

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed September 5, 2006

No. 04-3159

UNITED STATES OF AMERICA,
APPELLEE

v.

KEVIN PATRICK LUKE BROWN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 03cr00405-01)

On Petition for Rehearing

Before: RANDOLPH and TATEL, *Circuit Judges*, and
WILLIAMS, *Senior Circuit Judge*.

Opinion PER CURIAM.

PER CURIAM: 18 U.S.C. § 924(c)(1)(A)(iii) calls for a 10-year sentence where a gun, carried or used in furtherance of certain offenses, is “discharged.” In our initial opinion in this case we held that the provision creates liability only where the defendant has acted intentionally, e.g., “purposely, knowingly or recklessly.” *United States v. Brown*, 449 F.3d 154, 158-59

(D.C. Cir. 2006). We observed that there was “no evidence” that the defendant “acted purposely or knowingly,” and also said that his conduct with regard to the discharge could not “be viewed as ‘reckless.’” *Id. at 159*. Accordingly we vacated the sentence and remanded for resentencing under § 924(c)(1)(A)(ii) (providing a 7-year sentence for instances in which the firearm is “brandished”). *Id. at 159, 160*.

The government has petitioned for rehearing, arguing that we overlooked the principle that it is for the district court to resolve factual issues relevant to sentencing. We agree—to the extent of ordering a remand for the district court in the first instance to apply the standard that we adopted. Cf. *United States v. Kim*, 23 F.3d 513, 517 (D.C. Cir. 1994). As we originally noted, of course, the recklessness obviously associated with the defendant’s commission of bank robbery, and his carrying and brandishing of the weapon in the course of the robbery, cannot suffice for a finding of the requisite intent to discharge under § 924(c)(1)(A)(iii); otherwise “the separate mens rea requirement for the discharge provision would be meaningless or virtually so.” *Brown*, 449 F.3d at 159.

The case is remanded for further consideration in light of the original opinion and this order.

So ordered.