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Solidifying Judicial Discretion through Statutory Interpretation: The Implications of United States v. Nelson on Criminal Sentencing

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NOTES

SOLIDIFYING JUDICIAL DISCRETION THROUGH STATUTORY INTERPRETATION: THE IMPLICATIONS OF *UNITED STATES V. NELSON* ON CRIMINAL SENTENCING

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INTRODUCTION

Before a judge can make a decision about the length of a criminal defendant's sentence for committing a crime, a jury must first determine guilt beyond a reasonable doubt. However, once the jury convicts a defendant by returning a guilty verdict, another important inquiry inevitably follows. Indeed, resolving the question of what is the appropriate sentence for a defendant convicted of a crime is the most critical step in the legal process subsequent to determining actual guilt.

This phase of the legal process is the province of the judge.[1] Therefore, while it may be up to the jury to decide whether a person is guilty of an offense, the consequence that follows evades the jury and is the responsibility of the judge.[2] Consequently, the sentencing phase is largely a stage of judicial discretion, limited as it may be by a statutory sentencing range dictated by the crime.[3] Yet, where a statute

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1. United States v. Collins, 109 F.3d 1413, 1421 (9th Cir. 1997) ("He maintains that because the jury was instructed that the Government must prove that Collins acted with intent to kill or injure, it cannot be determined whether the jury found that he acted with the intent to kill. This argument ignores the principle that 'sentencing is the province of the judge, not the jury.'" (quoting United States v. Sherpa, 97 F.3d 1239, 1244 (9th Cir. 1996))). *See also* JOHN CHAMPION, SENTENCING 2 (2008) (noting that judges impose sentences).

2. *See Collins*, 109 F.3d at 1421 (citing United States v. Sherpa, 97 F.3d 1239, 1244 (9th Cir. 1996)).

3. *See* United States v. Parks, 89 F.3d 570, 573 (9th Cir. 1996) ("While the Sentencing Guidelines do not establish statutory maximums, they do constrain the sentencing discretion of judges, just as statutory ceilings do."). *See* U.S.S.G. § 5K2.0, p.s. (1996) (held unconstitutional by United States v. Detwiler, 338 F.Supp.2d 1166, 1168 (D.Or. Oct. 5, 2004); 18 U.S.C. § 3553(b) (1996) (held unconstitutional by United States v. Hecht, 470 F.3d 177, 177 (4th Cir. Dec. 4, 2006). *See also* Harris v. United States, 536 U.S. 545, 567 (2002) (did not abandon the understanding that the political system can use "judicial discretion—and rely upon judicial expertise"

does not clearly indicate the requirements to invoke a particular provision, sentencing can easily become problematic.

In *United States v. Nelson*, the defendant challenged the District Court's interpretation of a firearm statute which created ambiguity at the sentencing stage.[4] The statute enumerated different types of criminal conduct involving the use of a firearm and mandated the sentence to be received for each.[5] The defendant argued that the provision of the statute setting out the most severe punishment did not apply to him.[6] He insisted that although he had admittedly engaged in the conduct mentioned in the provision, his criminal intent (*mens rea*) to engage in the conduct was not established.[7] Therefore, he argued, with a lack of criminal intent to commit the conduct, he could not be sentenced to the punishment prescribed.[8] The District Court disagreed and sentenced him under the provision.[9]

The Court of Appeals had to resolve the issue of whether the defendant was correctly sentenced under the most severe provision of the firearm statute.[10] Prior to *Nelson*, there was conflicting precedent on the correct interpretation of the statute.[11] Some jurisdictions, including the D.C. Circuit and the Ninth Circuit, read the statute as requiring intent for each action listed, while others, namely the Tenth Circuit and the Eleventh Circuit, did not interpret the statute to require intent for each action, as long as the conduct in fact occurred.[12] The *Nelson* court concluded that the District Court judge correctly charged the defendant under the provision of the statute listing the most severe conduct the defendant engaged in, although intent was not established for that act.[13] Ultimately, however, the court did not take a definitive stance on the issue of intent.[14] Yet, despite the court claiming to defer the issue of intent, by affirming the defendant's sentence under subsection (iii) of the firearm statute, the *Nelson* decision

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when determining that defendants serve minimum terms based on factual findings of the judges). *See generally* 18 U.S.C. § 3553(a)-(b) (2003) (noting the factors to be considered in imposing a sentence and the application of the guidelines in imposing a sentence).

4. United States v. Nelson, 276 F. App'x 420, 420 (6th Cir. 2008).
5. *Id.* at 420-21 (quoting 18 U.S.C. § 924(c)(1)(A) (2006)).
6. *Id.* at 421.
7. *Id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *Nelson*, 276 F. App'x at 421 (citing United States v. Brown, 449 F.3d 154, 155 (D.C. Cir. 2006) (noting that the D.C. Circuit and the Ninth Circuit consider intent); (also citing *Harris*, 536 U.S. 545) (while the Tenth and the Eleventh Circuit do not consider intent when looking at 18 U.S.C § 924(c)(1)(A)(iii)).
13. *See id.* at 421-22.
14. *See id.*

falls in line with the other circuits that interpreted the firearm statute as not requiring intent.

The objective of this case note is to discuss the potential judicial and legal impacts on criminal sentencing if other circuits adopt the reasoning in *Nelson.* The case note will begin by examining the court's decision in *Nelson.*[15] The note will go on to discuss the status of the law and the circuit split of authority prior to *Nelson.*[16] The remainder of the note will focus on the possibility of judicial and legal implications on criminal sentencing if other circuits adopt the reasoning from *Nelson.*[17] This is because, by affirming the defendant's sentence without an inquiry into intent, *Nelson* reiterates the idea of judicial discretion in sentencing.[18] Furthermore, it adopts an increased standard of criminal accountability.[19] Finally, the decision moves toward eliminating the inquiry into criminal intent at the sentencing stage.[20]

THE CASE

The defendant in *United States v. Nelson* pleaded guilty to using, carrying, and discharging a firearm during the course of an attempted robbery.[21] He was convicted and the judge sentenced him to ten years in prison pursuant to 18 U.S.C. § 924(c)(1)(A)(iii).[22] The statute mandated that:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such 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.[23]

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15. *Id.*

16. *Id.*

17. *Id.*

18. *See generally id. See also* Harris v. United States, 536 U.S. 545, 547 (2002) (the court explained that "the political system may channel judicial discretion-and rely upon judicial expertise-by requiring defendants to serve minimum terms after judges make certain factual findings.").

19. *See generally id.* at 420. *See also* United States v. Nava-Sotelo, 354 F.3d 1202, 1206 (10th Cir. 2003) (the court noted that "Accountability is strict; the mere fact that the weapon discharged is controlling.").

20. *See generally id. See also* United States v. Dean, 517 F.3d 1224, 1229 (11th Cir.2008) (the court states, "[W]e now hold that nothing in the language of the statute requires separate proof of intent before applying the sentencing enhancement.").

21. *Id.* at 420.

22. *Id.*

23. 18 U.S.C. § 924(c)(1)(A) (2006) (statute providing sentence for any person who, during and in relation to any crime of violence or drug trafficking crime, uses or carries a firearm).

At his sentencing appeal, the defendant assigned error to the imposition of a mandatory ten year sentence under section (iii).[24] Although he admitted discharging the gun, he argued that since he discharged the gun inadvertently, he was erroneously sentenced under subsection (iii) to ten years.[25] Mens rea to commit any one act specified in the statute was a prerequisite, he argued, to be charged under the provision listing that act and its punishment.[26] He insisted that since the record failed to establish the requisite criminal intent for discharging the gun, he should have instead been sentenced under subsection (ii).[27] The Court of Appeals found his argument unconvincing, especially considering the clear circuit split on the issue.[28]

The Court of Appeals granted significant deference to the District Court's ruling by applying a plain error standard of review.[29] The court concluded that "in light of the jurisdictional split regarding" the issue of whether mens rea was required for each provision of the statute including subsection (iii), the defendant's argument was not strong enough to disturb the District Court's decision on appeal.[30]

The Court of Appeals based its decision on several considerations. First, the court indicated that the circuit split on the issue created uncertainty in interpreting the statute.[31] Some circuits took the position that at least a general intent to engage in discharging a firearm was required to rightfully sentence a defendant under subsection (iii).[32] Other circuits followed the United States Supreme Court decision *Harris v. United States,* which distinguished between elements of an offense and sentencing factors.[33] The Court of Appeals in *Harris* interpreted the conduct listed in the statute as "sentencing factors to be

24. *Nelson*, 276 F. App'x at 420.

25. *Id.* at 421.

26. *Id.*

27. *Id.*

28. *Id.* at 420 (holding that there was no error "in the face of a clear circuit split . . . ").

29. *Nelson*, 276 F. App'x at 421 (stating there was no error "[i]n the absence of Sixth Circuit precedent. . . .").

30. *Nelson*, 276 F. App'x at 420 (holding that there was no error "in the face of a clear circuit split. . . .").

31. *Nelson*, 276 F. App'x at 421 (citing United States v. Barrow, 118 F.3d 482, 492 (6th Cir. 1997) ("[I]n light [of] the circuit split regarding [this legal issue] and the lack of definitive precedent in this Circuit, the error was not 'plain.' ")).

32. *Nelson*, 276 F. App'x at 421 (citing United States v. Brown, 449 F.3d 154, 156 (D.C. Cir. 2006) (stating the statute subsections "penalize increasingly culpable or harmful conduct" and because subsections (i) and (ii) both require intent, reading a *mens rea* requirement into the third subsection's "discharge provision would be consistent with this progression"). *See also* United States v. Dare, 425 F.3d 634, 641 n. 3 (9th Cir.2005) (adopting the district court's opinion that "discharge" requires a general intent)).

33. *Nelson*, 276 F. App'x at 421 (stating that the Tenth and Eleventh Circuits focused on *Harris*, 536 U.S. at 556 (2002) (stating that "statute regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury.")).

found by a judge, not offense elements to be found by a jury."[34] They then determined that as a result, no mens rea was required to sentence a defendant under the provision.[35] The *Nelson* court reasoned that in the midst of such a clear split, and where the defendant lacked a very convincing argument, it could not overrule the District Court's decision to sentence him to ten years.[36]

Next, the court noted that the defendant in *Nelson* failed to raise a timely objection to imposition of sentencing under subsection (iii) at the district court level.[37] Yet, he later on appeal sought to be sentenced under subsection (ii).[38] Therefore, to prevail, the Court of Appeals required him to establish plain error at the district level, which he could not.[39]

In addition, the defendant entered a guilty plea under subsection (iii) admitting to discharging the firearm.[40] In exchange, he received concessions from the government.[41] Then, he subsequently attempted to assign error to the District Court's sentencing him under that very subsection.[42]

After considering everything, the Court of Appeals found the defendant's argument unimpressive.[43] The court affirmed the decision of the District Court to sentence him to ten years under subsection (iii) of the firearm statute.[44] However, the Court of Appeals did not take a clear and definitive stance on the issue of intent.[45] Yet, by affirming the defendant's sentence under subsection (iii), the *Nelson* decision followed the line of precedent which interpreted the statute as providing sentencing factors and not requiring intent be established for each.[46]

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34. *Harris,* 536 U.S. at 556.

35. *Nelson*, 276 F. App'x at 421 (citing United States v. Nava-Sotelo, 354 F.3d 1202, 1206 (10th Cir. 2003); United States v. Dean, 517 F.3d 1224, 1229 (11th Cir. 2008)).

36. *Nelson*, 276 F. App'x at 421 (stating "in the absence of Sixth Circuit precedent and in the face of a clear circuit split, we are prevented from finding plain error.").

37. *Nelson*, 276 F. App'x at 421 (referencing U.S.C. § 924(c)(1)(A)(iii) (2006) (stating "[defendant] raised no contemporaneous objection to imposition of sentence under subsection (iii).").

38. *Nelson*, 276 F. App'x at 420 (referencing U.S.C. § 924(c)(1)(A)(ii) (2006)).

39. *Nelson*, 276 F. App'x at 421 ("Hence, he could assign no more than plain error on appeal.").

40. *Nelson*, 276 F. App'x at 421 (referencing U.S.C. § 924(c)(1)(A)(iii) (2006)).

41. *Id.*

42. *Nelson*, 276 F. App'x at 421 (referencing U.S.C. § 924(c)(1)(A)(iii) (2006)).

43. *Nelson*, 276 F. App'x at 421 (stating that defendant "has no basis for his challenge to the sentence . . . .").

44. *Id.* at 422 (referencing U.S.C. § 924(c)(1)(A)(iii)).

45. *Id.* at 421.

46. *Nelson*, 276 F. App'x 420 (citing U.S.C. § 924(c)(1)(A)(iii) (2006)).

BACKGROUND

Prior to *United States v. Nelson,* there was a significant circuit split that created uncertainty on how to interpret the firearm statute at sentencing.[47] Precedent was divided as different circuit courts interpreted the application of subsection (iii) differently.[48] The critical question courts had to resolve concerning the statute was whether subsection (iii) could be used to increase a defendant's sentence if criminal intent was not involved in discharging the firearm.[49] The circuit courts that contemplated the issue used a variety of considerations to reach their conclusion.[50] As a result, they developed different theories on why intent should or should not be required for a criminal defendant to be charged under subsection (iii).[51] In *Nelson,* the court's conclusion followed the line of precedent that indicated criminal intent to discharge a firearm was not required to sentence a defendant under subsection (iii) if the gun was actually fired.[52] This meant a defendant who accidentally discharged a firearm in the process of committing an armed robbery or drug trafficking could be sentenced to ten years under subsection (iii) of the statute.[53]

The Supreme Court decision in *Harris v. United States* was the most influential case on the circuit courts that decided mens rea was not required under subsection (iii).[54] The Tenth and Eleventh Circuits later relied on the decision in *Harris* to conclude that intent was not a necessity to being sentenced for discharging a gun and receiving the mandatory ten year sentence.[55]

The *Harris* court's analysis relied heavily on distinguishing sentencing factors from offense elements.[56] The court explained "[w]e must first answer a threshold question of statutory construction: Did the Congress make brandishing an element or a sentencing factor in § 924(c)(1)(A)?"[57] Once the distinction was clear, the court indicated that "[t]he statute regards brandishing and discharging as sentencing

47. U.S.C. § 924(c)(1)(A)(iii) (2006); *see* United States v. Brown, 449 F.3d 154, 155 (D.C. Cir. 2006) (provides brief discussion of firearm statute sentencing split between the TN Circuits); *but see* United States v. Dean, 517 F.3d 1224, 1230 (11th Cir. 2008) (rejecting *Brown's* progression analysis); *see also Harris*, 536 U.S. 545 (court holding no *mens rea* required).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. U.S.C. § 924(c)(1)(A)(iii) (2006); *Nelson*, 276 F. App'x at 420.

53. U.S.C. § 924(c)(1)(A)(iii) (2006).

54. *Harris*, 536 U.S. 545 (involving defendant who was sentenced to seven years under firearm statute for brandishing firearm in relation to drug trafficking crime even though he was not convicted of brandishing).

55. *Nelson*, 276 F. App'x at 421.

56. *Harris* at 553-570.

57. *Id.* at 552.

factors to be found by the judge, not offense elements to be found by the jury."[58] On one hand, if the actions listed in the statute were interpreted as listing elements of a crime, each must be submitted to a jury and proven beyond a reasonable doubt. Conversely, if the actions mentioned in the statute were interpreted as sentencing factors, they could be factual findings made by a judge.

The defendant in *Harris* was charged under subsection (ii) of U.S.C § 924(c)(1)(A) which provides a seven year minimum sentence for brandishing a firearm.[59] "[H]e objected, arguing that brandishing was an element of a separate statutory offense for which he was not indicted or convicted."[60]

The opinion began by explaining why the distinction between sentencing factors and offense elements was a significant one.[61] More constitutional guarantees for the defendant attach where offense elements are involved.[62] The court explained the nature of these constitutional protections. "'In all criminal prosecutions,' state and federal, 'the accused shall enjoy the right to . . . trial . . . by an impartial jury,' at which the government must prove each element beyond a reasonable doubt;" yet, the court explained, "not all facts affecting the defendant's punishment are elements."[63] Sentencing factors allow judges discretion to increase a defendant's sentence based on aggravating circumstances.[64] The court stated, "[a]fter the accused is convicted, the judge may impose a sentence within a range provided by statute, basing it on various facts relating to the defendant and the manner in which the offense was committed."[65] It went on to say, "[t]hough these facts may have a substantial impact on the sentence, they are not elements, and are thus not subject to the Constitution's indictment, jury, and proof requirements."[66]

The United States Supreme Court used several considerations to finally conclude the criminal actions enumerated in the firearm statute were "sentencing factors to be found by the judge, not offense elements to be found by the jury."[67] This meant that if the judge determined the defendant brandished the gun, he could increase his sentence to seven years. First, the court reasoned that the statute's

58. *Id.* at 556.
59. 18 U.S.C. § 924(c)(1)(A)(iii) (2006); *Harris*, 536 U.S at 551.
60. *Harris*, 536 U.S. at 545.
61. *Id.* at 545-46.
62. *See id.* at 549.
63. *Id.* (quoting U.S. CONST. amend. VI.; quoting also Duncan v. Louisiana, 391 U.S. 145, 149 (1968)); *see also* In re Winship, 397 U.S. 358, 364 (1970).
64. *Id.*
65. *Harris*, 536 U.S. at 549.
66. *Id.*
67. *See id.* at 556.

structure suggested that "brandishing and discharging are sentencing factors."[68] Second, the court noted that while the statute's text might provide evidence to the contrary, "textual clues . . . reinforce the single-offense interpretation."[69] Lastly, the court decided that interpreting the statute as sentencing factors and allowing the judge to make the determination is constitutional because it does not increase the penalty for a crime beyond the prescribed statutory maximum.[70] In the end the court decided: "we can presume that the principal paragraph defines a single crime and its subsections identify sentencing factors."[71]

To conclude the firearm statute should be interpreted as providing sentencing factors, first, the court placed considerable weight on the statute's structure.

> Federal laws usually list all offense elements "in a single sentence" and separate the sentencing factors "into subsections." Here, 924(c)(1)(A) begins with a lengthy principal paragraph listing the elements of a complete crime... Toward the end of the paragraph is "the word 'shall,' which often divides offense-defining provisions from those that specify sentences." And following "shall" are the separate subsections, which explain how defendants are to "be sentenced."[72]

The court decided that this was an indication of sentencing factors.[73]

Secondly, the court decided the statute's text was consistent with that interpretation. The court believed the language in the statute was revealing.

> [E]ven if a statute "has a look to it suggesting that the numbering subsections are only sentencing provisions," the text might provide compelling evidence to the contrary. . . .
>
> The critical textual clues in this case, however, reinforce the single-offense interpretation applied by the statute's structure.[74]

The Court goes on to state, "Nothing about the text or history of the statute rebuts the presumption drawn from its structure."[75]

Finally, the Court believed this interpretation was constitutionally acceptable. "The mid-19th century produced a general shift in this country from criminal statutes 'providing fixed-term sentences to those providing judges discretion within a permissible range.'"[76]

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68. *Id.* at 546.
69. *Id.* at 546, 553.
70. *Id.* at 563 (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).
71. *Id.* at 546, 553.
72. *Id.* at 546, 553 (citing Castillo v. United States, 530 U.S. 120, 125 (2000); Jones v. United States, 526 U.S. 227, 233 (1999)).
73. *See id.* at 546, 553-54.
74. *Id.* at 553 (quoting *Jones*, 526 U.S. at 232).
75. *Id.* at 554.
76. *Id.* at 558 (quoting *Apprendi*, 530 U.S. at 481).

"Under these statutes, judges exercise their sentencing discretion through 'an inquiry broad in scope, largely unlimited either as to the kind of information they may consider, or the source from which it may come.'"[77] However, "[t]his court has recognized that this process is constitutional and that the facts taken into consideration need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt."[78] "Judicial fact-finding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments."[79] According to the Court, "[j]udges. . . have always considered uncharged 'aggravating circumstances' that, while increasing the defendant's punishment, have not 'swell[ed] the penalty above what the law has provided for the acts charged.'"[80] With that analysis, the Supreme Court sanctioned judicial discretion at the sentencing phase as constitutional.[81]

Harris provided a strong starting point for other circuit courts who would later consider the issue of whether the firearm statute required criminal intent. Other circuit courts of appeal used the *Harris* Court's interpretation of the firearm statute to conclude intent was not required for a defendant to be sentenced under subsection (iii).[82] *Harris* had established that the statute should be interpreted as providing sentencing factors to be found by a judge as opposed to offense elements to be submitted to a jury.[83] This meant the procedures necessary to convict a defendant of a criminal offense, such as submitting the issue to the jury and proving each element beyond a reasonable doubt, were not implicated. Instead, a judge's finding of an aggravating factor was enough for that judge to increase a defendant's sentence in accordance with the statute.[84] Other circuits interpreted this to mean that since the procedural requirements were unnecessary, a finding of intent was also not required.[85]

Both the Tenth Circuit and Eleventh Circuit courts rendered decisions on whether mens rea was necessary to sentence a defendant to ten years under subsection (iii).[86] Both of these circuits decided cases

77. *Id.* (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)).

78. *Id.* (citing generally United States v. Watts, 519 U.S. 148, 156 (1997) (per curium); Nichols v. United States, 511 U.S. 738, 747 (1994); Williams v. New York, 337 U.S. 241, 246 (1949)).

79. *Id.* (referencing U.S. CONST. amend. V, VI).

80. *Id.* at 562 (citing Bishop, Criminal Procedure § 85, at 54).

81. *See id.* at 568.

82. 18 U.S.C. § 924(c)(1)(A)(iii) (2006); *Harris*, 536 U.S. at 552.

83. 18 U.S.C. § 924(c)(1)(A) (2006); *Harris, 536* at 556.

84. *Id.* at 562, 565-66.

85. *Dean*, 517 F.3d at 1229 (citing *Harris*, 536 U.S. at 556); *Nava-Sotelo*, 354 F.3d at 1205-06.

86. 18 U.S.C. § 924(c)(1)(A)(iii) (2006); *Dean*, 517 F.3d at 1229-30; *Nava-Sotelo*, 354 F.3d at 1205-06.

involving the unintentional discharge of a firearm during a crime of violence or drug trafficking.[87] Influenced by *Harris,* both the Tenth and Eleventh Circuit reached the same conclusion.[88] They ruled intent was not required to impose a ten year sentence since the firearm statute provided sentencing enhancements that could be found by a judge and not offense elements.[89]

In *United States v. Nava-Sotelo*, the Tenth Circuit Court of Appeals ruled that because *Harris* had established that "§ 924 (c)'s brandishing and discharge provisions are 'sentencing factors to be found by a judge, not offense elements to be found by the jury,' . . . [a]s a result, no mens rea is required."[90] The court also took into account that "under its plain language, § 924(c) does not require a defendant to knowingly or intentionally discharge the firearm."[91] In addition, the court believed that a sentencing enhancement which increased a defendant's punishment for an underlying offense based on aggravating factors was reasonable because it did not criminalize innocuous conduct.[92] It stated "[b]ecause 'the § 924(c) defendant has demonstrated a vicious will by committing the principal offense, the risk of imposing punishment on an innocent actor is absent.'"[93] Therefore, "[a]ccountability is strict; the mere fact that the weapon discharged is controlling."[94]

87. *Nava-Sotelo*, 354 F.3d at 1203 (Case involves an attempted prison escape where the defendant, Nava-Sotelo, approached two prison officers with a loaded firearm in his hand. In an attempt to disarm Nava-Sotelo, an officer grabbed for the gun. A struggle ensued and the firearm discharged into the ground; Nava-Sotelo's finger was on the trigger.); *United States v. Dean*, 517 F.3d 1224, 1227 (11th Cir. 2008) (Case involving a bank robbery where the defendant, Dean, as he was grabbing the money, discharged the gun in his right hand, leaving a bullet hole in the partition between the two teller work stations. Upon discharge, Dean cursed himself as if the shot was inadvertent.).

88. *Nava-Sotelo*, 354 F.3d at 1203 (Here along with other crimes, Adalberto Nava-Sotelo was convicted for the use and carrying of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). The issue presented was whether a mandatory ten-year consecutive sentence for discharge of firearm must be imposed if the discharge was accidental. The district court answered in the negative. The answer was reversed.); *Dean*, 517 F.3d at 1227 (The court held that the statutory sentencing enhancement for defendant's discharge of a firearm during commission of crime of violence or drug trafficking offense did not contain as requirement that this discharge had to be intentional).

89. *See Nava-Sotelo*, 354 F.3d at 1202; *see also Dean* 517 F.3d 1224 at 1226.

90. *Nava-Sotelo*, 354 F.3d at 1206 (citing 18 U.S.C. § 924(c) (2006)); (quoting *Harris*, 536 U.S. at 556) (case involving a defendant who was subjected to a ten year mandatory sentence under statute governing discharge of a firearm during a crime of violence although intent to discharge was not established).

91. *Id.* at 1205 (citing 18 U.S.C. § 924(c) (2006)).

92. *See Nava-Sotelo*, 354 F.3d at 1205.

93. *Id.* at 1207 (quoting 18 U.S.C. § 924(c) (2006) (citation omitted)).

94. *Id.* at 1206 (The Court in Nava-Sotelo notes that "[Defendant] urges that [it] ought not be read so broadly as to impose strict liability on him. In doing so he ignores the distinction between sentencing factors and elements of an offense. Only the latter requires a *mens rea*.").

Following the reasoning in *Nava-Sotelo*, the Eleventh Circuit decision *United States v. Dean* held that despite evidence that the defendant Dean accidentally discharged his pistol during a robbery, he was still subject to subsection (iii).[95] In *Dean,* the Eleventh Circuit stated the same reasons that were set out in *Nava Sotelo.*[96] First, the Court indicated subsection (iii) "is a sentence enhancement and merely reflects factors that will enhance sentencing, not elements of an offense."[97] Also, the court reasoned that the language of 18 U.S.C. § 924(c)(1)(A)(iii) did not make reference to any mens rea requirement.[98] And like the *Nava-Sotelo* Court, the Court in *Dean* also believed these particular circumstances would not criminalize innocent conduct.[99] "Appellants had the vicious will to conspire to commit the underlying crime of robbery . . . which ensures that they are not innocent individuals unfairly held to a strict liability offense."[100] These two cases by the Tenth and Eleventh Circuits maintained the spirit of *Harris* but furthered the issue of intent; therefore assisting in the creation of the major circuit split on whether intent was required under subsection (iii).[101]

Although claiming to be silent on the issue of intent, the *Nelson* decision followed the *Dean* and *Nava-Sotelo* line of precedent by affirming the District Court's holding to charge the defendant under subsection (iii) without an inquiry into intent.[102] By doing so, the decision suggests that the points mentioned in *Harris, Dean,* and *Nava-Sotelo* are valid.[103]

ANALYSIS

If other circuit courts follow the reasoning in *Nelson,* this could have broad legal and judicial implications on the criminal sentencing phase.[104] This is because *Nelson* reiterates the idea of judicial discre-

95. *Dean*, 517 F.3d at 1226 ("[G]iven that § 924(c) is a sentencing enhancement, not an element of an offense, this Court holds that § 924(c)(1)(A)(iii) does not contain a separate intent requirement. The mere discharge of a firearm during any crime of violence or drug trafficking, even accidental, is subject to the sentencing enhancement requiring a minimum of ten additional years of imprisonment.") (citing 18 U.S.C. § 924(c) (2006)).

96. *See id.* at 1230; *see also Nava-Sotelo*, 354 F.3d 1202.

97. *Dean,* 517 F.3d at 1229 (referencing 18 U.S.C. § 924(c)(1)(A)(iii) (2006)) (citing Harris, 536 U.S. at 552) (case involving defendant sentenced to ten years for accidental discharge of a firearm during the commission of a violent crime because the court determined the firearm statute did not contain a separate mens rea requirement).

98. *Id*

99. *Nava-Sotelo*, 354 F.3d at 1205; *see also Dean,* 517 F.3d 1224.

100. *Id.* at 1230.

101. 18 U.S.C. § 924(c)(1)(A)(iii) (2006); *Nelson*, 276 F. App'x at 421.

102. 18 U.S.C. § 924(c)(1)(A)(iii) (2006); *see Nelson*, 276 F. App'x at 421 (referencing *Dean*, 517 F.3d 1224).

103. *Nelson*, 276 F. App'x 420.

104. See *generally id.*

tion in sentencing.[105] Furthermore, it adopts an increased standard of criminal accountability.[106] Finally, the decision moves toward eliminating the inquiry into criminal intent at the sentencing stage.[107]

First, *Nelson* reiterates the idea of judicial discretion at the sentencing phase.[108] When the Court affirmed the District Court's sentence, it sanctioned the judge's authority to decide the defendant's sentence based on judicial fact-finding.[109] This, in turn, confirms the legal distinction between sentencing factors to be found by a judge as opposed to offense elements that must be specifically found beyond a reasonable doubt by a jury.[110]

The decision implies that the factors laid out in the statute are not offense elements that require a jury decision, but instead, sentencing enhancements conferring discretion on judges to make unilateral decisions based on aggravating factors.[111] This could potentially grant a tremendous amount of discretion to judges when sentencing criminal defendants.[112] The constitutional protections that are granted when elements of a crime are involved, such as the jury's fact finding or the beyond a reasonable doubt standard of proof, would not attach.[113] Ultimately, the judges would have a lot of leeway in sentencing based on aggravating factors.[114]

Second, the *Nelson* holding adopts an increased standard of criminal accountability.[115] Like the preceding cases decided by the Tenth and Eleventh circuits, *Nelson* supports criminal liability for actual conduct.[116] *Nelson* indicates that a defendant will be required to answer for his actual conduct and not the underlying intention.[117] Because it is the actual conduct that creates the harm to others and not what the

105. *See generally id. See also Harris*, 536 U.S. at 547 (the court explained that "the political system may channel judicial discretion-and rely upon judicial expertise-by requiring defendants to serve minimum terms after judges make certain factual findings.").

106. *See generally id. See also Nava-Sotelo*, 354 F.3d at 1206 (the court noted that "Accountability is strict; the mere fact that the weapon discharged is controlling.").

107. *See generally id. See also Dean*, 517 F.3d at 1229 (the court states, "[W]e now hold that nothing in the language of the statute requires separate proof of intent before applying the sentencing enhancement.").

108. *See generally id.*

109. *See Nelson*, 276 F. App'x 422; *Apprendi*, 530 U.S. at 481 (*Apprendi* established the judge's authority to decide sentencing based on judicial fact-finding).

110. *See Harris*, 536 U.S. at 556.

111. *See* 18 U.S.C. § 3553 (2003); *See Nelson,* 276 F. App'x at 420.

112. *Nelson,* 276 F. App'x at 420; *see also Apprendi*, 530 U.S. at 481.

113. *See* U.S. CONST. amend. VI.

114. *See* 18 U.S.C. § 3553 (2003).

115. *Nelson*, 276 F. App'x 420.

116. *See id.* at 421.

117. *Id.*

defendant "meant" to do, the standard of judgment becomes what *actually* happened and not what the defendant *meant* to happen.[118]

Under statutes like the firearm statute, the defendant had to possess the ill will to commit the underlying act before he could be subject to an increased sentenced based on aggravating factors.[119] As a result, there is no danger of criminalizing innocent conduct under these circumstances, despite whether or not the defendant meant to discharge the firearm.[120] Therefore, the law holds the defendant accountable for what happened in reality.[121] The cases before *Nelson* indicate that this is an acceptable standard.[122] And by affirming the District Court's sentence to charge the defendant to ten years under subsection (iii) when the discharge was inadvertent, the *Nelson* Court reinforces that standard as reasonable.[123]

Finally, the decision moves toward eliminating the inquiry into criminal intent at the sentencing stage.[124] Although the Court did not take a definitive stance on the intent issue, the Court of Appeal's decision to affirm the District Court indicates a defendant can in fact be charged under provision (iii) when the firearm discharged accidentally.[125] Therefore, it follows that at the sentencing phase, the judge need not inquire about what the defendant meant to do, what the defendant's state of mind was, or whether or not intent can be proven.[126] Instead, the judge can simply determine if the conduct listed in the statute actually happened.[127] The judge is free to increase a defendant's sentence based on aggravating factors without getting tied up in an intent analysis which may very well be unsuccessful.[128] This is less a restraint on judges and may contribute to justice overall.

CONCLUSION

Ultimately, these impacts support the purpose of having a fact finding phase and a separate sentencing phase inherent in the American criminal law system. After all, it is the province of the jury to deter-

118. *Id.*
119. *See id.*
120. *See generally* Bailey v. United States, 516 U.S. 137, 143 (1995) (holding that 18 U.S.C. § 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense).
121. *See id.*
122. *See Nava-Sotelo*, 354 F.3d at 1204; *see also Dean*, 517 F.3d at 1230 (holding that defendant is still culpable under 18 U.S.C. § 924(c)(1)(A)(iii) and subject to the sentence enhancement).
123. 18 U.S.C. § 924(c)(1)(A)(iii) (2006); *Nelson*, 276 F. App'x at 422.
124. *Nelson*, 276 F. App'x at 421.
125. 18 U.S.C. § 924(c)(1)(A)(iii) (2006); *Nelson*, 276 F. App'x at 421-22.
126. *Nava-Sotelo*, 354 F.3d 1202.
127. 18 U.S.C. § 924(c)(1) (2006); *Nava-Sotelo*, 354 F.3d 1202.
128. *See* 18 U.S.C. § 3553 (2006).

mine what happened and the job of the judge to apply the facts to the law to determine the defendant's sentence.[129] The *United States v. Nelson* decision reiterates precedent set out by the Supreme Court of the United States and the Tenth and Eleventh Circuits.[130] It reinforces a distinction between offense elements and sentencing factors and implies the firearm statute indicates sentencing factors. It also supports the conclusion that the statute should be interpreted as not requiring intent. It furthermore indicates this interpretation is constitutional.

The decision also has broad implications for the criminal sentencing stage. First, *Nelson* embraces the idea of judicial discretion at sentencing. It also promotes criminal accountability. Finally, the decision moves toward eliminating the inquiry into criminal intent at the sentencing phase. Overall, the effects of *Nelson* operate to ensure that an effective process of criminal sentencing is realized. A sentencing process that does not prosecute innocent conduct, but provides judges their constitutionally granted discretion and creates a firm standard of criminal accountability.

If other circuit courts follow the reasoning in *Nelson*, this could have broad implications on the criminal sentencing phase. This is because *Nelson* embraces the idea of judicial discretion at sentencing, adopts a higher standard of criminal accountability, and moves toward eliminating the inquiry into criminal intent at the sentencing phase. If other circuits follow that logic, a more effective process of criminal sentencing could be realized. A sentencing process that does not prosecute innocent conduct but provides judges their Constitutionally granted discretion and creates a firm standard of criminal accountability.

129. Schaefer v. United States, 251 U.S. 466, 476 (1920) (in *dicta* the Court states "we repeat, [the Court] is subordinate to that of the jury on questions of fact . . . [b]ut first as to the law.").

130. *See Harris*, 536 U.S. 545; *Nava-Sotelo*, 354 F.3d at 1206; *see also Dean*, 517 F.3d at 1226 (holding that 18 U.S.C. § 924(c)(1)(A)(iii) (2006) does not contain a separate intent requirement).