violence." See id., at ___ (If a state crime "sweeps more broadly" than the federally defined one, a conviction for the state offense "cannot count" as a predicate, no matter what *mens rea* the defendant actually had). So in the 35 jurisdictions like Maine, petitioners' reading risks allowing domestic abusers of all mental states to evade §922(g)(9)'s firearms ban. . . .*

Petitioners respond that we should ignore the assault and battery laws actually on the books when Congress enacted §922(g)(9). In construing the statute, they urge, we should look instead to how the common law defined those crimes in an earlier age. And that approach, petitioners claim, would necessitate reversing their convictions because the common law "required a *mens rea* greater than recklessness."

But we see no reason to wind the clock back so far. Once again: Congress passed §922(g)(9) to take guns out of the hands of abusers convicted under the misdemeanor assault laws then in general use in the States. And by that time, a substantial majority of jurisdictions, following the Model Penal Code's lead, had abandoned the common law's approach to *mens rea* in drafting and interpreting their assault and battery statutes. Indeed, most had gone down that road decades before. That was the backdrop against which

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* [The procedural problem to which the Court is alluding here is that criminal charging documents generally don't have to specify which particular term, in a list of terms that define a particular element of a crime, the defendant's behavior satisfied. And juries almost always issue general verdicts — meaning that there's also no good way to tell which particular term the jury found to be satisfied. — EDS.]

Congress was legislating. Nothing suggests that, in enacting §922(g)(9), Congress wished to look beyond that real world to a common-law precursor that had largely expired. To the contrary, such an approach would have undermined Congress's aim by tying the ban on firearms possession not to the laws under which abusers are prosecuted but instead to a legal anachronism.

And anyway, we would not know how to resolve whether recklessness sufficed for a battery conviction at common law. Recklessness was not a word in the common law's standard lexicon, nor an idea in its conceptual framework; only in the mid- to late-1800's did courts begin to address reckless behavior in those terms. See Jerome Hall, Assault and Battery by the Reckless Motorist, 31 J. Crim. L. & C. 133, 138-139 (1940). The common law traditionally used a variety of overlapping and, frankly, confusing phrases to describe culpable mental states — among them, specific intent, general intent, presumed intent, willfulness, and malice. See, e.g., Morissette v. United States, 342 U.S. 246, 252 (1952); Model Penal Code §2.02, Comment 1, at 230. Whether and where conduct that we would today describe as reckless fits into that obscure scheme is anyone's guess: Neither petitioners' citations, nor the Government's competing ones, have succeeded in resolving that counterfactual question. And that indeterminacy confirms our conclusion that Congress had no thought of incorporating the common law's treatment of *mens rea* into §921(a)(33)(A). That provision instead corresponds to the ordinary misdemeanor assault and battery laws used to prosecute domestic abuse, regardless of how their mental state requirements might — or, then again, might not — conform to the common law's.[6]

III

The federal ban on firearms possession applies to any person with a prior misdemeanor conviction for the "use . . . of physical force" against a domestic relation. §921(a)(33)(A). That language, naturally read, encompasses acts of force undertaken recklessly — i.e., with conscious disregard of a substantial risk of harm. And the state-law backdrop to that provision, which included misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said. Each petitioner's possession of a gun, following a conviction under Maine law for abusing a domestic partner, therefore violates §922(g)(9). We accordingly affirm the judgment of the Court of Appeals.

Justice THOMAS, with whom Justice SOTOMAYOR joins as to Parts I and II, dissenting.

Federal law makes it a crime for anyone previously convicted of a "misdemeanor crime of domestic violence" to possess a firearm "in or affecting commerce." 18 U.S.C. §922(g)(9). A "misdemeanor crime of domestic violence" includes "an offense that . . . has, as an element, the use or attempted use of physical force . . . committed by [certain close family members] of the victim." §921(a)(33)(A)(ii). In this case, petitioners were convicted under §922(g)(9) because they possessed firearms and had prior convictions for assault under Maine's statute prohibiting "intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to another person." Me. Rev. Stat. Ann., Tit. 17-A, §207(1)(A) (2006). The question presented is whether a prior conviction under §207 has, as an element, the "use of physical force," such that the conviction can strip someone of his right to possess a firearm. In my view, §207 does not qualify as such an offense, and the majority errs in holding otherwise. I respectfully dissent.

I

. . . The Maine statute appears to lack, as a required element, the "use or attempted use of physical force." Maine's statute punishes at least some conduct that does not involve the "use of physical force." Section 207 criminalizes "recklessly caus[ing] bodily injury or offensive physical contact to another person." By criminalizing all reckless conduct, the Maine statute captures conduct such as recklessly injuring a passenger by texting while driving resulting in a crash. Petitioners' charging documents generically recited the

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6. Petitioners make two last arguments for reading §921(a)(33)(A) their way, but they do not persuade us. First, petitioners contend that we should adopt their construction to avoid creating a question about whether the Second Amendment permits imposing a lifetime firearms ban on a person convicted of a misdemeanor involving reckless conduct. And second, petitioners assert that the rule of lenity requires accepting their view. But neither of those arguments can succeed if the statute is clear. . . . And as we have shown, §921(a)(33)(A) plainly encompasses reckless assaults.

statutory language; they did not charge intentional, knowing, and reckless harm as alternative counts. Accordingly, Maine's statute appears to treat "intentionally, knowingly, or recklessly" causing bodily injury or an offensive touching as a single, indivisible offense that is satisfied by recklessness. So petitioners' prior assault convictions do not necessarily have as an element the use of physical force against a family member. These prior convictions, therefore, do not qualify as a misdemeanor crime involving domestic violence under federal law, and petitioners' convictions accordingly should be reversed. At the very least, to the extent there remains uncertainty over whether Maine's assault statute is divisible, the Court should vacate and remand for the First Circuit to determine that statutory interpretation question in the first instance.

II

To illustrate where I part ways with the majority, consider different mental states with which a person could create and apply force. First, a person can create force intentionally or recklessly.[3] For example, a person can intentionally throw a punch or a person can crash his car by driving recklessly. Second, a person can intentionally or recklessly harm a particular person or object as a result of that force. For example, a person could throw a punch at a particular person (thereby intentionally applying force to that person) or a person could swing a baseball bat too close to someone (thereby recklessly applying force to that person).

These different mental states give rise to three relevant categories of conduct. A person might intentionally create force and intentionally apply that force against an object (*e.g.,* punching a punching bag). A person might also intentionally create force but recklessly apply that force against an object (*e.g.,* practicing a kick in the air, but recklessly hitting a piece of furniture). Or a person could recklessly create force that results in damage, such as the car crash example.

The question before us is what mental state suffices for a "use of physical force" against a family member. In my view, a "use of physical force" most naturally refers to cases where a person intentionally creates force and intentionally applies that force against a family member. It also includes (at least some) cases where a person intentionally creates force but recklessly applies it to a family member. But I part ways with the majority's conclusion that purely reckless conduct — meaning, where a person recklessly creates force — constitutes a "use of physical force." In my view, it does not, and therefore, the "use of physical force" is narrower than most state assault statutes, which punish anyone who recklessly causes physical injury.

A

To identify the scope of the "use of physical force," consider three different types of intentional and reckless force resulting in physical injury.

1

The paradigmatic case of battery: A person intentionally unleashes force and intends that the force will harm a particular person. This might include, for example, punching or kicking someone. Both the majority and I agree that these cases constitute a "use of physical force" under §921(a)(33)(A)(ii).

This first category includes all cases where a person intentionally creates force and desires or knows with a practical certainty that that force will cause harm. This is because the law traditionally treats conduct as intended in two circumstances. First, conduct is intentional when the actor desires to produce a specific result. 1 W. LaFave, Substantive Criminal Law §5.2(a), pp. 340-342 (2d ed. 2003). But conduct is also traditionally deemed intentional when a person acts "knowingly": that is, he knows with practical certainty that a result will follow from his conduct. Ibid.; see also Restatement (Second) of Torts §8A, Comment *b*, at 15 ("If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result").

To illustrate, suppose a person strikes his friend for the purpose of demonstrating a karate move. The person has no desire to injure his friend, but he knows that the move is so dangerous that he is practically

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3. To simplify, I am using only those mental states relevant to the Court's resolution of this case. A person could also create a force negligently or blamelessly.

certain his friend will be injured. Under the common law, the person intended to injure his friend, even though he acted only with knowledge that his friend would be injured rather than the desire to harm him. Thus, even when a person acts knowingly rather than purposefully, this type of conduct is still a "use of physical force."

2

The second category involves a person who intentionally unleashes force that recklessly causes injury. The majority gives two examples:

1. The Angry Plate Thrower: "[A] person throws a plate in anger against the wall near where his wife is standing." The plate shatters, and a shard injures her.

2. The Door Slammer: "[A person] slams the door shut with his girlfriend following close behind" with the effect of "catch[ing] her fingers in the jamb."

The Angry Plate Thrower and the Door Slammer both intentionally unleashed physical force, but they did not intend to direct that force at those whom they harmed. Thus, they *intentionally* employed force, but *recklessly* caused physical injury with that force. The majority believes that these cases also constitute a "use of physical force," and I agree. The Angry Plate Thrower has used force against the plate, and the Door Slammer has used force against the door.

The more difficult question is whether this "use of physical force" comes within §921(a)(33)(A)(ii), which requires that the "use of physical force" be committed by someone having a familial relationship with the victim. The natural reading of that provision is that the use of physical force must be against a family member. In some cases, the law readily transfers the intent to use force from the object to the actual victim. Take the Angry Plate Thrower: If a husband throws a plate at the wall near his wife to scare her, that is assault. If the plate breaks and cuts her, it becomes a battery, regardless of whether he intended the plate to make contact with her person. See W. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser and Keeton on Law of Torts §9, pp. 39-42 (5th ed. 1984) (Prosser and Keeton). Similarly, "if one person intends to harm a second person but instead unintentionally harms a third, the first person's criminal or tortious intent toward the second applies to the third as well." Black's Law Dictionary 1504 (defining transferred-intent doctrine); see also 1 LaFave, supra, §5.2(c)(4), at 349-350. Thus, where a person acts in a violent and patently unjustified manner, the law will often impute that the actor intended to cause the injury resulting from his conduct, even if he actually intended to direct his use of force elsewhere. Because we presume that Congress legislates against the backdrop of the common law, these cases would qualify as the "use of physical force" against a family member.

3

Finally, and most problematic for the majority's approach, a person could recklessly unleash force that recklessly causes injury. Consider two examples:

1. The Text-Messaging Dad: Knowing that he should not be texting and driving, a father sends a text message to his wife. The distraction causes the father to rear end the car in front of him. His son, who is a passenger, is injured.

2. The Reckless Policeman: A police officer speeds to a crime scene without activating his emergency lights and siren and careens into another car in an intersection. That accident causes the police officer's car to strike another police officer, who was standing at the intersection. See Seaton v. State, 385 S.W.3d 85, 88 (Tex. App. 2012).

In these cases, both the unleashing of the "force" (the car crash) and the resulting harm (the physical injury) were reckless. Under the majority's reading of §921(a)(33)(A)(ii), the husband "use[d] . . . physical force" against his son, and the police officer "use[d] . . . physical force" against the other officer.

But this category is where the majority and I part company. These examples do not involve the "use of physical force" under any conventional understanding of "use" because they do not involve an active employment of something for a particular purpose. In the second category, the actors intentionally use violence against property; this is why the majority can plausibly argue that they have "used" force, even

though that force was not intended to harm their family members. But when an individual does not engage in any violence against persons or property — that is, when physical injuries result from purely reckless conduct — there is no "use" of physical force.

. . .

The "use of physical force" against a family member includes cases where a person intentionally commits a violent act against a family member. And the term includes at least some cases where a person engages in a violent act that results in an unintended injury to a family member. But the term does not include nonviolent, reckless acts that cause physical injury or an offensive touching. Accordingly, the majority's definition is overbroad. . . .

The majority blurs the distinction between recklessness and intentional wrongdoing by overlooking the difference between the *mens rea* for force and the *mens rea* for causing harm with that force. The majority says that "'use' does not demand that the person applying force have the purpose or practical certainty that it will cause harm" (namely, knowledge), "as compared with the understanding that it is [a substantial and unjustifiable risk that it will] do so" (the standard for recklessness).[5] Put in the language of *mens rea*, the majority is saying that purposeful, knowing, and reckless applications of force are all equally "uses" of force.

But the majority fails to explain why mere recklessness in creating force — as opposed to recklessness in causing harm with intentional force — is sufficient. The majority gives the Angry Plate Thrower and the Door Slammer as examples of reckless conduct that are "uses" of physical force, but those examples involve persons who *intentionally* use force that *recklessly* causes injuries. Reckless assault, however, extends well beyond intentional force that recklessly causes injury. In States where the Model Penal Code has influence, reckless assault includes any recklessly caused physical injury. See ALI, Model Penal Code §211.1(1)(a) (1980). This means that the Reckless Policeman and the Text-Messaging Dad are as guilty of assault as the Angry Plate Thrower. See, e.g., *Seaton*, 385 S.W. 3d, at 89-90; see also People v. Grenier, 250 App. Div. 2d 874, 874-875, 672 N.Y.S. 2d 499, 500-501 (1998) (upholding an assault conviction where a drunk driver injured his passengers in a car accident).

The majority's examples are only those in which a person has intentionally used force, meaning that the person acts with purpose or knowledge that force is involved. As a result, the majority overlooks the critical distinction between conduct that is intended to cause harm and conduct that is not intended to cause harm. Violently throwing a plate against a wall is a use of force. Speeding on a roadway is not. That reflects the fundamental difference between intentional and reckless wrongdoing. An intentional wrong is designed to inflict harm. See Restatement (Second) of Torts §8A, at 15. A reckless wrong is not: "While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it." Id., §500, Comment *f*, at 590.

All that remains of the majority's analysis is its unsupported conclusion that recklessness looks enough like knowledge, so that the former suffices for a use of force just as the latter does. That overlooks a crucial distinction between a "practical certainty" and a substantial risk. . . . [T]he distinction between intentional and reckless conduct is key for defining "use." When a person acts with a practical certainty that he will employ force, he intends to cause harm; he has actively employed force for an instrumental purpose, and that is why we can fairly say he "uses" force. In the case of reckless wrongdoing, however, the injury the actor has caused is just an accidental byproduct of inappropriately risky behavior; he has not actively employed force.

In sum, "use" requires the intent to employ the thing being used. And in law, that intent will be imputed

5. The majority's equation of recklessness with "the understanding" that one's actions are "substantially likely" to cause harm, misstates the standard for recklessness in States that follow the Model Penal Code. Recklessness only requires a "substantial and unjustifiable risk." ALI, Model Penal Code §2.02(2)(c) (1980). A "substantial" risk can include very small risks when there is no justification for taking the risk. See id., §2.02, Comment 1, at 237, n. 14. Thus, it would be reckless to play Russian roulette with a revolver having 1,000 chambers, even though there is a 99.9% chance that no one will be injured.

when a person acts with practical certainty that he will actively employ that thing. Merely disregarding a risk that a harm will result, however, does not supply the requisite intent. . . .

. . .

If Congress wanted to sweep in all reckless conduct, it could have written §921(a)(33)(A)(ii) in different language. Congress might have prohibited the possession of firearms by anyone convicted under a state law prohibiting assault or battery. Congress could also have used language tracking the Model Penal Code by saying that a conviction must have, as an element, "the intentional, knowing, or reckless causation of physical injury." But Congress instead defined a "misdemeanor crime of domestic violence" by requiring that the offense have "the use of physical force." And a "use of physical force" has a well-understood meaning applying only to intentional acts designed to cause harm.

III

Even assuming any doubt remains over the reading of "use of physical force," the majority errs by reading the statute in a way that creates serious constitutional problems. The doctrine of constitutional avoidance "command[s] courts, when faced with two plausible constructions of a statute — one constitutional and the other unconstitutional — to choose the constitutional reading." Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U.S. 193, 213 (2009) (Thomas, J., concurring in judgment in part and dissenting in part) (internal quotation marks omitted). Section 922(g)(9) is already very broad. It imposes a lifetime ban on gun ownership for a single intentional nonconsensual touching of a family member. A mother who slaps her 18-year-old son for talking back to her — an intentional use of force — could lose her right to bear arms forever if she is cited by the police under a local ordinance. The majority seeks to expand that already broad rule to any reckless physical injury or nonconsensual touch. I would not extend the statute into that constitutionally problematic territory. . . .

Today the majority expands §922(g)(9)'s sweep into patently unconstitutional territory. Under the majority's reading, a single conviction under a state assault statute for recklessly causing an injury to a family member — such as by texting while driving — can now trigger a lifetime ban on gun ownership. And while it may be true that such incidents are rarely prosecuted, this decision leaves the right to keep and bear arms up to the discretion of federal, state, and local prosecutors.

We treat no other constitutional right so cavalierly. At oral argument the Government could not identify any other fundamental constitutional right that a person could lose forever by a single conviction for an infraction punishable only by a fine. Tr. of Oral Arg. 36-40. Compare the First Amendment. Plenty of States still criminalize libel. See, *e.g.,* Ala. Code. §13A-11-160 (2015); Fla. Stat. §836.01 (2015); La. Rev. Stat. Ann. §14:47 (West 2016); Mass. Gen. Laws, ch. 94, §98C (2014); Minn. Stat. §609.765 (2014); N. H. Rev. Stat. Ann. §644:11 (2007); Va. Code Ann. §18.2-209 (2014); Wis. Stat. §942.01 (2005). I have little doubt that the majority would strike down an absolute ban on publishing by a person previously convicted of misdemeanor libel. In construing the statute before us expansively so that causing a single minor reckless injury or offensive touching can lead someone to lose his right to bear arms forever, the Court continues to "relegat[e] the Second Amendment to a second-class right." Friedman v. Highland Park, 577 U.S. ___, ___ (2015) (Thomas, J., dissenting from denial of certiorari).

* * *

In enacting §922(g)(9), Congress was not worried about a husband dropping a plate on his wife's foot or a parent injuring her child by texting while driving. Congress was worried that family members were abusing other family members through acts of violence and keeping their guns by pleading down to misdemeanors. Prohibiting those convicted of intentional and knowing batteries from possessing guns — but not those convicted of reckless batteries — amply carries out Congress' objective.

Instead, under the majority's approach, a parent who has a car accident because he sent a text message while driving can lose his right to bear arms forever if his wife or child suffers the slightest injury from the crash. This is obviously not the correct reading of §922(g)(9). The "use of physical force" does not include crimes involving purely reckless conduct. Because Maine's statute punishes such conduct, it sweeps more broadly than the "use of physical force." I respectfully dissent.

Notes and Questions

1. The oral arguments before the Supreme Court in *Voisine* made headline news — not so much because of the facts or the legal issues, but because Justice Thomas asked several questions of the Assistant Solicitor General who was arguing the case for the government. That was the first time Justice Thomas had spoken during oral arguments in more than a decade. *Voisine* also happened to be one of the first cases orally argued before the Court after Justice Scalia's death on February 13, 2016.

2. Justice Kagan, speaking for the majority in *Voisine*, calls the common law of *mens rea* "obscure" and "confusing." But then she describes the Model Penal Code's recklessness standard as requiring a defendant to be aware that his conduct is "substantially likely" to cause harm. Is that really how the Code defines "recklessness"? Does the Code's definition require the harm to be "substantially likely" to occur, or merely that the risk of harm be both "substantial" and "unjustifiable"? See also footnote 5 in Justice Thomas' dissenting opinion. And why does Justice Kagan feel the need to emphasize that the defendant's conduct must be "volitional," rather than a mere accident? Those *mens rea* concepts don't appear in the Code — rather, they sound a lot more like how common-law courts would describe general intent.

For his part, Justice Thomas seems to have a rather idiosyncratic view about how to apply the mental states of "purpose" and "recklessness" to conduct elements and result elements. For example, he writes: "Finally, and most problematic for the majority's approach, a person could recklessly unleash force that recklessly causes injury." What does *that* mean? In the hypothetical case of the texting driver, the defendant's conduct (texting while driving) is clearly intentional, whereas the resulting injury to the victim is probably reckless. So what's the extra concept that Justice Thomas describes as "recklessly unleash[ing] force"? Where does *that* idea come from?

Based on *Voisine*, does anybody on the Court really seem to understand *mens rea*?

3. Who's got the better of the argument here? Does Justice Thomas adequately deal with the majority's concern that a victory for the defendants would make it virtually impossible — because of the way most contemporary state assault statutes are drafted, combined with the vagueness of most charging documents and the general verdicts rendered by juries — to keep domestic abusers in 34 states, plus the District of Columbia, from obtaining firearms? Could that really be what Congress intended? On the other hand, does Justice Kagan adequately deal with Justice Thomas' concern that the majority's interpretation will deny a basic constitutional right to persons whose misdemeanor assault crimes are so minor that they can't even be jailed for them?

4. Why do you think so many states amended their assault statutes to criminally punish the "reckless" causing of harm to close family members (and others) — as in the text-messaging-while-driving example provided by Justice Thomas? Keep in mind that, at common law, simple assault is a *general intent* crime — which means that *no* particular *mens rea*, with respect to the resulting harm, is required. On the other hand, common-law courts and legislatures always have had the option (as we have previously seen, in cases involving child abuse and arson) to require proof of either "malice" or "criminal negligence," in situations where the defendant's conduct alone doesn't seem bad enough to justify criminal punishment. Which approach makes more sense?

5. Although the constitutional issue was not part of the Court's grant of certiorari, and although Justice Kagan dismissed the issue in a brief footnote, the Second Amendment clearly lurks in the background in *Voisine*. But the Court has also made it perfectly clear that the Second Amendment does not invalidate all gun laws.

In District of Columbia v. Heller, 554 U.S. 570 (2008), the Court struck down the District's strict ban on handgun possession, as well as the requirement that all other guns legally owned must be "unloaded and dissembled or bound by a trigger lock or similar device," finding both restrictions to violate the Second Amendment. The Court's basic reasoning was that the Second Amendment protects the right of private citizens to possess "usable" handguns in their own home, for the purpose of self-defense. But the Court further explained:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone

through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, e.g., State v. Chandler, 5 La. Ann. 489, 490 (1850); Nunn v. State, 1 Ga. 243, 251 (1846); see generally 2 Kent *340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

We also recognize another important limitation on the right to keep and carry arms. [W]e have explained, [in Miller v. United States, 307 U.S. 174 (1939),] that the sorts of weapons protected were those "in common use at the time." 307 U.S., at 179. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." See 4 Blackstone 148-149 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804); H. Stephen, Summary of the Criminal Law 48 (1840); F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852). . . .

It may be objected that if weapons that are most useful in military service — M-16 rifles and the like — may be banned, then the Second Amendment right is completely detached from the prefatory clause [referring to the "well regulated Militia"]. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right. . . .

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns . . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

554 U.S. at 626-28, 636.

And in McDonald v. City of Chicago, 561 U.S. 742 (2010), where the Court held that the Second Amendment is a "fundamental right" incorporated within the meaning of the Fourteenth Amendment's Due Process Clause, thus making it applicable to the states, the Court added:

. . . Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless stare decisis counsels otherwise, that guarantee is fully binding on the States and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values. As noted by the 38 States that have appeared in this case as amici supporting petitioners, "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." Brief for State of Texas et al. 23. . . .

As evidence that the Fourteenth Amendment has not historically been understood to restrict the authority of the States to regulate firearms, municipal respondents and supporting amici cite a variety of

> state and local firearms laws that courts have upheld. But what is most striking about their research is the paucity of precedent sustaining [complete handgun possession] bans comparable to those at issue here and in *Heller*. Municipal respondents cite precisely one case (from the late 20th century) in which such a ban was sustained. See Brief for Municipal Respondents 26-27 (citing Kalodimos v. Morton Grove, 103 Ill. 2d 483, 470 N.E.2d 266, 83 Ill. Dec. 308 (1984)); see also Reply Brief for Respondent NRA et al. 23, n. 7 (asserting that no other court has ever upheld a complete ban on the possession of handguns). It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S., at 626, 678. We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Id., at 626-627. We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

561 U.S. at 784-86.

What can be said with some certainty, after *Heller* and *McDonald*, is that complete state or federal bans on handgun possession (or on the possession of any other weapons "in common use" for the purpose of self-defense) inside the home cannot stand, in view of the Second Amendment. But that leaves many other important questions unanswered: What about bans on such possession *outside* the home, such as in government buildings, in public parks, or on college campuses? What about bans on carrying concealed weapons in public places? Do felons, or those convicted of domestic assaults, forever forfeit their Second Amendment right to possess guns for self-defense? *Heller* and *McDonald* seem to leave the door open to such narrower legal restrictions, but only time will tell for sure.

6. Many observers believed that the Court might begin to answer such questions when certiorari was granted in the case of New York State Rifle & Pistol Association, Inc. v. City of New York, 590 U.S. ___ (2020). The case involved a constitutional challenge to a New York City ordinance that allowed the holder of a so-called "premises license" to possess a firearm only at the holder's own home or business, and generally prohibited the transport of that firearm to any other location except one of the seven authorized shooting ranges within the city — including second homes, shooting ranges, and target-shooting competition venues located outside the city. The U.S. District Court for the Southern District of New York issued summary judgment for the city, and the Second Circuit affirmed, concluding that the ordinance served an important governmental interest in promoting public safety and describing the burden on the plaintiffs' Second Amendment rights as "trivial."

The Supreme Court granted certiorari shortly after new Justice Brett Kavanaugh, a strong supporter of gun rights, joined the Court, leading many to anticipate a reversal. But a per curiam Court ultimately vacated the judgment below as moot because New York City had — after the cert grant — amended its ordinance to allow safe transport "directly" to second homes, gun ranges, and shooting competitions outside the city. Justice Alito dissented from the mootness ruling and added, in language joined by Justice Gorsuch: "We are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern." Justice Kavanaugh concurred in the mootness ruling, but added: "I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court." Despite these suggestions, in June 2020 the Court denied review in all of the other Second Amendment cases in which certiorari petitions had been filed.

Tafel v. State

Court of Appeals of Texas, Tenth District, Waco

542 S.W.3d 642 (2016)

Opinion by Justice SCOGGINS (joined by Justice DAVIS):

In two cause numbers, the trial court convicted Mark Ken Tafel of the offense of unlawful carrying of a handgun by a license holder and assessed his punishment at thirty days confinement and a $500 fine. The trial court suspended imposition of the sentence and placed Tafel on community supervision for six months. We affirm.

Background Facts

Mark Ken Tafel was a County Commissioner for Hamilton County. Sheriff Gregg Bewley received complaints that Tafel was carrying a concealed handgun to meetings of the Commissioners Court. Sheriff Bewley met with Tafel and discussed those concerns. On February 23, 2011, Tafel gave Sheriff Bewley a written statement in which he stated that he understood he could not carry a handgun to the meetings of the Commissioners Court.

On April 14, 2011, County Judge Randy Mills issued a letter to Tafel purportedly authorizing Tafel to carry concealed handguns to the meetings. Judge Mills gave a copy of the letter to Tafel; however, Judge Mills did not file the letter in any court in Hamilton County.

Sheriff Bewley attended the November 14, 2011 meeting of the Hamilton County Commissioners Court and observed a bulge that he believed was a weapon under Tafel's jacket. Sheriff Bewley recovered a .45 caliber handgun and a .22 caliber revolver from Tafel, and he placed Tafel under arrest.

Sufficiency of the Evidence

In the first issue, Tafel argues that the evidence is insufficient to support the trial court's rejection of the defensive issue of lack of effective notice. We first will determine whether Section 46.035(i) of the Texas Penal Code is an exception or a defense. The Texas Penal Code provides that:

> A license holder commits an offense if the license holder intentionally, knowingly, or recklessly carries a handgun under the authority of Subchapter H, Chapter 411, Government Code, regardless of whether the handgun is concealed, at any meeting of a governmental entity.

TEX. PENAL CODE ANN. §46.035(c). The Texas Penal Code further provides that subsection (c) does "not apply if the actor was not given effective notice under Section 30.06." TEX. PENAL CODE ANN. §46.035(i).

Section 2.02(a) of the Penal Code provides, "An exception to an offense in this code is so labeled by the phrase: 'It is an exception to the application of . . . .' " TEX. PENAL CODE ANN. §2.02(a). Section 2.03(e) of the Penal Code states, "A ground of defense in a penal law that is not plainly labeled in accordance with this chapter has the procedural and evidentiary consequences of a defense." TEX. PENAL CODE ANN. §2.03(e). We agree with Tafel that Section 46.035(i) is a defense.

When a defendant challenges the legal sufficiency of the evidence to support rejection of a defense, we examine all of the evidence in the light most favorable to the verdict to determine whether a rational factfinder could have found the defendant guilty of all essential elements of the offense beyond a reasonable doubt and also could have found against the defendant on the defensive issue beyond a reasonable doubt. See Dudzik v. State, 276 S.W.3d 554, 557 (Tex. App.-Waco 2008, pet. ref'd).

Section 46.035(i) states that subsection (c) does "not apply if the actor was not given effective notice under Section 30.06." TEX. PENAL CODE ANN. §46.035(i). Section 30.06 provides that:

> (b) For purposes of this section, a person receives notice if the owner of the property or someone with apparent authority to act for the owner provides notice to the person by oral or written communication.
>
> (c) In this section:
>
> (1) "Entry" has the meaning assigned by Section 30.05(b).
>
> (2) "License holder" has the meaning assigned by Section 46.035(f).
>
> (3) "Written communication" means:

(A) a card or other document on which is written language identical to the following: "Pursuant to Section 30.06, Penal Code (trespass by holder of license to carry a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (concealed handgun law), may not enter this property with a concealed handgun"; or

(B) sign posted on the property that:

(i) includes the language described by Paragraph (A) in both English and Spanish;

(ii) appears in contrasting colors with block letters at least one inch in height; and

(iii) is displayed in a conspicuous manner clearly visible to the public.

TEX. PENAL CODE ANN. §30.06(b)(c).

Tafel focuses on whether a rational factfinder could have found against him beyond a reasonable doubt on the issue of lack of effective notice. Section 30.06 provides that effective notice can be provided by oral or written communication. Judge Mills posted a sign in an attempt to comply with the provisions of Section 30.06. The record is unclear whether the sign was displayed in a conspicuous manner clearly visible to the public and whether it contained contrasting colors with block letters. The sign was printed only in English.

The record indicates that Tafel was aware of the sign after it was posted. Sheriff Bewley met with Tafel to discuss Tafel carrying weapons to the county commissioner's meetings. Tafel's statement to Sheriff Bewley is as follows:

> My name is Mark Tafel and I am the Commissioner of Hamilton County Precinct Two. Sheriff Bewley asked me to come to his office today regarding concealed carry of a firearm. It has been brought to my attention questions have been raised from the past where I did not willingly or knowingly break any laws. On or prior to a Commissioner's Court meeting discussions from a gentleman, Dave Gustafson, asked questions of concealed carry. At that point in time no 30.06 sign was posted at the courtroom nor did I know that any laws were being broken. As questions arose weeks later I confirmed that I cannot carry a concealed weapon during court hours with proper signage displayed. Sheriff Bewley investigated Texas Penal Codes and determined that section 46.03 and 46.035 are applicable when Commissioner's Court is in session. From knowing this now I have not and will not carry a weapon until new laws are written from our state courts. In fact from that day forward, in talking to Sheriff Bewley, I have been pursuing our state representative and his aid where the state house is challenging and changing the validity of 46.03 and 46.035 to allow any elected officials in Commissioner's Court or any Justice Court to carry a concealed weapon as long as they are a CCL holder. The Sheriff has asked me about a conversation that occurred prior to a Commissioner's Court meeting between myself and Mr. Gustafson. A discussion I vaguely remember was about whether we, Dave and I, were legal to carry concealed weapons in the courthouse. Judge Mills had previously told me it didn't bother him that I carried in the courthouse. There was no positive outcome of Dave and mine's conversation till weeks later when Sheriff Bewley confirmed that according to Texas Penal Code section 46.03 and 46.035 that I would be breaking the law if I carried in the courtroom when in session. Back to the discussion with Dave Gustafson, in a conversation I vaguely remember, the Sheriff has referred to my patting my clothing and ankle with which I completely disagree that could have happened. Because, I have never carried a boot gun. I do however carry an underarm shouldered weapon or small of the back carry. Again though I must reiterate that no determination was made of what is legal and wasn't legal. Today however, we do know, and that is why I do not carry during court. I don't want to lie I believe I was carrying a concealed weapon on my first and second court date. Again after this conversation with Mr. Gustafson I brought the concern to our County Judge and he didn't care that I was carrying during court.
>
> This issue seems to be very confusing to me and to others. We know state law says that a 30.06 sign must be posted to stop concealed carry with that building. At no time were signs ever present until recently, and now I know that I cannot carry a weapon past that sign. At no time did I intentionally or knowingly break any laws. In fact I pride myself in being an upstanding law abiding citizen. Being taught what is proper in concealed carry by my instructor, Carl Chandler, told me that it was my right

to carry in the state capitol while it is in session. This has been confirmed by the state reps assistant that concealed carry is allowed at the state capitol but not in a county courtroom. This is why they are vigilantly trying to change the law. This is the end of my statement.

Tafel further consulted with County Attorney Mark Henke on carrying a concealed handgun in the courtroom and to the meetings of the Commissioners Court. Henke never advised Tafel that he was permitted to carry a concealed handgun to the meetings of the Commissioner's Court. Henke testified that his advice was consistently ". . . don't do it. You risk going to jail." Henke and Tafel also discussed the sign posted in an attempt to comply with Section 30.06. Tafel was aware of the written sign prohibiting him from carrying a handgun to the meetings, and Tafel received oral notice that he was prohibited from carrying a handgun to the meetings. Viewing the evidence in the light most favorable to the verdict, we find that a rational factfinder could have found against Tafel on the issue of lack of effective notice. We overrule the first issue.

Mistake of Law

In the second issue, Tafel argues that the evidence established as a matter of law the affirmative defense of mistake of law. To establish the affirmative defense of mistake of law, a defendant bears the burden of proving by a preponderance of the evidence that he reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon:

> (1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or
>
> (2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

TEX. PENAL CODE ANN. §§2.04, 8.03(b).

The proper standard in criminal cases for review of legal sufficiency challenges to a factfinder's refusal to find on an issue that the defendant had the burden of proof is the same standard applied in civil cases. Reynolds v. State, 385 S.W.3d 93, 100-101(Tex. App.-Waco 2012, aff'd 423 S.W.3d 377 (Tex. Crim. App. 2014). That standard requires a two-step analysis. We first examine the record for any evidence that supports the factfinder's refusal to find while ignoring all evidence to the contrary. If no evidence supports the refusal to find, we then examine the entire record to determine whether the evidence establishes the affirmative defense as a matter of law.

Judge Mills wrote a letter addressed to "To Whom It May Concern" and states:

> Commissioner Mark Tafel is authorized by this office to exercise his authority under Texas Concealed Handgun laws to carry concealed handgun in Hamilton County Commissioners Court. This is to remain in effect until further notification.

Tafel contends that he relied on Judge Mill's authorization to bring concealed handguns to the commissioners meeting pursuant to TEX. PENAL CODE ANN. §8.03(b)(2).

Section 8.03 requires reliance on a narrow class of official statements or interpretations of the law. Hawkins v. State, 656 S.W.2d 70, 73 (Tex. Crim. App. 1983). The letter is not a written interpretation of the law contained in an opinion as set out in Section 8.03(b)(2). An interpretation is defined as an explanation. (Merriam Webster's Collegiate Dictionary (10th Edition 1993). The letter written by Judge Mills does not explain the applicable law, and it is not an opinion. Judge Mills testified that his letter did not constitute an opinion. We find that Tafel's reliance on the letter was not reasonable. Tafel did not establish the affirmative defense of mistake of law as a matter of law. We overrule the second issue.

Conclusion

We affirm the trial court's judgments.

Chief Justice GRAY, dissenting.

The issues we decide today relate to how a concealed handgun license holder can be confident in the determination of where it is lawful to carry. The underlying right at issue was confirmed by the adoption of the second amendment to the United States Constitution. The scope of that right was discussed at length in the United States Supreme Court's opinion in District of Columbia v. Heller, 554 U.S. 570 (2008). And the right was confirmed as applicable to the States in the United States Supreme Court's opinion in McDonald v. City of Chicago, 561 U.S. 742 (2010).

As presented to this Court, the issue is narrower than the issue in *Heller* and *McDonald*; but due to the need to interpret various statutes and case law holdings, the issue is somewhat more complex. This is where the theory of the right to "keep and bear arms" runs into a maze of statutes and definitions that limit that right. . . .

In this case, we are called upon to review the sufficiency of the evidence to support the defendant's convictions. To do this, we must know the elements of the crime the State must prove to the requisite level of proof to obtain a conviction. But it does not stop there. We must also know whether there are circumstances that prevent the conduct from being criminal. Such circumstances can be broadly characterized as either exceptions or defenses. Moreover, exceptions and defenses can be further divided. For example, defenses can be ordinary defenses or they can be affirmative defenses. Analyzing what they are with precision is critical to understanding who, the State or the defendant, has to prove what, and to what level of certainty, for the State to obtain a valid criminal conviction. . . .

In this case, the indictment included the allegation that Tafel had received "effective notice" under section 30.06 of the Penal Code. . . . [T]he legislature decided that if a person was not given "effective notice" under section 30.06, the subsection did not apply. §46.035(i). It appears that the legislature meant that there is no offense without effective notice. Thus, whether or not a person was given effective notice seems to be a necessary part of the offense.

Effective Notice

. . . What is "effective notice?" What seems like a simple question is not. The most difficult aspect of understanding the meaning of "effective notice" is to distinguish it from what it is not. "Effective notice" is not knowledge of section 46.035(c) of the Penal Code. It is not general familiarity with or understanding of the statute regarding where concealed carry is prohibited. It is not an awareness of a risk of criminal prosecution if the Penal Code provision is violated. The Penal Code elements of the crime, or overcoming the defense, are only satisfied if the defendant received "effective notice."

The fundamental flaw in the prosecution of Tafel was the prosecutor's, and ultimately the trial court's, belief that mere knowledge of the Penal Code provision was the equivalent of notice. This is evident in a question to County Attorney Henke when the prosecutor asked:

> And regardless of whether or not a notice was posted, if they had actual knowledge that they were not approved to do that, it really wouldn't matter if it [the 30.06 sign] was posted.

But it does matter. The Penal Code says it matters. Notice, not knowledge of the statute, is required.

But in this growing quagmire of legal analysis, "effective notice" of what? An excellent question! Let us return to the statute at issue: "(i) Subsections (b)(4), (b)(5), (b)(6), and (c) *do not apply* if the actor was not given *effective notice under Section 30.06*." See current version at TEX. PENAL CODE ANN. §46.035(i) (emphasis added). Thus, we turn our attention to section 30.06 of the Penal Code.

What does it mean to "receive notice?" The statute seems to provide the answer to this question; but upon further analysis the answer it provides is overly simplistic and leaves more questions than it answers. Subsection (b) of section 30.06 provides:

> (b) For purposes of this section, a person receives notice if the owner of the property or someone with apparent authority to act for the owner provides notice to the person by oral or written communication.

The statute appears, at first glance, to be functionally defective because it seems to use the term "notice"

to describe what it means to receive notice. This is worth further analysis. Because the license holder must "receive notice," this subsection is actually defining who can provide the notice and the form in which the notice must be provided. To be notice, the notice must be provided by either

1. The owner of the property; or
2. Someone with apparent authority to act for the owner.

In this proceeding, subdivision one is not at issue. The actual owner of the property was never identified. Hamilton County was apparently leasing the property as temporary space while the county's courthouse was being renovated. But let us not be unreasonable in our application of the statute. The County "owned" the lease that gave it the authority to occupy the property. Thus, I have no problem with the concept that the "owner" for purposes of the application of the statute was Hamilton County. Hamilton County is a governmental corporate entity. That entity is represented by the commissioners court. The evidence established that prior to Tafel's arrest, the commissioners court, as such, took no action to notify anyone, including Tafel, that a license holder could not enter upon the property with a concealed handgun.

Because the "owner" of the property did not provide notice to Tafel, we must consider whether "someone with apparent authority to act for the owner" provided notice to Tafel. The State contends that the required notice was provided by Sheriff Bewley, County Attorney Henke, or County Judge Mills. We will look at what oral or written communication was provided by each of these persons in turn but there are two issues that must be discussed first. The two issues are (1) what is the acceptable form of the communication and (2) what is the information that must be communicated.

a) Form of the Communication

There are two forms of communications that are authorized by the statute; oral and written. I will deal with written communications first.

i) Written Communications

There are two forms of written communication authorized by the statute. The statute dictates the form and content of both types of written communication. . . .

Whether a written communication that complied with the statute was provided to Tafel can be dispensed with quickly. There was not. However, this is where some confusion is created which must be addressed. There is no suggestion in the record of any card or other document having been provided to Tafel. There was, however, testimony that at some point the County Judge put up a sign at the public entrance to the room where commissioners court met. The State relies on the posted sign as notice.

. . . The testimony about the sign posted by Judge Mills is less than clear. It is not clear when it was posted, except that it was some time prior to the day of Tafel's arrest and prior to Tafel's meeting with Sheriff Bewley as will be discussed later. It is not clear when it was removed, except that it was removed sometime after Tafel's arrest. It is not clear precisely what the sign said or the size of the lettering, except that it did not comply with the requirements of the statute to be the written communication. See TEX. PENAL CODE ANN. §30.06(c)(3)(B). Specifically, the only testimony about the wording on the sign was that it had no Spanish content as required to meet the statutory definition of "Written Communication." Id.

Thus, it is undisputed, and the record contains no evidence to the contrary, that there was no "written communication" within the meaning of the statute that would have given Tafel, or any other concealed handgun license holder, the required notice to make entry on the property with a concealed handgun a criminal violation.

ii) Oral Communications

Because there was no "written communication," no written card and no compliant sign, the State now has to rely on an oral communication for section 30.06 notice. And we know the oral communication had to be from "someone with apparent authority to act for the owner." "Written communication" was expressly and meticulously defined by the statute. So now we turn to the statute to the definition of "oral communication."

There is none.

Notwithstanding the detailed description of two different forms of what constitutes "written communication," the legislature provided absolutely nothing to define or describe an adequate or compliant "oral communication." It would, however, be unreasonable to require anything more to be communicated orally than in writing. Further, the oral communication should be adequate if communicated in English unless the person making the oral communication has reason to believe the person does not comprehend English.

There is nothing to suggest that Tafel cannot comprehend English and, as will be seen from the written statement he gave to Sheriff Bewley, he can speak English and is a college graduate. So we now turn to what the evidence shows was orally communicated in English to Tafel.

b) Means of Communication

Three people potentially communicated notice to Tafel. We will discuss each person's communication separately.

i) Sheriff Bewley

We will first examine what Sheriff Bewley communicated to Tafel. Tafel gave Sheriff Bewley a written statement. It is important to know the reason this statement was created. In response to a citizen complaint, Sheriff Bewley had confronted Tafel to get "his side of the story." Thus, Bewley confronted Tafel with the complaint. The record does not contain a recounting of the dialogue between Bewley and Tafel. The only evidence we have of what Bewley said or told Tafel is that which is contained in the statement Tafel gave Bewley as a result of the confrontation. In reading the statement, particular attention should be given to what oral notice was given to Tafel that would be the equivalent of what is required information in a written communication. In summary, that would be words to the effect that "Pursuant to Section 30.06, Penal Code, a person licensed under the concealed handgun law, may not enter this property with a concealed handgun."

There are a few specific passages [in the defendant's statement] that should be analyzed. We will discuss each in turn. There is a statement that: "Sheriff Bewley investigated Texas Penal Codes and determined that section 46.03 and 46.035 are applicable when commissioners court is in session." While they may be "applicable," that is not the issue. The issue is whether Sheriff Bewley provided the required oral communication to Tafel that he could not lawfully enter the premises. This portion of Tafel's statement does not support such a conclusion.

The statement later says, ". . . weeks later . . . Sheriff Bewley confirmed that according to Texas Penal Code section 46.03 and 46.035 that I would be breaking the law if I carried in the courtroom when in session." Unquestionably this portion of Tafel's statement is closer to documenting something that Sheriff Bewley may have provided to Tafel that would qualify as the required notice. But both forms of the written communication for notice require a specific reference to section 30.06 and that was not included in this implied oral communication from Sheriff Bewley. And each statement in the document must be considered in light of the language: "Again though I must reiterate that no determination was made of what is legal and what wasn't legal. Today, however, we do know, and that is why I do not carry during court." If these two sentences are isolated, it is clear that there was no determination made during the previous conversations with Sheriff Bewley but that, as of the date of the statement, they had determined it would be a violation.

But then there is the most important sentence in the entire statement: "We know state law says that a 30.06 sign must be posted to stop concealed carry within that building. At no time were any signs posted until recently, and now I know that I cannot carry a weapon past that sign." This brings home the need to reference section 30.06 in the oral communication — it informs the recipient of the basis for being excluded from the property whether it is an oral communication or a written sign.

The only reasonable inference from these statements in context is that because the purported 30.06 sign was now posted, as of the date the statement was given, which was February 23, 2011, Sheriff Bewley and Commissioner Tafel both thought that the presence of the sign was what made entry on the property by a license holder with a concealed handgun illegal. They were not relying on any type of oral notice. They were

relying solely on the posted sign.

But, as discussed above, we know the purported section 30.06 sign did not comply with the required language of the statute. Because the sign did not comply with the statute, it was not a "written communication" as defined by the statute.

. . . This Penal Code provision defines conduct that is unlawful but only if a person provides notice to the actor. Thus, the conduct is not criminal without the required notice.[17] . . .

It is easy to get sucked into being comfortable with what Tafel "knew." And looking at all the back and forth and discussion, it is easy to conclude that Tafel "knew" he could not carry his concealed weapon past the posted sign. But regardless of what Tafel and the Sheriff thought they knew at the time, they were wrong on what made the conduct a violation. And what the State had to prove was that Tafel was given notice as required by section 30.06 that as a license holder he could not enter the property with a concealed handgun. That notice did not come from Sheriff Bewley. . . .

ii) County Attorney Henkes

The next potential source of an oral communication to Tafel relied on by the State was Tafel's discussion with the County Attorney, Mark Henkes. Probably the easiest way to approach the ineffectiveness of the State's position that Henkes could be the person providing an "oral communication" to Tafel is that Henkes does not appear to be a person that had apparent authority to provide the statutory notice for the County. Even if he had apparent authority, at no point in his testimony does Henkes testify that he provided oral notice that would comply with section 30.06 of the Penal Code. . . .

Henkes approached the issue from a risk management perspective that carrying a concealed handgun during a commissioners court meeting which was being held in a room that was also sometimes used as a district courtroom was not worth the risk of a felony prosecution and that he would advise against it. Henkes admitted he was not particularly familiar with the section 30.06 notice requirement because it related only to a possible misdemeanor violation and he was focused on the possibility of a felony violation. Accordingly, there was nothing to which he testified that could be construed as having been an "oral communication" that complied with the section 30.06 notice requirement.

iii) County Judge

This brings us to the County Judge, Randy Mills, and his testimony about whether he provided the notice required by section 30.06 to make the entry of a license holder on the property with a concealed handgun a violation. He did not. Judge Mills did not testify that the sign he posted complied with section 30.06. So, as discussed above, he provided no evidence of a written communication. Moreover, sometime after Tafel was confronted by Sheriff Bewley and after the discussion with County Attorney Henkes, Judge Mills provided a letter to Tafel on Hamilton County letterhead that expressly authorized Tafel to carry his handgun during commissioners court meetings. . . .

c) Summary — No 30.06 Notice Was Given

In summary, there is nothing in this record to show that Tafel was given the notice described in section 30.06 of the Penal Code that would make his carrying of a concealed handgun in commissioners court a violation of the Penal Code. But if I am mistaken on it being an exception and therefore the State's burden to negate such notice is an element of the offense; and instead, it was merely a defense and thus Tafel has the burden to raise the defense of lack of such notice, I would hold that Tafel raised the issue and the State failed to overcome the defense that section 30.06 notice was not provided. Alternately, I would hold Tafel proved the defense, even if not his burden, as a matter of law that the required notice was not given and that a

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17. Compare the offense of "Left Lane for Passing Only" and the notice required to convict a driver thereof. See Abney v. State, 394 S.W.3d 542 (Tex. Crim. App. 2013). There are other crimes which require proof of some type of notice before the conduct is criminal. See generally Harvey v. State, 78 S.W.3d 368 (Tex. Crim. App. 2002) (notice of protective order); Ex parte Vetterick, 744 S.W.2d 598 (Tex. 1988) (notice of contempt); In re Moreno, 328 S.W.3d 915 (Tex. App. — Eastland 2010, orig. proceeding) (same).

reasonable fact finder could not have rejected Tafel's defense in that regard.

[In addition,] Judge Mills provided Tafel a letter on County letterhead that is quoted in full above. The operative portion of the letter for this discussion is as follows:

> Commissioner Mark Tafel is authorized by this office to exercise his authority under Texas Concealed Handgun laws to carry concealed handgun in Hamilton County Commissioners Court. This is to remain in effect until further notification.

. . . The issue thus framed is: Could the letter from Judge Mills override the assumed effectiveness of the oral notices? It has to. And why not? Any other result would leave the actor in the untenable position of not knowing whether it is lawful or unlawful to enter the property with his handgun under his concealed handgun license. Clarity is critical in determining when conduct is criminal. Laws are routinely held invalid for being vague.[20] In the fact pattern described with our assumption of the receipt of a compliant oral notice under section 30.06, the countermanding of the notice that otherwise makes the conduct criminal, has to have the effect of taking away the criminal nature of the otherwise lawful conduct.

. . . On the facts of this case, if we assume the section 30.06 sign posted by Judge Mills was a compliant sign even though it did not contain the required information and was not approved for posting by the commissioners court, then it seems inescapable that Judge Mills could issue a letter than authorizes a particular person with a concealed handgun license to enter the premises without that entry being a criminal act. Surely the person who can prohibit legal entry to all concealed handgun license holders can also authorize an exception. . . .

In summary, . . . I would hold that any person authorized to provide any of the forms or methods of notice under sections 46.035(i) and 30.06 that makes the conduct prohibited/criminal may also rescind, revoke, or withdraw the notice (in essence authorizing or permitting the conduct) by any of those same methods. Thus, because Judge Mills posted the sign on which the State relies to make the conduct of Tafel criminal, I believe Judge Mills also had the authority to give permission to Tafel that authorized his conduct that would otherwise be criminal. Judge Mills did so in writing.[22] Therefore, Tafel's conduct was not a criminal violation of section 46.035(c). . . .

Notes and Questions

1. Do you think that Commissioner Tafel was treated fairly here? Why wasn't the letter from County Judge Mills sufficient to authorize Tafel's carrying of his concealed handguns into the meetings of the Commissioner's Court? Even if the County Attorney and Sheriff told Tafel otherwise, shouldn't Judge Mills' letter take priority? Or, at the very least, shouldn't the letter be treated as sufficient for Tafel to raise a valid "mistake of law" defense?

On the other hand, what if other law-abiding citizens of Hamilton County, Texas, felt threatened or intimidated by the suspected presence of concealed weapons at a public meeting of the Commissioner's Court? Shouldn't their rights to attend a local government meeting without having to worry about who might be packing heat count for something, too?

Why do you think this case was prosecuted in the first place? Is this just a case of local political infighting run amok?

2. In addition to his misdemeanor conviction, Tafel also was subjected to the forfeiture of his two handguns to the government. This is a relatively common collateral consequence of a gun crime — sometimes as an adjunct to the criminal conviction, and sometimes pursuant to a separate civil forfeiture proceeding. Chief Justice Gray, in dissent, objected to the forfeiture as well:

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20. See for example, Kolender v. Lawson, 461 U.S. 352 (1983) (California statute requiring loiterers to provide "credible and reliable" identification and account for his presence was unconstitutionally vague) . . . .

22. In this context, the written authorization from Judge Mills does not have to be a legal opinion as defined for a mistake-of-law defense.

> [T]he State moved to forfeit Tafel's two handguns pursuant to article 18.19(e). In relevant part, subsection (e) provides:
>
> > If the person found in possession of a weapon is convicted of an offense involving the use of the weapon, before the 61st day after the date of conviction the court entering judgment of conviction shall order destruction of the weapon, sale at public sale . . . , or forfeiture to the state. . . . If the court entering judgment of conviction does not order the destruction, sale, or forfeiture of the weapon within the period prescribed by this subsection, the law enforcement agency holding the weapon may request an order of destruction, sale, or forfeiture of the weapon from a magistrate.
>
> TEX. CODE CRIM. PROC. ANN. art. 18.19(e) (West 2015).
>
> . . . Here, it was not illegal for Tafel to carry a handgun. He was licensed to carry. It was the place into which he carried those handguns which arguably caused his conduct to be a criminal offense. The carrying of the handguns did not facilitate another offense, let alone a felony offense. Thus, according to the definitions used by the Court, there was no evidence that Tafel *used* the handguns which would authorize their forfeiture. The Court errs in holding otherwise.

Do you agree with Chief Justice Gray that Tafel did not "use" the two handguns, and therefore they were not properly subject to forfeiture? Or, as the majority concluded in upholding the forfeiture, did Tafel's physical carrying of the handguns into the meeting room constitute a prohibited "use" of those handguns?

B. GUN ENHANCEMENTS

Thompson v. State

Court of Appeals of Georgia

277 Ga. App. 323; 626 S.E.2d 825 (2006)

Opinion by MIKELL, Judge.

A Richmond County jury found Roger Thompson guilty of aggravated assault, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. Thompson appeals from his judgment of conviction and sentence, contending (i) that the evidence was insufficient to support the guilty verdict on the charge of aggravated assault, (ii) that the trial court erred by allowing testimony that Thompson's nickname was "Shotgun," and (iii) that the trial court erred by failing to instruct the jury on reckless conduct as a lesser included offense of aggravated assault. We affirm for the reasons set forth below.

Viewed in a light most favorable to the jury's verdict, the evidence shows that around 2:00 A.M. on April 1, 2000, the victim and two friends drove to the Hale Street Apartments in Augusta. There were more than 30 people in the apartment parking lot who were "having a good time." The victim became involved in an argument with another person in the parking lot. About two minutes after the argument began, the victim saw Thompson, who the victim only knew by the nickname "Shotgun," come out of an upstairs apartment. Thompson fired a gun three times, aiming "towards [the victim], towards the ground." The second shot grazed the victim over his left eye. The victim, who was scared, ran to the street to call for help on his cellphone.

1. Thompson claims the evidence was insufficient to support his conviction for aggravated assault because he did not intend to assault the victim. We disagree.

The indictment charged Thompson of aggravated assault with a deadly weapon by making "an assault upon the person of the [victim], with a certain handgun, a deadly weapon, by shooting him." See OCGA §16-5-21(a)(2) (a person commits the offense of aggravated assault when he or she assaults with a deadly weapon).

> The offense of aggravated assault has two essential elements: (1) that an assault, as defined in OCGA §16-5-20 be committed on the victim; and (2) that it was aggravated by (a) an intention to

murder, rape, or to rob, or (b) use of a deadly weapon. OCGA §16-5-20 states: (a) a person commits the offense of simple assault when he either: (1) Attempts to commit a violent injury to the person of another; or (2) Commits an act which places another in reasonable apprehension of immediately receiving a violent injury.

(Citations, punctuation and emphasis omitted.) Williams v. State, 208 Ga. App. 12, 13, 430 S.E.2d 157 (1993).

The indictment only specifies that Thompson made an "assault" with a deadly weapon, and "[s]uch general language sufficiently charges an assault by way of either manner contained in the assault statute." (Footnote omitted.) Tucker v. State, 245 Ga. App. 551, 553, 538 S.E.2d 458 (2000). The trial court charged the jury that "assault is an intent to commit a violent injury to the person of another or an act which places another person in reasonable apprehension of immediately receiving a violent injury." Viewing the evidence in a light most favorable to the jury's verdict, a rational trier of fact could conclude that Thompson assaulted the victim with his gun, a deadly weapon, by shooting it toward the victim, an act which placed the victim in reasonable apprehension of receiving a violent injury. See Dukes v. State, 264 Ga. App. 820, 824, 592 S.E.2d 473 (2003) (a rational trier of fact could conclude that defendant committed the crime of aggravated assault by shooting his gun toward the victim).

Thompson argues that he did not intend to assault the victim, but that he fired the shots in order to quell the disturbance in the parking lot. However, the evidence showed that Thompson intended to commit the act which "place[d] another in reasonable apprehension of immediately receiving a violent injury," OCGA §16-5-20(a)(2). See *Williams*, supra, at 13-14 (victim's reasonable apprehension of receiving an immediate violent injury established crime of aggravated assault). "There is an intent of the accused that must be shown, but it is only the criminal intent to commit the acts which caused the victim to be reasonably apprehensive of receiving a violent injury, not any underlying intent of the accused in assaulting the victim." (Citation and footnote omitted.) Maynor v. State, 257 Ga. App. 151, 156, 570 S.E.2d 428 (2002). Accordingly, we find the evidence was sufficient to support Thompson's conviction for aggravated assault under the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979).

2. Thompson also claims that the trial court erred by denying his motion in limine to prevent the prosecution from presenting evidence that his nickname was "Shotgun." We disagree. A trial court's ruling on a motion in limine is reviewed for abuse of discretion. See Johnson v. State, 275 Ga. 650, 652, 571 S.E.2d 782 (2002).

Our Supreme Court has held that reference to a defendant by his nickname does not reflect on the defendant's bad character. Riley v. State, 268 Ga. 640, 643, 491 S.E.2d 802) (1997). See Burtts v. State, 269 Ga. 402-403, 499 S.E.2d 326 (1998) (trial court did not err in allowing witnesses to refer to defendant by his nickname, "Killer Corey," in defendant's murder trial). Thompson nevertheless relies on Justice Sears's suggestion in *Burtts*, supra, through her special concurrence, that "trial courts should consider whether the probative value associated with recitation of the street name in the jury's presence is outweighed by the prejudicial impact of the jury's hearing the defendant referred to by a nickname that explicitly suggests guilt." Id. at 404. However, even if we review the trial court's ruling in light of the approach suggested by Justice Sears, we must conclude that the trial court did not abuse its discretion in allowing testimony as to Thompson's street name. The testimony was probative of the issue of identification, and the nickname "Shotgun" did not explicitly suggest Thompson's guilt of aggravated assault. Accordingly, we conclude that the trial court did not abuse its discretion in denying Thompson's motion in limine.

3. Finally, Thompson claims the trial court erred by failing to give his requested jury charge on the lesser included offense of reckless conduct. Again, we disagree.

"[A] written request to charge a lesser included offense must always be given if there is any evidence that the defendant is guilty of the lesser included offense." State v. Alvarado, 260 Ga. 563, 564, 397 S.E.2d 550 (1990). "However, when the evidence establishes all of the elements of the indicted offense and there is no evidence [showing] the lesser offense, there is no error in refusing to charge the lesser offense." Anderson v. State, 264 Ga. App. 362, 365, 590 S.E.2d 729 (2003).

Thompson testified that he procured a gun from a neighbor in order to "get these folks attention, man, stop all the arguing," and then stepped in between the victim and the person the victim was arguing with, before firing the gun twice. While Thompson testified he "ain't . . . shot at" the victim, Thompson intentionally fired the gun, he was aware of the victim's location, and his testimony was consistent with the victim's testimony that Thompson aimed toward the victim, toward the ground. Thus, "[t]here was no evidence that [Thompson] was simply negligent in either pointing or firing the pistol and thus no evidence of reckless conduct." Anthony v. State, 276 Ga. App. 107, 110, 622 S.E.2d 450 (2005). See Tew v. State, 246 Ga. App. 270, 274-275, 539 S.E.2d 579 (2000) (where evidence showed that defendant pointed his gun at the victims and fired, and there was no evidence that he was negligent in doing so, it was not error for the court to refuse to charge on reckless conduct as lesser included offense of aggravated assault); Hall v. State, 235 Ga. App. 44, 46-47, 508 S.E.2d 703 (1998) (criminal negligence, which is an essential element of reckless conduct, was lacking where evidence showed defendant deliberately pointed a pistol at the victim). Shaw v. State, 238 Ga. App. 757, 519 S.E.2d 486) (1999), relied upon by Thompson, is factually distinguishable because the defendant in that case "might have merely fired a gun out of the car up into the air while the police were chasing the car in which he was riding." Id. at 759. Therefore, we conclude the trial court did not err in refusing to give a charge on reckless conduct as a lesser included offense of aggravated assault.

Judgment affirmed. Andrews, P.J., and Phipps, J., concur.

Notes and Questions

1. Did Roger Thompson (with his unfortunate nickname of "Shotgun") deserve a jury instruction on the lesser included offense of "reckless conduct" in this case? What does the Georgia court mean when it says, "criminal negligence . . . is an essential element of reckless conduct"? On the other hand, isn't it obvious — as the court ultimately concludes — that Thompson satisfies the statutory definition of the greater crime of "aggravated assault"?

2. What, exactly, is the *mens rea* required for the crime of aggravated assault in Georgia, pursuant to OCGA §16-5-20(a)? Is it a general intent crime, a specific intent crime, or some combination of the two? How does that affect your view of the result in *Thompson*?

Dean v. United States

Supreme Court of the United States

556 U.S. 568 (2009)

ROBERTS, C.J., delivered the opinion of the Court.

Accidents happen. Sometimes they happen to individuals committing crimes with loaded guns. The question here is whether extra punishment Congress imposed for the discharge of a gun during certain crimes applies when the gun goes off accidentally.

I

Title 18 U.S.C. §924(c)(1)(A) criminalizes using or carrying a firearm during and in relation to any violent or drug trafficking crime, or possessing a firearm in furtherance of such a crime. An individual convicted of that offense receives a 5-year mandatory minimum sentence, in addition to the punishment for the underlying crime. §924(c)(1)(A)(i). The mandatory minimum increases to 7 years "if the firearm is brandished" and to 10 years "if the firearm is discharged." §§924(c)(1)(A)(ii), (iii).

In this case, a masked man entered a bank, waved a gun, and yelled at everyone to get down. He then walked behind the teller counter and started removing money from the teller stations. He grabbed bills with his left hand, holding the gun in his right. At one point, he reached over a teller to remove money from her drawer. As he was collecting the money, the gun discharged, leaving a bullet hole in the partition between two stations. The robber cursed and dashed out of the bank. Witnesses later testified that he seemed surprised that the gun had gone off. No one was hurt.

Police arrested Christopher Michael Dean and Ricardo Curtis Lopez for the crime. Both defendants were charged with conspiracy to commit a robbery affecting interstate commerce, in violation of 18 U.S.C. §1951(a), and aiding and abetting each other in using, carrying, possessing, and discharging a firearm during an armed robbery, in violation of §924(c)(1)(A)(iii) and §2. At trial, Dean admitted that he had committed the robbery, and a jury found him guilty on both the robbery and firearm counts. The District Court sentenced Dean to a mandatory minimum term of 10 years in prison on the firearm count, because the firearm "discharged" during the robbery. §924(c)(1)(A)(iii).

Dean appealed, contending that the discharge was accidental, and that the sentencing enhancement in §924(c)(1)(A)(iii) requires proof that the defendant intended to discharge the firearm. The Court of Appeals affirmed, holding that separate proof of intent was not required. 517 F.3d 1224, 1229 (CA11 2008). That decision created a conflict among the Circuits over whether the accidental discharge of a firearm during the specified crimes gives rise to the 10-year mandatory minimum. See United States v. Brown, 449 F.3d 154 (CADC 2006) (holding that it does not). We granted certiorari to resolve that conflict. 555 U.S. 1028 (2008).

II

Section 924(c)(1)(A) provides:

> "[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime —
>
> "(i) be sentenced to a term of imprisonment of not less than 5 years;
>
> "(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years."

The principal paragraph defines a complete offense and the subsections "explain how defendants are to 'be sentenced.' " Harris v. United States, 536 U.S. 545, 552 (2002). Subsection (i) "sets a catchall minimum" sentence of not less than five years. Subsections (ii) and (iii) increase the minimum penalty if the firearm "is brandished" or "is discharged." The parties disagree over whether §924(c)(1)(A)(iii) contains a requirement that the defendant intend to discharge the firearm. We hold that it does not.

A

"We start, as always, with the language of the statute." Williams v. Taylor, 529 U.S. 420, 431 (2000). The text of subsection (iii) provides that a defendant shall be sentenced to a minimum of 10 years "if the firearm is discharged." It does not require that the discharge be done knowingly or intentionally, or otherwise contain words of limitation. As we explained in Bates v. United States, 522 U.S. 23 (1997), in declining to infer an " 'intent to defraud' " requirement into a statute, "we ordinarily resist reading words or elements into a statute that do not appear on its face." Id., at 29.

Congress's use of the passive voice further indicates that subsection (iii) does not require proof of intent. The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability. Cf. Watson v. United States, 552 U.S. 74, 81 (2007) (use of passive voice in statutory phrase "to be used" in 18 U.S.C. §924(d)(1) reflects "agnosticism . . . about who does the using"). It is whether something happened — not how or why it happened — that matters.

The structure of the statute also suggests that subsection (iii) is not limited to the intentional discharge of a firearm. Subsection (ii) provides a 7-year mandatory minimum sentence if the firearm "is brandished." Congress expressly included an intent requirement for that provision, by defining "brandish" to mean "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, *in order to intimidate* that person." §924(c)(4) (emphasis added). The defendant must have intended to brandish the firearm, because the brandishing must have been done for a specific purpose. Congress did not, however, separately define "discharge" to include an intent requirement. "[W]here Congress includes

particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

Dean argues that the statute is not silent on the question presented. Congress, he contends, included an intent element in the opening paragraph of §924(c)(1)(A), and that element extends to the sentencing enhancements. Section 924(c)(1)(A) criminalizes using or carrying a firearm "during and in relation to" any violent or drug trafficking crime. In Smith v. United States, 508 U.S. 223 (1993), we stated that the phrase "in relation to" means "that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." Id., at 238. Dean argues that the adverbial phrase thus necessarily embodies an intent requirement, and that the phrase modifies all the verbs in the statute — not only use, carry, and possess, but also brandish and discharge. Such a reading requires that a perpetrator knowingly discharge the firearm for the enhancement to apply. If the discharge is accidental, Dean argues, it is not "in relation to" the underlying crime.

The most natural reading of the statute, however, is that "in relation to" modifies only the nearby verbs "uses" and "carries." The next verb — "possesses" — is modified by its own adverbial clause, "in furtherance of." The last two verbs — "is brandished" and "is discharged" — appear in separate subsections and are in a different voice than the verbs in the principal paragraph. There is no basis for reading "in relation to" to extend all the way down to modify "is discharged." The better reading of the statute is that the adverbial phrases in the opening paragraph — "in relation to" and "in furtherance of" — modify their respective nearby verbs, and that neither phrase extends to the sentencing factors.

But, Dean argues, such a reading will lead to absurd results. The discharge provision on its face contains no temporal or causal limitations. In the absence of an intent requirement, the enhancement would apply "regardless of when the actions occur, or by whom or for what reason they are taken." Brief for Petitioner 11-12. It would, for example, apply if the gun used during the crime were discharged "weeks (or years) before or after the crime." Reply Brief for Petitioner 11.

We do not agree that implying an intent requirement is necessary to address such concerns. As the Government recognizes, sentencing factors such as the one here "often involve . . . special features of the manner in which a basic crime was carried out." Brief for United States 29 (quoting Harris, 536 U.S., at 553; internal quotation marks omitted). The basic crime here is using or carrying a firearm during and in relation to a violent or drug trafficking crime, or possessing a firearm in furtherance of any such crime. Fanciful hypotheticals testing whether the discharge was a "special featur[e]" of how the "basic crime was carried out," id., at 553 (internal quotation marks omitted), are best addressed in those terms, not by contorting and stretching the statutory language to imply an intent requirement.

B

Dean further argues that even if the statute is viewed as silent on the intent question, that silence compels a ruling in his favor. There is, he notes, a presumption that criminal prohibitions include a requirement that the Government prove the defendant intended the conduct made criminal. . . . "[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." Staples v. United States, 511 U.S. 600, 606 (1994).

Dean argues that the presumption is especially strong in this case, given the structure and purpose of the statute. In his view, the three subsections are intended to provide harsher penalties for increasingly culpable conduct: a 5-year minimum for using, carrying, or possessing a firearm; a 7-year minimum for brandishing a firearm; and a 10-year minimum for discharging a firearm. Incorporating an intent requirement into the discharge provision is necessary to give effect to that progression, because an accidental discharge is less culpable than intentional brandishment. See *Brown*, 449 F.3d at 156.

It is unusual to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts. See 2 W. LaFave, Substantive Criminal Law §14.4, pp 436-437 (2d ed. 2003). The felony-murder rule is a familiar example: If a defendant commits an unintended homicide while committing another felony, the defendant can be

convicted of murder. See 18 U.S.C. §1111. The Sentencing Guidelines reflect the same principle. See United States Sentencing Commission, Guidelines Manual §2A2.2(b)(3) (Nov. 2008) (USSG) (increasing offense level for aggravated assault according to the seriousness of the injury); §2D2.3 (increasing offense level for operating or directing the operation of a common carrier under the influence of alcohol or drugs if death or serious bodily injury results). . . .

Here the defendant is already guilty of unlawful conduct twice over: a violent or drug trafficking offense and the use, carrying, or possession of a firearm in the course of that offense. That unlawful conduct was not an accident. See *Smith*, 508 U.S., at 238.

The fact that the actual discharge of a gun covered under §924(c)(1)(A)(iii) may be accidental does not mean that the defendant is blameless. The sentencing enhancement in subsection (iii) accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible. See *Harris*, supra, at 553. An individual who brings a loaded weapon to commit a crime runs the risk that the gun will discharge accidentally. A gunshot in such circumstances — whether accidental or intended — increases the risk that others will be injured, that people will panic, or that violence (with its own danger to those nearby) will be used in response. Those criminals wishing to avoid the penalty for an inadvertent discharge can lock or unload the firearm, handle it with care during the underlying violent or drug trafficking crime, leave the gun at home, or — best yet — avoid committing the felony in the first place.

Justice Stevens contends that the statute should be read to require a showing of intent because harm resulting from a discharge may be punishable under other provisions, such as the Sentencing Guidelines (but only if "bodily injury" results) (citing USSG §2B3.1(b)(3)). But Congress in §924(c)(1)(A)(iii) elected to impose a mandatory term, without regard to more generally applicable sentencing provisions. Punishment available under such provisions therefore does not suggest that the statute at issue here is limited to intentional discharges.

And although the point is not relevant under the correct reading of the statute, it is wrong to assert that the gunshot here "caused no harm." By pure luck, no one was killed or wounded. But the gunshot plainly added to the trauma experienced by those held during the armed robbery. See, e.g., App. 22 (the gunshot "shook us all"); ibid. ("Melissa in the lobby popped up and said, 'oh, my God, has he shot Nora?'").

C

Dean finally argues that any doubts about the proper interpretation of the statute should be resolved in his favor under the rule of lenity. "The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. . . . To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute." Muscarello v. United States, 524 U.S. 125, 138-139 (1998). In this case, the statutory text and structure convince us that the discharge provision does not contain an intent requirement. Dean's contrary arguments are not enough to render the statute grievously ambiguous.

* * *

Section 924(c)(1)(A)(iii) requires no separate proof of intent. The 10-year mandatory minimum applies if a gun is discharged in the course of a violent or drug trafficking crime, whether on purpose or by accident. The judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

Justice STEVENS, dissenting.

Accidents happen, but they seldom give rise to criminal liability. Indeed, if they cause no harm they seldom give rise to any liability. The Court today nevertheless holds that petitioner is subject to a mandatory additional sentence — a species of criminal liability — for an accident that caused no harm. For two reasons, 18 U.S.C. §924(c)(1)(A)(iii) should not be so construed. First, the structure of §924(c)(1)(A) suggests that Congress intended to provide escalating sentences for increasingly culpable conduct and that the discharge provision therefore applies only to intentional discharges. Second, even if the statute did not affirmatively support that inference, the common-law presumption that provisions imposing criminal penalties require proof of *mens rea* would lead to the same conclusion. Cf. United States v. X-Citement Video, Inc., 513 U.S.

64, 70 (1994). Accordingly, I would hold that the Court of Appeals erred in concluding that petitioner could be sentenced under §924(c)(1)(A)(iii) absent evidence that he intended to discharge his gun.

I

It is clear from the structure and history of §924(c)(1)(A) that Congress intended §924(c)(1)(A)(iii) to apply only to intentional discharges. The statute's structure supports the inference that Congress intended to impose increasingly harsh punishment for increasingly culpable conduct. The lesser enhancements for carrying or brandishing provided by clauses (i) and (ii) clearly require proof of intent. Clause (i) imposes a 5-year mandatory minimum sentence for using or carrying a firearm "during and in relation to" a crime of violence or drug trafficking offense, or possessing a firearm "in furtherance" of such an offense. As we have said before, the provision's relational terms convey that it does not reach inadvertent conduct. See Smith v. United States, 508 U.S. 223, 238 (1993) ("The phrase 'in relation to' . . . at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence"). Similarly, clause (ii) mandates an enhanced penalty for brandishing a firearm only upon proof that a defendant had the specific intent to intimidate. See §924(c)(4). In that context, the most natural reading of clause (iii), which imposes the greatest mandatory penalty, is that it provides additional punishment for the more culpable act of intentional discharge.[1]

The legislative history also indicates that Congress intended to impose an enhanced penalty only for intentional discharge. In Bailey v. United States, 516 U.S. 137, 148 (1995), the Court held that "use" of a firearm for purposes of §924(c)(1) required some type of "active employment," such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire." Congress responded to *Bailey* by amending §924(c)(1), making it an offense to "posses[s]" a firearm "in furtherance of" one of the predicate offenses and adding sentencing enhancements for brandishing and discharge. See Pub. L. 105-386, §1(a)(1), 112 Stat. 3469; see also 144 Cong. Rec. 26608 (1998) (remarks of Sen. DeWine) (referring to the amendments as the "*Bailey* Fix Act"). Given the close relationship between the *Bailey* decision and Congress' enactment of the brandishing and discharge provisions, those terms are best read as codifying some of the more culpable among the "active employment[s]" of a firearm that the Court identified in *Bailey.*

II

Even if there were no evidence that Congress intended §924(c)(1)(A)(iii) to apply only to intentional discharges, the presumption that criminal provisions include an intent requirement would lead me to the same conclusion. Consistent with the common-law tradition, the requirement of *mens rea* has long been the rule of our criminal jurisprudence. The concept of crime as a "concurrence of an evil-meaning mind with an evil-doing hand . . . took deep and early root in American soil." Morissette v. United States, 342 U.S. 246, 251-252 (1952). . . . [A]bsent a clear statement by Congress that it intended to create a strict-liability offense, a *mens rea* requirement has generally been presumed in federal statutes. See id., at 273; Staples v. United States, 511 U.S. 600, 605-606 (1994). With only a few narrowly delineated exceptions for such crimes as statutory rape and public welfare offenses, the presumption remains the rule today.

Although mandatory minimum sentencing provisions are of too recent genesis to have any common-law pedigree, . . . there is no sensible reason for treating them differently from offense elements for purposes of the presumption of *mens rea.* Sentencing provisions of this type have substantially the same effect on a defendant's liberty as aggravated offense provisions. . . . If anything, imposition of a mandatory minimum sentence under §924(c)(1)(A) will likely have a greater effect on a defendant's liberty than will conviction for another offense because, unlike sentences for most federal offenses, sentences imposed pursuant to that section must be served consecutively to any other sentence. See §924(c)(1)(D)(ii).

. . . [M]andatory minimum sentencing provisions are in effect no different from aggravated offense provisions. The common-law tradition of requiring proof of *mens rea* to establish criminal culpability should

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1. Contrary to the Court's suggestion, Congress' provision of a specific intent element for brandishing and not for discharge only supports the conclusion that Congress did not intend enhancements under the discharge provision to require proof of specific intent; it supports no inference that Congress also intended to eliminate any general intent requirement and thereby make offenders strictly liable.

thus apply equally to such sentencing factors. Absent a clear indication that Congress intended to create a strict-liability enhancement, courts should presume that a provision that mandates enhanced criminal penalties requires proof of intent. This conclusion is bolstered by the fact that we have long applied the rule of lenity — which is similar to the *mens rea* rule in both origin and purpose — to provisions that increase criminal penalties as well as those that criminalize conduct. See United States v. R.L.C., 503 U.S. 291, 305 (1992) (plurality opinion); Bifulco v. United States, 447 U.S. 381, 387 (1980); Ladner v. United States, 358 U.S. 169, 178 (1958). Accordingly, I would apply the presumption in this case and avoid the strange result of imposing a substantially harsher penalty for an act caused not by an "evil-meaning mind" but by a clumsy hand. . . .

[The dissenting opinion of Justice BREYER is omitted.]

Rosemond v. United States

Supreme Court of the United States

572 U.S. 65 (2014)

JUSTICE KAGAN delivered the opinion of the Court.*

A federal criminal statute, §924(c) of Title 18, prohibits "us[ing] or carr[ying]" a firearm "during and in relation to any crime of violence or drug trafficking crime." In this case, we consider what the Government must show when it accuses a defendant of aiding or abetting that offense. We hold that the Government makes its case by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission. We also conclude that the jury instructions given below were erroneous because they failed to require that the defendant knew in advance that one of his cohorts would be armed.

I

This case arises from a drug deal gone bad. Vashti Perez arranged to sell a pound of marijuana to Ricardo Gonzales and Coby Painter. She drove to a local park to make the exchange, accompanied by two confederates, Ronald Joseph and petitioner Justus Rosemond. One of those men apparently took the front passenger seat and the other sat in the back, but witnesses dispute who was where. At the designated meeting place, Gonzales climbed into the car's backseat while Painter waited outside. The backseat passenger allowed Gonzales to inspect the marijuana. But rather than handing over money, Gonzales punched that man in the face and fled with the drugs. As Gonzales and Painter ran away, one of the male passengers — but again, which one is contested — exited the car and fired several shots from a semiautomatic handgun. The shooter then re-entered the vehicle, and all three would be drug dealers gave chase after the buyers-turned-robbers. But before the three could catch their quarry, a police officer, responding to a dispatcher's alert, pulled their car over. This federal prosecution of Rosemond followed.

The Government charged Rosemond with, *inter alia*, violating §924(c) by using a gun in connection with a drug trafficking crime, or aiding and abetting that offense under §2 of Title 18. Section 924(c) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime[,] . . . uses or carries a firearm," shall receive a five-year mandatory-minimum sentence, with seven- and ten-year minimums applicable, respectively, if the firearm is also brandished or discharged. 18 U.S.C. §924(c)(1)(A). Section 2, for its part, is the federal aiding and abetting statute: It provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

Consistent with the indictment, the Government prosecuted the §924(c) charge on two alternative theories. The Government's primary contention was that Rosemond himself used the firearm during the aborted drug transaction. But recognizing that the identity of the shooter was disputed, the Government also offered a back-up argument: Even if it was Joseph who fired the gun as the drug deal fell apart, Rosemond aided and abetted the §924(c) violation.

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* Justice Scalia joins all but footnotes 7 and 8 of this opinion.

The District Judge accordingly instructed the jury on aiding and abetting law. He first explained, in a way challenged by neither party, the rudiments of §2. Under that statute, the judge stated, "[a] person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself." And in order to aid or abet, the defendant must "willfully and knowingly associate[ ] himself in some way with the crime, and . . . seek[ ] by some act to help make the crime succeed." The judge then turned to applying those general principles to §924(c) — and there, he deviated from an instruction Rosemond had proposed. According to Rosemond, a defendant could be found guilty of aiding or abetting a §924(c) violation only if he "intentionally took some action to facilitate or encourage the use of the firearm," as opposed to the predicate drug offense. But the District Judge disagreed, instead telling the jury that it could convict if "(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime." In closing argument, the prosecutor contended that Rosemond easily satisfied that standard, so that even if he had not "fired the gun, he's still guilty of the crime." After all, the prosecutor stated, Rosemond "certainly knew [of] and actively participated in" the drug transaction. "And with regards to the other element," the prosecutor urged, "the fact is a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun. You simply can't do it."

The jury convicted Rosemond of violating §924(c) (as well as all other offenses charged). The verdict form was general: It did not reveal whether the jury found that Rosemond himself had used the gun or instead had aided and abetted a confederate's use during the marijuana deal. As required by §924(c), the trial court imposed a consecutive sentence of 120 months of imprisonment for the statute's violation.

The Tenth Circuit affirmed, rejecting Rosemond's argument that the District Court's aiding and abetting instructions were erroneous. The Court of Appeals acknowledged that some other Circuits agreed with Rosemond that a defendant aids and abets a §924(c) offense only if he intentionally takes "some action to facilitate or encourage his cohort's use of the firearm." 695 F.3d 1151, 1155 (2012).[3] But the Tenth Circuit had already adopted a different standard, which it thought consonant with the District Court's instructions. And the Court of Appeals held that Rosemond had presented no sufficient reason for departing from that precedent.

We granted certiorari, 569 U.S. ___ (2013), to resolve the Circuit conflict over what it takes to aid and abet a §924(c) offense. Although we disagree with Rosemond's principal arguments, we find that the trial court erred in instructing the jury. We therefore vacate the judgment below.

II

The federal aiding and abetting statute, 18 U.S.C. §2, states that a person who furthers — more specifically, who "aids, abets, counsels, commands, induces or procures" — the commission of a federal offense "is punishable as a principal." That provision derives from (though simplifies) common-law standards for accomplice liability. See, e.g., Standefer v. United States, 447 U.S. 10, 14-19 (1980); United States v. Peoni, 100 F.2d 401, 402 (CA2 1938) (L. Hand, J.) ("The substance of [§2's] formula goes back a long way"). And in so doing, §2 reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission. See J. Hawley & M. McGregor, Criminal Law 81 (1899).

We have previously held that under §2 "those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U.S. 164, 181 (1994). Both parties here embrace that formulation, and agree as well that it has two components. As at common law, a person is liable under §2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission. . . .

The questions that the parties dispute, and we here address, concern how those two requirements — affirmative act and intent — apply in a prosecution for aiding and abetting a §924(c) offense. Those

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3. See, e.g., United States v. Rolon-Ramos, 502 F.3d 750 (CA8 2007); United States v. Medina-Roman, 376 F.3d 1 (CA1 2004); United States v. Bancalari, 110 F.3d 1425 (CA9 1997).

questions arise from the compound nature of that provision. Recall that §924(c) forbids "us[ing] or carr[ying] a firearm" when engaged in a "crime of violence or drug trafficking crime." The prosecutor must show the use or carriage of a gun; so too he must prove the commission of a predicate (violent or drug trafficking) offense. See Smith v. United States, 508 U.S. 223, 228 (1993). For purposes of ascertaining aiding and abetting liability, we therefore must consider: When does a person act to further this double-barreled crime? And when does he intend to facilitate its commission? We address each issue in turn.

A

Consider first Rosemond's account of his conduct (divorced from any issues of intent). Rosemond actively participated in a drug transaction, accompanying two others to a site where money was to be exchanged for a pound of marijuana. But as he tells it, he took no action with respect to any firearm. He did not buy or borrow a gun to facilitate the narcotics deal; he did not carry a gun to the scene; he did not use a gun during the subsequent events constituting this criminal misadventure. His acts thus advanced one part (the drug part) of a two-part incident — or to speak a bit more technically, one element (the drug element) of a two-element crime. Is that enough to satisfy the conduct requirement of this aiding and abetting charge, or must Rosemond, as he claims, have taken some act to assist the commission of the other (firearm) component of §924(c)?

The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part — even though not every part — of a criminal venture. As a leading treatise, published around the time of §2's enactment, put the point: Accomplice liability attached upon proof of "*[a]ny* participation in a general felonious plan" carried out by confederates. 1 F. Wharton, Criminal Law §251, p. 322 (11th ed. 1912) (hereinafter Wharton) (emphasis added). Or in the words of another standard reference: If a person was "present abetting while *any* act necessary to constitute the offense [was] being performed through another," he could be charged as a principal — even "though [that act was] *not the whole thing necessary*." 1 J. Bishop, Commentaries on the Criminal Law §649, p. 392 (7th ed. 1882) (emphasis added). And so "[w]here several acts constitute[d] together one crime, if each [was] separately performed by a different individual[,] . . . all [were] principals as to the whole." Id., §650, at 392.[4] Indeed, as yet a third treatise underscored, a person's involvement in the crime could be not merely partial but minimal too: "The quantity [of assistance was] immaterial," so long as the accomplice did "*something*" to aid the crime. R. Desty, A Compendium of American Criminal Law §37a, p. 106 (1882) (emphasis added). After all, the common law maintained, every little bit helps — and a contribution to some part of a crime aids the whole.

That principle continues to govern aiding and abetting law under §2: As almost every court of appeals has held, "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." United States v. Sigalow, 812 F.2d 783, 785 (CA2 1987). In proscribing aiding and abetting, Congress used language that "comprehends all assistance rendered by words, acts, encouragement, support, or presence," Reves v. Ernst & Young, 507 U.S. 170, 178 (1993) — even if that aid relates to only one (or some) of a crime's phases or elements. So, for example, in upholding convictions for abetting a tax evasion scheme, this Court found "irrelevant" the defendants' "non-participation" in filing a false return; we thought they had amply facilitated the illegal scheme by helping a confederate conceal his assets. "[A]ll who shared in [the overall crime's] execution," we explained, "have equal responsibility before the law, whatever may have been [their] different roles." United States v. Johnson, 319 U.S. 503, 515 (1943). And similarly, we approved a conviction for abetting mail fraud even though the defendant had played no part in mailing the fraudulent documents; it was enough to satisfy the law's conduct requirement that he had in other ways aided the deception. See Pereira v. United States, 347 U.S. 1, 8-11 (1954). The division of labor between two (or more) confederates thus has no significance: A strategy of "you take that element, I'll take this one" would free neither party from liability.

Under that established approach, Rosemond's participation in the drug deal here satisfies the affirmative-

4. The Wharton treatise gave the following example of how multiple confederates could perform different roles in carrying out a crime. Assume, Wharton hypothesized, that several persons "act in concert to steal a man's goods." The victim is "induced by fraud to trust one of them[,] in the presence of [the] others[,] with the [goods'] possession." Afterward, "another of the party entice[s] the owner away so that he who has the goods may carry them off." Wharton concludes: "[A]ll are guilty as principals." Wharton §251, at 322-23.

act requirement for aiding and abetting a §924(c) violation. As we have previously described, the commission of a drug trafficking (or violent) crime is — no less than the use of a firearm — an "essential conduct element of the §924(c) offense." United States v. Rodriguez-Moreno, 526 U.S. 275, 280 (1999). In enacting the statute, "Congress proscribed both the use of the firearm *and* the commission of acts that constitute" a drug trafficking crime. *Rodriguez-Moreno*, 526 U.S., at 281. Rosemond therefore could assist in §924(c)'s violation by facilitating either the drug transaction or the firearm use (or of course both). In helping to bring about one part of the offense (whether trafficking drugs or using a gun), he necessarily helped to complete the whole. And that ends the analysis as to his conduct. It is inconsequential, as courts applying both the common law and §2 have held, that his acts did not advance each element of the offense; all that matters is that they facilitated one component.

Rosemond argues, to the contrary, that the requisite act here "must be directed at the use of the firearm," because that element is §924(c)'s most essential feature. . . . But Rosemond can provide no authority for demanding that an affirmative act go toward an element considered peculiarly significant; rather, as just noted, courts have never thought relevant the importance of the aid rendered. And in any event, we reject Rosemond's premise that §924(c) is somehow more about using guns than selling narcotics. . . . §924(c) is, to coin a term, a combination crime. It punishes the temporal and relational conjunction of two separate acts, on the ground that together they pose an extreme risk of harm. See Muscarello v. United States, 524 U.S. 125, 132 (1998) (noting that §924(c)'s "basic purpose" was "to combat the dangerous combination of drugs and guns"). And so, an act relating to drugs, just as much as an act relating to guns, facilitates a §924(c) violation.

Rosemond's related argument that our approach would conflate two distinct offenses — allowing a conviction for abetting a §924(c) violation whenever the prosecution shows that the defendant abetted the underlying drug trafficking crime — fares no better. That is because, as we will describe, an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime. And under that rule, a defendant may be convicted of abetting a §924(c) violation only if his intent reaches beyond a simple drug sale, to an armed one. Aiding and abetting law's intent component — to which we now turn — thus preserves the distinction between assisting the predicate drug trafficking crime and assisting the broader §924(c) offense.

B

Begin with (or return to) some basics about aiding and abetting law's intent requirement, which no party here disputes. As previously explained, a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission. An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged — so here, to the full scope (predicate crime plus gun use) of §924(c). See, e.g., ALI, Model Penal Code §2.06 Comment, p. 306 (1985).[7] And the canonical formulation of that needed state of mind — later appropriated by this Court and oft-quoted in both parties' briefs — is Judge Learned Hand's: To aid and abet a crime, a defendant must not just "in some sort associate himself with the venture," but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (quoting *Peoni*, 100 F.2d, at 402).

We have previously found that intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense. In *Pereira*, the mail fraud case discussed above, we found the requisite intent for aiding and abetting because the defendant took part in a fraud "know[ing]" that his confederate would take care of the mailing. 347 U.S., at 12. Likewise, in Bozza v. United States, 330 U.S. 160, 165 (1947), we upheld a conviction for aiding and abetting the evasion of liquor taxes because the defendant helped operate a clandestine distillery "know[ing]" the business was set up "to violate Government revenue laws." And several Courts of Appeals have similarly held — addressing a fact pattern much like this one — that the unarmed driver of a getaway

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7. Some authorities suggest an exception to the general rule when another crime is the "natural and probable consequence" of the crime the defendant intended to abet. . . . That question is not implicated here, because no one contends that a §924(c) violation is a natural and probable consequence of simple drug trafficking. We therefore express no view on the issue.

car had the requisite intent to aid and abet armed bank robbery if he "knew" that his confederates would use weapons in carrying out the crime. See, e.g., United States v. Akiti, 701 F.3d 883, 887 (CA8 2012); United States v. Easter, 66 F.3d 1018, 1024 (CA9 1995). So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission.[8]

The same principle holds here: An active participant in a drug transaction has the intent needed to aid and abet a §924(c) violation when he knows that one of his confederates will carry a gun. In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope — that the plan calls not just for a drug sale, but for an armed one. In so doing, he has chosen (like the abettors in *Pereira* and *Bozza* or the driver in an armed robbery) to align himself with the illegal scheme in its entirety — including its use of a firearm. And he has determined (again like those other abettors) to do what he can to "make [that scheme] succeed." *Nye & Nissen*, 336 U.S., at 619. He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a §924(c) offense — i.e., an armed drug sale.

For all that to be true, though, the §924(c) defendant's knowledge of a firearm must be advance knowledge — or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an *armed* offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun. As even the Government concedes, an unarmed accomplice cannot aid and abet a §924(c) violation unless he has "foreknowledge that his confederate will commit the offense with a firearm." Brief for United States 38. For the reasons just given, we think that means knowledge at a time the accomplice can do something with it — most notably, opt to walk away.[9]

Both parties here find something to dislike in our view of this issue. Rosemond argues that a participant in a drug deal intends to assist a §924(c) violation only if he affirmatively desires one of his confederates to use a gun. The jury, Rosemond concedes, could infer that state of mind from the defendant's advance knowledge that the plan included a firearm. But according to Rosemond, the instructions must also permit the jury to draw the opposite conclusion — that although the defendant participated in a drug deal knowing a gun would be involved, he did not specifically want its carriage or use. That higher standard, Rosemond claims, is necessary to avoid subjecting persons of different culpability to the same punishment. Rosemond offers as an example an unarmed driver assisting in the heist of a store: If that person spent the drive "trying to persuade [his confederate] to leave [the] gun behind," then he should be convicted of abetting shoplifting, but not armed robbery. Reply Brief 9.

We think not. What matters for purposes of gauging intent, and so what jury instructions should convey, is that the defendant has chosen, with full knowledge, to participate in the illegal scheme — not that, if all had been left to him, he would have planned the identical crime. Consider a variant of Rosemond's example: The driver of a getaway car wants to help rob a convenience store (and argues passionately for that plan), but eventually accedes when his confederates decide instead to hold up a national bank. Whatever his

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8. We did not deal in these cases, nor do we here, with defendants who incidentally facilitate a criminal venture rather than actively participate in it. A hypothetical case is the owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used. We express no view about what sort of facts, if any, would suffice to show that such a third party has the intent necessary to be convicted of aiding and abetting.

9. Of course, if a defendant continues to participate in a crime after a gun was displayed or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that he had such knowledge. In any criminal case, after all, the factfinder can draw inferences about a defendant's intent based on all the facts and circumstances of a crime's commission.

original misgivings, he has the requisite intent to aid and abet *bank* robbery; after all, he put aside those doubts and knowingly took part in that more dangerous crime. The same is true of an accomplice who knowingly joins in an armed drug transaction — regardless whether he was formerly indifferent or even resistant to using firearms. The law does not, nor should it, care whether he participates with a happy heart or a sense of foreboding. Either way, he has the same culpability, because either way he has knowingly elected to aid in the commission of a peculiarly risky form of offense.

A final, metaphorical way of making the point: By virtue of §924(c), using a firearm at a drug deal ups the ante. A would-be accomplice might decide to play at those perilous stakes. Or he might grasp that the better course is to fold his hand. What he should not expect is the capacity to hedge his bets, joining in a dangerous criminal scheme but evading its penalties by leaving use of the gun to someone else. Aiding and abetting law prevents that outcome, so long as the player knew the heightened stakes when he decided to stay in the game.

The Government, for its part, thinks we take too strict a view of when a defendant charged with abetting a §924(c) violation must acquire that knowledge. As noted above, the Government recognizes that the accused accomplice must have "foreknowledge" of a gun's presence. Brief for United States 38. But the Government views that standard as met whenever the accomplice, having learned of the firearm, continues any act of assisting the drug transaction. According to the Government, the jury should convict such a defendant even if he became aware of the gun only after he realistically could have opted out of the crime.

But that approach, we think, would diminish too far the requirement that a defendant in a §924(c) prosecution must intend to further an *armed* drug deal. Assume, for example, that an accomplice agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange. But just as the parties are making the trade, the accomplice notices that one of his confederates has a (poorly) concealed firearm in his jacket. The Government would convict the accomplice of aiding and abetting a §924(c) offense if he assists in completing the deal without incident, rather than running away or otherwise aborting the sale. But behaving as the Government suggests might increase the risk of gun violence — to the accomplice himself, other participants, or bystanders; and conversely, finishing the sale might be the best or only way to avoid that danger. In such a circumstance, a jury is entitled to find that the defendant intended only a drug sale — that he never intended to facilitate, and so does not bear responsibility for, a drug deal carried out with a gun. A defendant manifests that greater intent, and incurs the greater liability of §924(c), when he chooses to participate in a drug transaction knowing it will involve a firearm; but he makes no such choice when that knowledge comes too late for him to be reasonably able to act upon it.[10]

III

Under these principles, the District Court erred in instructing the jury, because it did not explain that Rosemond needed advance knowledge of a firearm's presence. Recall that the court stated that Rosemond was guilty of aiding and abetting if "(1) [he] knew his cohort used a firearm in the drug trafficking crime, and (2) [he] knowingly and actively participated in the drug trafficking crime." App. 196. We agree with that instruction's second half: As we have explained, active participation in a drug sale is sufficient for §924(c) liability (even if the conduct does not extend to the firearm), so long as the defendant had prior knowledge of the gun's involvement. The problem with the court's instruction came in its description of that knowledge requirement. In telling the jury to consider merely whether Rosemond "knew his cohort used a firearm," the court did not direct the jury to determine *when* Rosemond obtained the requisite knowledge. So, for example, the jury could have convicted even if Rosemond first learned of the gun when it was fired and he took no further action to advance the crime. For that reason, the Government itself describes the

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10. Contrary to the dissent's view, nothing in this holding changes the way the defenses of duress and necessity operate. Neither does our decision remotely deny that the "intent to undertake some act is . . . perfectly consistent with the motive of avoiding adverse consequences which would otherwise occur." Our holding is grounded in the distinctive intent standard for aiding and abetting someone else's act — in the words of Judge Hand, that a defendant must not just "in some sort associate himself with the venture" (as seems to be good enough for the dissent), but also "participate in it as in something that he wishes to bring about" and "seek by his action to make it succeed." Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (quoting *Peoni*, 100 F.2d, at 402). . . .

instruction's first half as "potentially misleading," candidly explaining that "it would have been clearer to say" that Rosemond had to know that his confederate " 'would use' [a firearm] or something . . . that makes absolutely clear that you [need] foreknowledge." Tr. of Oral Arg. 48-49. We agree with that view, and then some: The court's statement failed to convey that Rosemond had to have advance knowledge, of the kind we have described, that a confederate would be armed. . . .

. . . Accordingly, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

Justice ALITO, with whom Justice THOMAS joins, concurring in part and dissenting in part.

. . . I reject the Court's conclusion that a conviction for aiding and abetting a violation of 18 U.S.C. §924(c) demands proof that the alleged aider and abettor had what the Court terms "a realistic opportunity" to refrain from engaging in the conduct at issue.[1] This rule represents an important and, as far as I am aware, unprecedented alteration of the law of aiding and abetting and of the law of intentionality generally.

. . . The Court imagines the following situation:

> "[A]n accomplice agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange. But just as the parties are making the trade, the accomplice notices that one of his confederates has a (poorly) concealed firearm in his jacket."

If the accomplice, despite spotting the gun, continues to assist in the completion of the drug sale, has the accomplice aided and abetted the commission of a violation of §924(c)?

The Court's answer is "it depends." Walking away, the Court observes, "might increase the risk of gun violence — to the accomplice himself, other participants, or bystanders; and conversely, finishing the sale might be the best or only way to avoid the danger." Moreover — and this is where the seriously misguided step occurs — the Court says that if the risk of walking away exceeds (by some unspecified degree) the risk created by completing the sale and if the alleged aider and abettor chooses to continue for that reason, the alleged aider and abettor lacks the *mens rea* required for conviction.

What the Court has done is to convert what has up to now been an affirmative defense into a part of the required *mens rea*, and this step has very important conceptual and practical consequences. It fundamentally alters the prior understanding of mental states that form the foundation of substantive criminal law, and it places a strange and difficult burden on the prosecution.

That the Court has taken a radical step can be seen by comparing what the Court now holds with the traditional defense of necessity. That defense excuses a violation of law if "the harm which will result from compliance with the law is greater than that which will result from violation of it." 2 W. LaFave, Substantive Criminal Law §10.1, p. 116 (2003) (hereinafter LaFave). This is almost exactly the balance-of-risks calculus adopted by the Court, but under the traditional approach necessity is an affirmative defense. See, e.g., United States v. Bailey, 444 U.S. 394, 416 (1980). Necessity and the closely related defense of duress are affirmative defenses because they almost invariably do not negate the *mens rea* necessary to incur criminal liability. See 2 LaFave §10.1(a), at 118 ("The rationale of the necessity defense is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires"); id., §9.7(a), at 73 (same for duress). . . .

. . . [T]he Court, having refrained from deciding whether aiding and abetting requires purposeful, as opposed to knowing, conduct, quickly and without explanation jettisons the "knowing" standard and concludes that purposeful conduct is needed. This is a critical move because if it is enough for an alleged

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1. I am also concerned that the Court's use, without clarification, of the phrase "advance knowledge" will lead readers astray. Viewed by itself, the phrase most naturally means knowledge acquired in advance of the commission of the drug trafficking offense, but this is not what the Court means. Rather, "advance knowledge," as used by the Court, may include knowledge acquired while the drug trafficking offense is in progress. Specifically, a defendant has such knowledge, the Court says, if he or she first learns of the gun while the drug offense is in progress and at that time "realistically could have opted out of the crime."

aider and abettor simply to know that his confederate is carrying a gun, then the alleged aider and abettor in the Court's hypothetical case (who spots the gun on the confederate's person) unquestionably had the *mens rea* needed for conviction.

. . . The Court confuses two fundamentally distinct concepts: intent and motive. It seems to assume that, if a defendant's *motive* in aiding a criminal venture is to avoid some greater evil, he does not have the *intent* that the venture succeed. But the intent to undertake some act is of course perfectly consistent with the motive of avoiding adverse consequences which would otherwise occur. We can all testify to this from our daily experience. People wake up, go to work, balance their checkbooks, shop for groceries — and yes, commit crimes — because they believe something bad will happen if they do not do these things, not because the deepest desire of their heart is to do them. A person may only go to work in the morning to keep his or her family from destitution; that does not mean he or she does not intend to put in a full day's work. In the same way, the fact that a defendant carries out a crime because he feels he must do so on pain of terrible consequences does not mean he does not intend to carry out the crime. When Jean Valjean stole a loaf of bread to feed his starving family, he certainly intended to commit theft; the fact that, had he been living in America today, he may have pleaded necessity as a defense does not change that fact. See V. Hugo, Les Misérables 54 (Fall River Press ed. 2012).

. . . [I]t seems inarguable to me that the existence of the purpose or intent to carry out a crime is perfectly compatible with facts giving rise to a necessity or duress defense. Once that proposition is established, the Court's error is readily apparent. The Court requires the Government to prove that a defendant in Rosemond's situation could have walked away without risking harm greater than he would cause by continuing with the crime — circumstances that traditionally would support a necessity or duress defense. It imposes this requirement on the Government despite the fact that such dangerous circumstances simply do not bear on whether the defendant intends the §924(c) offense to succeed, as (on the Court's reading) is required for aiding and abetting liability.

The usual rule that a defendant bears the burden of proving affirmative defenses is justified by a compelling, commonsense intuition: "[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof." Smith v. United States, 568 U.S. ___, ___ (2013). By abandoning that rule in cases involving aiding and abetting of §924(c) offenses, the Court creates a perverse arrangement whereby the prosecution must prove something that is peculiarly within the knowledge of the defendant. Imagine that A aids B in committing a §924(c) offense and claims that he only learned of the gun once the crime had begun. If A had the burden of proof, he might testify that B was a hothead who had previously shot others who had crossed him. But under the Court's rule, the prosecution, in order to show the intent needed to convict A as an aider and abettor, presumably has the burden of proving that B was not such a person and that A did not believe him to be. How is the prosecution to do this? By offering testimony by B's friends and associates regarding his peaceful and easygoing nature? By introducing entries from A's diary in which he reflects on the sense of safety he feels when carrying out criminal enterprises in B's company? Furthermore, even if B were a hothead and A knew him to be such, A would presumably only be entitled to escape liability if he continued with the offense *because of* his fear of B's reaction if he walked away. Under the Court's rule, it is up to the Government to prove that A's continued participation was not on account of his fear of B — but how? By introducing footage of a convenient security camera demonstrating that A's eyes were not wide with fear, nor his breathing rapid?

The Court's rule breaks with the common-law tradition and our case law. It also makes no sense. I respectfully dissent from that portion of the Court's opinion which places on the Government the burden of proving that the alleged aider and abettor of a §924(c) offense had what the Court terms "a realistic opportunity" to refrain from engaging in the conduct at issue.

Notes and Questions

1. *Dean* and *Rosemond* both involved 18 U.S.C. §924(c)(1)(A), the federal statute that enhances criminal penalties for using or carrying a gun in connection with certain federal crimes. Both cases also involved accomplice liability under 18 U.S.C. §2, the federal aiding and abetting statute. Finally, both cases involved tricky issues of *mens rea*. The main difference between the two cases was that the focus in *Dean* was on the minimum required *mens rea* with respect to the fact that the gun "discharged" during the crime — an element

that mandated a ten-year minimum sentence enhancement, consecutive to the sentence for the underlying crime — whereas in *Rosemond* the focus was on the defendant's *mens rea* with respect to the co-defendant's carrying of the gun. (*Rosemond* also involved the actus reus to be an accomplice to §924(c)(1)(A).) In *Dean*, the defendant lost. In *Rosemond*, both sides partially won and partially lost. Did the Court get both cases right?

2. In *Dean*, do you agree that strict liability is the most appropriate *mens rea* with respect to the statutory element of the "discharge[ ]" of the gun? The Court analogized the situation to the felony murder rule — a rule roundly criticized by academics and legal reformers, and rejected by the drafters of the Model Penal Code. Are you persuaded? Does it seem fair for Dean to get a mandatory minimum of ten extra years in prison, just because he was a klutz?

3. In *Rosemond*, do you agree that the prosecution should be required to prove, in order to obtain the sentence enhancement, that the defendant had "advance knowledge" of the co-defendant's gun? According to the majority opinion, this means knowledge "at a time the accomplice can do something with it — most notably, opt to walk away." Isn't Justice Alito correct to say that this interpretation makes it prohibitively difficult for prosecutors to prevail in §924(c)(1)(A) cases involving accomplices? Should that matter? And isn't Justice Alito likewise correct to point out that the *Rosemond* majority confused "intent" and "motive"? Should *that* matter?

4. What do you think about Justice Kagan's wry observation, in the majority opinion in *Rosemond*, that "[b]oth parties here find something to dislike in our view of this issue"? Do you think that makes it more, or less, likely that the Court found the right answer?

5. Note that Justice Scalia, who otherwise joined the majority opinion in *Rosemond*, declined to join footnotes 7 and 8. Why? Was he just being snarky? Did he think Justice Kagan was somehow implying an answer to the questions that she specifically declined, in those two footnotes, to answer? Or was it that Justice Scalia simply didn't like any mention of questions that the Court was *not* going to answer?