No. 97-7164

In the Supreme Court of the United States

OCTOBER TERM, 1997

FRANCOIS HOLLOWAY, AKA ABDU ALI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant acted "with the intent to cause death or serious bodily harm" for purposes of the federal carjacking statute, 18 U.S.C. 2119, where he intended to cause death or serious harm if it proved necessary to do so in order to steal the victim's car.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 48-73) is reported at 126 F.3d 82. The opinion of the district court (J.A. 32-47) is reported at 921 F. Supp. 155.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1997. The petition for a writ of certiorari was filed on December 12, 1997, and granted on April 27, 1998. J.A. 74. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

At the time of petitioner's offenses, 18 U.S.C. 2119 (1994) provided as follows:

> **§ 2119. Motor Vehicles**
>
> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall —
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.[1]

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[1] Unless otherwise noted, references to Section 2119 in this brief are to this version of the statute. The question whether clauses (2) and (3) of the pre-1994 version of Section 2119 (see note 14, *infra*) specify sentencing factors or define additional elements of separate, aggravated carjacking offenses is before this Court in *Jones* v. *United States*, No. 97-6203 (argument scheduled for Oct. 5, 1998). In 1996, Congress amended Section 2119 to specify that the term "serious bodily injury" in subsection (2) includes certain sexual assaults. Carjacking Correction Act of 1996, Pub. L. No. 104-217, § 2, 110 Stat. 3020.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to operate a "chop shop" in violation of 18 U.S.C. 371; operating a chop shop, in violation of 18 U.S.C. 2322; three counts of carjacking, in violation of 18 U.S.C. 2119; and three counts of using a firearm during and in relation to the commission of a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to concurrent prison terms of 60 months for conspiracy, 151 months for operation of the chop shop, and 151 months for each count of carjacking; a consecutive term of five years' imprisonment on the first firearms count; and two additional consecutive 20-year terms on the two remaining firearms counts. The district court also imposed a five-year term of supervised release. The court of appeals affirmed.

1. In September 1994, Teddy Arnold recruited his son, Vernon Lennon, to steal cars to be taken to a Queens, New York, "chop shop" for dismantling. Lennon, in turn, recruited petitioner and David Valentine to assist him. The three agreed that they should use a firearm during their thefts, and Lennon showed the others a .32 caliber revolver for that purpose. J.A. 50.

On October 14, 1994, petitioner and Lennon followed a 1992 Nissan Maxima driven by 69-year-old Stanley Metzger. When Metzger stopped and parked across from his residence, Lennon approached, pointed his revolver at Metzger, and demanded Metzger's car keys. Metzger first gave Lennon his house keys, but Lennon demanded the car keys, telling Metzger "I have a gun. I am going to shoot." Metzger then surrendered his keys and his money, and Lennon drove away in the Maxima. J.A. 50-51.

The following day, Lennon and petitioner followed a 1991 Toyota Celica driven by Donna DiFranco. When DiFranco parked, Lennon approached her, pointed his gun at her, and demanded her money and car keys. After DiFranco disengaged the car alarm and unlocked the "club" device that secured the steering wheel, Lennon drove off in her car. J.A. 51.

That same day, Lennon and petitioner followed a 1988 Mercedes-Benz driven by Ruben Rodriguez until Rodriguez parked near his home. As Lennon and petitioner approached him, Rodriguez retreated to his car. Lennon produced his gun and threatened: "Get out of the car or I'll shoot." Rodriguez complied, and Lennon demanded his money and car keys. When Rodriguez hesitated, petitioner punched him in the face. Rodriguez surrendered the items and fled on foot. Lennon drove off in the Mercedes, and petitioner followed in another car. J.A. 51.[2]

Lennon pleaded guilty to several carjacking and robbery charges and testified as a government witness at trial. Lennon testified that his plan was to steal cars without harming the victims, but that he would have used the gun if any of the victims had resisted or given him "a hard time." J.A. 52.

Petitioner was charged with conspiracy to operate and operation of a "chop shop," three counts of carjacking, and three counts of using a firearm during and in relation to a crime of violence. See page 3, *supra*. With respect to carjacking, the district court instructed the jury that in order to find petitioner guilty it must find that his "intent in committing the crime [was] to cause death or serious bodily harm."

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[2] At trial, the government also presented evidence of two additional, uncharged carjackings, one successful and one foiled by an off-duty police officer. J.A. 51-52.

J.A. 19; see J.A. 18-21, 27-31. Over the objection of defense counsel, the court also instructed the jury that, under a theory of "conditional" intent, it could find petitioner guilty if it found that he "intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars." J.A. 20-21, 30-31.

2. The court of appeals affirmed. J.A. 48-73. With respect to the district court's "conditional intent" instruction, the court first reviewed the history of 18 U.S.C. 2119. J.A. 54-59. It noted that before 1994, Section 2119 required proof that the defendant possessed a firearm in connection with a carjacking, but imposed no explicit intent requirement. In 1994, Congress amended the statute to authorize imposition of the death penalty if a carjacking resulted in death, and to replace the phrase "possessing a firearm" with the present language requiring an "intent to cause death or serious bodily harm." The court observed that the new "intent" language was inserted late in the legislative process, without recorded explanation. The court nonetheless thought it "clear from * * * the legislative history that Congress intended to broaden the coverage of the federal carjacking statute," and it speculated that application of the new intent requirement to cases not involving the death of a victim "was, in all likelihood, an unintended drafting error." J.A. 57. The court "decline[d]," however, "any invitation to redraft the statute," and instead considered whether the new intent element could be satisfied by proof of "conditional" intent—that is, an intent to kill or harm a victim *if* it proved necessary to do so in order to complete the carjacking. J.A. 58-59.

The court rejected (J.A. 60-61) petitioner's argument that "conditional" intent involved "no more than

a state of mind where death is a foreseeable event." In the court's view, "conditional intent requires a much more culpable mental state," because "[a] carjacker who plans to kill or use deadly force on a victim in the event that his victim fails to comply with his demands has engaged in willful and deliberate consideration of his actions." J.A. 60. Under those circumstances, the court explained, "death is more than merely foreseeable, it is fully contemplated and planned for." *Ibid.*

The court observed that "the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law" (J.A. 62), supported by state statutory and case law, academic commentary, and the Model Penal Code (see J.A. 62-64). "Furthermore, and most importantly," the court concluded that "incorporating conditional intent within the specific intent language of the carjacking statute comports with a reasonable interpretation of the legislative purpose of the statute." J.A. 63. Rejecting an interpretation that "would have the federal carjacking statute covering only those carjackings in which the carjacker's sole and unconditional purpose at the time he committed the carjacking was to kill or maim the victim," the court held instead that "an intent to kill or cause serious bodily harm conditioned on whether the victim relinquishes his or her car is sufficient to fulfill the intent requirement set forth in the federal carjacking statute." J.A. 63-64.

Judge Miner dissented. J.A. 67-73. In his view, there was "no basis in the plain language of [Section 2119] or in the legislative history for an element of conditional intent." J.A. 67. Rather, Judge Miner concluded that "[t]he intent required is spelled out explicitly in the statute," and that any interpretation of that requirement informed by common-law princi-

ples lay beyond the power of courts applying federal criminal law. J.A. 73. He would therefore have reversed petitioner's convictions and remanded for retrial. *Ibid.*

SUMMARY OF ARGUMENT

The federal statute that prohibits carjacking, 18 U.S.C. 2119, requires that the defendant have acted "with the intent to cause death or serious bodily harm." That intent requirement is satisfied if the government proves, beyond a reasonable doubt, that a carjacker intended to cause death or serious bodily harm if, but only if, it proved necessary to do so in order to complete the theft of the victim's car.

Petitioner argues principally (Br. 13-19) that the phrase "with the intent to cause death or serious bodily harm" in Section 2119 must be read to require proof that, at some point before or during commission of the offense, the carjacker formed a fixed and unconditional intention to kill or wound the victim. That contention is incorrect, because it ignores background principles that guide construction of the intent elements of analogous crimes. The criminal law has long recognized and punished offenses in which, as in carjacking under the amended Section 2119, a particular intention (here, to cause serious harm or death) is essential, but its implementation (here, actually causing harm or death) is not. In such cases, courts and commentators have recognized that the requisite intent may be conditional. Although there are limited circumstances in which the conditionality of an intention would traditionally preclude criminal liability, no such exception would apply to a carjacker who intends to cause death or injury if necessary to obtain the victim's car. Thus, construing the language of Section 2119 in light of traditional

legal concepts and widely accepted criminal-law definitions, a conditional intent to harm satisfies the intent element of the statute.

Consideration of the text of Section 2119 as a whole confirms that interpretation. In specifying the manner in which a carjacking could be committed, Congress included "intimidation" as an alternative to "force and violence." Petitioner's contention that the intent to cause death or injury must always be entirely unconditional would, however, make the group of cases in which the crime was committed "by intimidation" implausibly small. Similarly, the structure of Section 2119's penalty provisions makes clear that Congress anticipated that in a significant number of cases—indeed, in the basic or ordinary case—the offender would act with the required "intent to cause death or serious bodily harm," but no such harm would "result." That category would most naturally include cases in which the defendant was prepared to inflict physical harm if necessary, but was able to steal the victim's car without doing so.

Thus, the clear implications of the statutory text, which would be anomalous under petitioner's absolute interpretation of the intent requirement, are consistent with a construction of the statute under which intent to harm may be conditional. Moreover, such a construction, while giving Section 2119 the full scope an ordinary reader would expect, nonetheless confines the application of federal criminal sanctions to those cases that present the most serious risk of bodily harm.

Finally, petitioner relies on the rule of lenity. Br. 31-32. A case like this one, in which the offense conduct at issue is plainly criminal and highly blameworthy (whether or not petitioner's intent to harm was unconditional), lies far from the central

concerns of that rule. In any event, the rule of lenity applies only where the intended application of a criminal statute remains ambiguous after every effort has been made to construe it. In this case, application of ordinary principles of statutory construction leaves no doubt about the proper interpretation of Section 2119's intent requirement.

ARGUMENT

A DEFENDANT COMMITS A CARJACKING "WITH THE INTENT TO CAUSE DEATH OR SERIOUS BODILY HARM" WHERE HE INTENDS TO INFLICT SUCH HARM IF IT PROVES NECESSARY TO DO SO IN ORDER TO STEAL THE VICTIM'S CAR

As originally enacted, 18 U.S.C. 2119 specified, as an element of the new federal carjacking offense, that the offender must have "possess[ed] a firearm" while committing the offense. 18 U.S.C. 2119 (Supp. IV 1992). In 1994, as part of the Violent Crime Control and Law Enforcement Act, Congress replaced Section 2119's "possessing a firearm" element with a requirement that the offender have acted "with the intent to cause death or serious bodily harm." 18 U.S.C. 2119 (1994). That requirement is satisfied if the government proves, beyond a reasonable doubt, that a carjacker intended to cause death or serious harm if, but only if, it proved necessary to do so in order to complete the theft of the victim's car.

A. The Intent Requirement Of Section 2119 Should Be Construed In Light Of The Traditional Recognition Of Conditional Intent To Harm As Sufficient To Support Conviction For Crimes Analogous To Carjacking

Petitioner argues principally (Br. 13-19) that the phrase "with the intent to cause death or serious

bodily harm" in Section 2119 must be read to require that, at some point before or during commission of the offense, the carjacker formed a fixed and unconditional intention to kill or wound the victim, whether or not it was necessary to do so in order to obtain the victim's car. While that mental state would plainly satisfy the statutory requirement, the argument that *only* such an unconditional intent will suffice is unsound.

Section 2119 does not state that it is an element of the carjacking offense that the carjacker "intentionally cause death or serious bodily harm." Language to that effect might be read to require the government to prove both that the stated harm was caused and that the offender had at some point conceived a fixed purpose to cause it. The same would generally be true of the intent element of a first-degree murder statute, or of any other crime where the intent in question is an intention to bring about some result (such as death) that is itself an element of the crime. In such a case, the result in question must in fact have been caused in order for there to be a prosecution in the first place, and the additional question posed by an intent requirement is normally whether it was caused purposefully, rather than accidentally or recklessly. If it can be shown that the defendant acted purposefully and that the intended result was, in fact, caused, there is little point in inquiring further whether that purpose was always a firm one, or was at any previous point "conditional."

The analysis is different, however, for a statute like Section 2119, which requires an intent to cause a result, the actual occurrence of which is *not* an element of the offense. There is no question that the government, to establish a carjacking charge, must prove that a defendant acted with the "intent to

cause" death or harm. Equally clearly, however, there is no requirement that death or harm have actually resulted in order for the carjacking offense to be complete.[3] The substantive harm that must result is, instead, the taking of a motor vehicle, by force and violence or by intimidation, from the person or presence of the victim.

The absence of an identity, in a statute of this type, between what the government must prove the defendant intended and what it must prove actually occurred is highly relevant to the character of the intent that must be shown. It will always be sufficient to prove an unconditional intent to bring about the specified result (here, bodily harm), wholly apart from and in addition to any result that must be proved as an element of the offense (here, the theft of the victim's car). The question that arises is whether it is also sufficient to show that the defendant, although not independently intent on causing physical harm, did intend to cause it *if* it proved necessary to do so in order to achieve his primary criminal objective of stealing the victim's car.

Fortunately, that question is not unique or novel. The criminal law has long recognized and punished offenses in which a particular intention is essential, but its implementation is not; and in such cases,

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[3] This would remain true even if the Court were to conclude in *Jones* v. *United States*, No. 97-6203, that the government must plead and prove resulting serious bodily harm or death in order to impose the enhanced penalties authorized by clauses (2) and (3) of Section 2119. There would be no such requirement in cases like this one, in which the pleading and proof encompass all of the elements set out in the initial paragraph of Section 2119, and the punishment imposed does not exceed that authorized by the first (unenhanced) penalty clause.

courts and commentators have recognized that the requisite intent may be conditional. Thus, for example, in one leading case, the defendants brandished guns at members of a rival labor union, telling them that if they did not stop work and take off their overalls, the defendants would "fill [them] full of holes." *People* v. *Connors*, 97 N.E. 643, 644-645 (Ill. 1912). The workers complied with the demand, and there was no shooting. *Id*. at 645. In upholding the defendants' convictions for assault with intent to murder, the Supreme Court of Illinois agreed that, in such a prosecution, "the specific intent charged is the gist of the offense, and must be proven as charged in the indictment"; but it rejected the defendants' contention "that the intent to commit the crime charged must be absolute and unconditional." *Ibid*.

The court approved, instead, the trial court's instruction to the jury that:

> though you must find that there was a specific intent to kill the prosecuting witness, * * * still, if you believe from the evidence beyond a reasonable doubt that the intention of the defendants was only in the alternative * * * and the shooting * * * was only prevented by the happening of the alternative—that is, the compliance of the [victim] with the demand that he take off his overalls and quit work—then the requirement of the law as to the specific intent is met.

97 N.E.2d at 645. As the court explained, where "the assailant suspends the execution of his purpose merely to give his victim a chance to comply with an unlawful demand, the offense is complete even though the commission of the felony is averted by the submission of the assailed party to the unlawful demands made upon him." *Id*. at 648.

Similarly, in *Eby* v. *State*, 290 N.E.2d 89, 91 & n.2 (Ind. Ct. App. 1972), the court construed Indiana's burglary statute in a prosecution for breaking and entering a dwelling "with the intent * * * to do any act of violence or injury to any human being." The court held that, while the defendant's primary "purpose" in entering the dwelling was not clear, it could be inferred from the evidence that he had at least a coexistent intent to offer violence or injury to anyone who surprised and confronted him inside. *Id.* at 92-95. So long as the trier of fact was convinced "that when the defendant broke in he intended to commit violence if the occasion arose," such an "intent to do violence if necessary," while "conditional," was nonetheless sufficiently "specific" to support the burglary conviction. *Id.* at 96-97. Many other cases in the state courts may be cited to the same or similar effect,[4] and

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[4] See, *e.g.*, *People* v. *McMakin*, 8 Cal. 547, 548-549 (1857) (assault with intent to inflict injury; "Where a party puts in a condition which must be at once performed, and which condition he has no right to impose, and his intent is immediately to enforce performance by violence, and he places himself in a position to do so, and proceeds as far as it is *then* necessary for him to go in order to carry out his intention, then it is as much an assault as if he actually struck, or shot, at the other party, and missed him. It would, indeed, be a great defect in the law, if individuals could be held guiltless under such circumstances."); *Monroe* v. *United States*, 598 A.2d 439 (D.C. 1991) (intent to use weapon if necessary); *State* v. *Mathewson*, 472 P.2d 638, 640 & nn. 1-3 (Idaho 1970) (following *McMakin*, *supra*); *People* v. *Bashic*, 137 N.E. 809, 811 (Ill. 1922) ("A threat to kill, unless any other sort of demand is complied with, is an assault with an intent to murder."); *Commonwealth* v. *Richards*, 293 N.E.2d 854, 860 (Mass. 1973) ("[I]t would suffice [in prosecution for assault with intent to commit murder] if the purpose to murder in the mind of the accessory was a conditional or contingent one, a willingness to see the shooting take place should it become necessary to effectuate the robbery or

the federal courts have not hesitated to apply the same principle when they have had occasion to do so.[5]

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make good an escape."); *People* v. *Vandelinder*, 481 N.W.2d 787, 788-789 (Mich. Ct. App. 1992) (conditional intent that wife be murdered if she refused to reconcile satisfied specific intent requirement of solicitation-to-murder offense); *State* v. *Simonson*, 214 N.W.2d 679, 682 (Minn. 1974) ("[O]ne who receives or conceals what he knows to be stolen property with the intent to restore it to the owner only if the owner pays a reward does have the requisite wrongful intent [to deprive the owner of the property]."); *Vanderpool* v. *State*, 211 N.W. 605, 606-607 (Neb. 1926) (assault with intent to inflict great bodily injury); *State* v. *Morgan*, 25 N.C. 186, 189-190, 192-194 (1842) (conditional intent to strike with an axe sufficient to show "present purpose of doing harm" necessary for assault); see also *State* v. *Bond*, 478 S.E.2d 163, 175 (N.C. 1996) ("The fact that defendant did not definitively know that the condition of the victims' 'messing up' would occur does not negate the specific intent defendant had for [a codefendant] to kill the [victims] if it did occur."); *State* v. *Klein*, 547 P.2d 75, 78 (Mont. 1976). Partly or wholly to the contrary, see *McKinnon* v. *United States*, 644 A.2d 438, 442 (D.C.) (holding that conditional intent to assault former girlfriend if she refused to reconcile would support burglary conviction, but distinguishing conditional intent to use weapon if confronted during burglary, which would not), cert. denied, 513 U.S. 1005 (1994); *Carter* v. *State*, 408 N.E.2d 790, 796 n.6 (Ind. Ct. App. 1980) (disagreeing, in dicta, with analysis of "specific intent" in *Eby*, *supra*); *Craddock* v. *State*, 37 So.2d 778 (Miss. 1948); *State* v. *Irwin*, 285 S.E.2d 345, 349 (N.C. Ct. App. 1982) (but see *Morgan*, *supra*); *State* v. *Kinnemore*, 295 N.E.2d 680, 682-683 (Ohio Ct. App. 1972).

[5] See *United States* v. *Richardson*, 27 F. Cas. 798 (C.C.D.C. 1837) (No. 16,155) (when defendant raised club over victim's head and told her he would strike her if she said a word, his language "showed an intent to strike upon her violation of a condition which he had no right to impose"); *United States* v. *Myers*, 27 F. Cas. 43 (C.C.D.C. 1806) (No. 15,845) ("If you say so again, I will knock you down."); *United States* v. *Dworken*, 855 F.2d 12, 18-19 (1st Cir. 1988) (attempt and conspiracy to distribute drugs, on condition that terms of sale could be

Commentators, too, have long recognized the principle of conditional intent. One leading treatise, for example, explains:

> Where a crime is defined so as to require that the defendant have a particular intention in his mind —as larceny requires that he have an intention to deprive the owner permanently of his property, burglary that he have an intention to commit a felony, and assault with intent to kill that he have an intention to kill—the problem arises whether he has the required intention when his intention is conditional. Thus *A* takes and carries away *B*'s property intending to restore it to *B* if *A*'s dying aunt should leave him a fortune. *A* breaks and enters *B*'s house intending to rape Mrs. *B* if he finds her at home alone. *A* points a gun at *B* telling him he will shoot him unless he removes his overalls, and intending to kill *B* if he does not comply. Perhaps *A*'s aunt does actually leave him the fortune; and Mrs. *B* is away from home; and *B* does remove his overalls. In these cases *A* is

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agreed); *United States* v. *Anello*, 765 F.2d 253, 262-263 (1st Cir. 1985) (intent to purchase and distribute marijuana on condition that quality was adequate); *Shaffer* v. *United States*, 308 F.2d 654 (5th Cir. 1962) (conditional intent to do bodily harm in federal assault prosecution under 18 U.S.C. 113), cert. denied, 373 U.S. 939 (1963); *United States* v. *Marks*, 29 M.J. 1, 3 (C.M.A. 1989) (conditional intent to burn, if material proved flammable, sufficient to support conviction for aggravated arson); *United States* v. *Arrellano*, 812 F.2d 1209, 1212 n.2 (9th Cir. 1987) ("[c]onditional intent is still intent"; conditional intent to kill victim if she refused request for money would support conviction for transporting firearm with intent to commit a felony, although conviction at issue could not be sustained because the jury made no finding as to intent).

> guilty of larceny, burglary, and assault with intent to kill, respectively.

1 W. Lafave & A. Scott, *Substantive Criminal Law* § 3.5(d), at 312 (1986) (Lafave & Scott). Thus, "[t]he fact that an intent is conditional or qualified, while not without significance, does not exclude it from the 'intent' category. It is a special type of intent rather than some other kind of state of mind." R. Perkins & R. Boyce, *Criminal Law* 835 (3d ed. 1982) (Perkins & Boyce).[6] And the Model Penal Code, in what its

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[6] See also J.A. 62-63; Perkins & Boyce 647 ("[The established rule], which seems quite sound, [is] that an assault with intent to murder does not require an unconditional intent to kill. An intent to kill, in the alternative, is nevertheless an intent to kill."); 2 C. Torcia, *Wharton's Criminal Law* § 182 (15th ed. 1994) (assault); 1 J. Bishop, *Bishop on Criminal Law* § 287a (J. Zane & C. Zollmann eds., 9th ed. 1923) (in the chapter "General View of Intent": "The intent need not be absolute and unconditional."); 2 *id.* § 34 (discussing assault); H. Brill, *Cyclopedia of Criminal Law* § 409, at 692 (1922) (assault with intent to murder requires specific intent to kill, but "[i]f [that intent] exists when the assault is committed, the guilt of the defendant is not affected by the fact that he is prevented from carrying out his felonious purpose * * *, or does not carry it out because the person assaulted yields to his unlawful demands."); 2 F. Wharton, *A Treatise on Criminal Law* § 801 (J. Kerr ed., 1912) ("A conditional threat of force may be an assault."); W. Clark & W. Marshall, *A Treatise on the Law of Crimes* § 202, at 278 (H. Lazell ed., 2d ed. 1905) (assault); I. McLean & P. Morrish, *Harris's Criminal Law* 40 (22d ed., London 1973) (discussing "Specific or Ulterior Intent": "Finally, a person intends to do "Y" if his intent is conditional, *i.e.* he intends to do "Y" if certain circumstances arise. So for example, a person is guilty of burglary if he enters a building as a trespasser, intending to steal one particular thing *if it is there*, or to rape a woman if she is there."); G. Williams, *Criminal Law: The General Part* § 23 (2d ed., London 1961) (in the chapter on "Intention and Recklessness": "A conditional inten-

drafters considered to be "a statement and rationalization of the present law," restates the principle as follows in Section 2.02, "General Requirements of Culpability":

> (6) *Requirement of Purpose Satisfied if Purpose Is Conditional.* When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

Model Penal Code § 2.02(6) & cmt. 8 (Official Draft 1962 & rev. cmts. 1985).

As the Model Penal Code formulation makes clear, there are limited circumstances in which the contingency of an intention may preclude criminal liability, because it "negatives the harm or evil sought to be prevented by the law defining the offense." In the Code commentary's example, an assault "would not be * * * with the intent to rape, if the defendant's purpose was to accomplish the sexual relation only if the mature victim consented"; or, in LaFave & Scott's examples, "*A* will not be guilty of larceny if his intention, when taking and carrying away *B*'s property, is to return it if it proves to be *B*'s property, but to keep it if it turns out to be *A*'s own property. * * * For one to take another's property intending to give it back if he inherits other property involves a condition which does not negative the evil which larceny seeks to prevent; but taking it intending to restore it if it is not his own property does involve a

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tion is capable of ranking as intention for legal purposes." (citing the Model Penal Code)).

condition which negatives that evil." Model Penal Code § 2.02, cmt. 8; LaFave & Scott § 3.5(d), at 312-313.

No such exception would apply to a carjacker who intends to cause serious harm or death only if it becomes necessary to do so in order to steal the victim's car. As the district court in this case pointed out (J.A. 45), that condition on the intent to cause harm—relinquishment of the victim's car—not only does not "negative" the harm the statute seeks to prevent, it *is* the harm the statute seeks to prevent. See *United States* v. *Anderson*, 108 F.3d 478, 484 (3d Cir.) ("Whether the harm sought to be prevented by the statute is the theft of cars, the threat to cause death or serious bodily harm in order to obtain another's car, or the causing of death or serious bodily harm, the intervening event of the victim giving up his or her car in order to avoid serious injury in no way negatives the harm sought to be prevented by the statute."), cert. denied, 118 S. Ct. 123 (1997); see also J.A. 62-65; *United States* v. *Williams*, 136 F.3d 547, 551 (8th Cir. 1998); *United States* v. *Romero*, 122 F.3d 1334, 1338 (10th Cir. 1997), cert. denied, 118 S. Ct. 1310 (1998); but see *United States* v. *Randolph*, 93 F.3d 656, 665 & n.6 (9th Cir. 1996) (declining, on other grounds, to hold conditional intent sufficient under Section 2119).[7]

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[7] Petitioner places some reliance (Br. 28-31) on Sections 2.02(2)(a)(ii) and 2.02(7) of the Model Penal Code. The "intent" element in Section 2119 requires a state of mind that the Code would define as "purpose." See Code § 2.02(2)(a), 2.02(6). Petitioner's discussion of Section 2.02(7), which deals only with the different mental state of "knowledge," is therefore inapposite here. Section 2.02(2)(a)(ii), which petitioner also cites, specifies that an offender acts "purposely" with respect to an offense element that "involves the attendant circumstances" of the offense if "he is aware of the[ir] existence * * * or

Indeed, the traditional conditional-intent principle is naturally suited to the intent element of the carjacking offense defined by Section 2119. If a defendant is prepared to use deadly force to obtain a victim's car, the fact that the victim's accession to his unlawful demand spares him the necessity of doing so scarcely mitigates the culpability of his mental state. The offender's intent is to maim or kill if necessary, and such a firm and present, though conditional, intent fully satisfies the requirements of the statute.[8]

Petitioner himself stresses (Br. 18) this Court's observation that, in interpreting the intent requirements of federal criminal statutes, "Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a

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believes or hopes they exist." That provision has no application here, because the "intent" element in Section 2119, whether conditional or not, relates not to the "attendant circumstances" of a carjacking, but to "the nature of [the offender's] conduct or a result thereof." Code § 2.02(2)(a)(i). The relevant parts of Section 2.02 are therefore subsections (2)(a)(i) and (6), not subsection (2)(a)(ii). Subsection (6) is discussed in the text.

[8] The situation in which circumstances make it unnecessary for an offender to carry out a genuine threat is comparable to the situation in which circumstances make it impossible for him to commit an intended crime. In the latter situation, the better view is that the defendant is nonetheless guilty of attempt. "[A]s a matter of policy * * * no reason exists for exonerating the defendant because of facts unknown to him which made it impossible for him to succeed. In [such] instance[s] the defendant's mental state [is] the same as that of a person guilty of the completed crime, and by committing the acts in question he has demonstrated his readiness to carry out his illegal venture. He is therefore deserving of conviction and is just as much in need of restraint and corrective treatment as the defendant who did not meet with the unanticipated events which barred successful completion of the crime." 2 LaFave & Scott § 6.3(a)(2), at 43.

critical factor, and 'absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them.'" *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978); see also, *e.g.*, *United States* v. *Bailey*, 444 U.S. 394, 397 (1980) ("[I]n enacting the Federal Criminal Code Congress legislated in the light of a long history of case law that is frequently relevant in fleshing out the bare bones of a crime that Congress may have proscribed in a single sentence."); *id.* at 402-406 (discussing historical and modern analysis of criminal intent, including Model Penal Code § 2.02). Petitioner is correct that intent to cause death or serious harm is a "critical factor" under the plain language of Section 2119; but the precise nature of that factor must also be construed in light of "traditional legal concepts" and "widely accepted definitions."[9] As we have shown, those traditional concepts and definitions make clear that the intent element of Section 2119 may be satisfied by proof that the defendant intended to cause death or serious bodily harm *if necessary* to obtain the victim's car.[10]

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[9] As cases like *United States Gypsum* and *Bailey*, among many others, make clear, reference to the backdrop of traditional legal principles against which Congress legislates, as an aid in understanding the meaning of terms or phrases used in federal statutes, does not, as the dissenting judge below suggested (J.A. 73), amount to the improper creation of a "federal common law of crimes." See also, *e.g.*, *Evans* v. *United States*, 504 U.S. 255, 259 (1992) ("It is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning.'"); *Molzof* v. *United States*, 502 U.S. 301, 307-308 (1992); *Kungys* v. *United States*, 485 U.S. 759, 770 (1988); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

[10] Compare *State* v. *Morgan*, 25 N.C. at 189-190 ("The act was not only apparently a most dangerous assault, but accompanied with a present purpose to do great bodily harm;

B. Section 2119 As A Whole Is Best Read To Permit Conviction On The Basis Of A Conditional Intent To Harm

The common-law background that we have described raises at least a presumption that the intent requirement in Section 2119 is best read to encompass conditional intent to kill or cause serious bodily harm. Consideration of the remainder of the statutory text confirms that presumption.

Section 2119 criminalizes the taking of a car from a victim, "with the intent to cause death or serious bodily harm," in one of two ways: "by force and violence *or* by intimidation." 18 U.S.C. 2119 (emphasis added). Because it included "intimidation" as an alternative means of committing the crime, Congress must have contemplated a substantial subset of cases in which a carjacker's threats would successfully obviate any need to resort to actual force or violence —but in which the carjacker would, after 1994, nonetheless possess the requisite intent to cause death or serious harm. Yet if the intent requirement could be satisfied, as petitioner contends, only by a fixed and unconditional intent to harm, then the

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and the only declaration, by which its character is attempted to be changed, is, that the assailant was not determined to execute his savage purpose unconditionally and without a moment's delay. He had commenced the attack and raised the deadly weapon and was in the attitude to strike, but suspended the blow, to afford the object of his vengeance an opportunity to buy his safety, by compliance with the defendant's terms. To hold that such an act, under such circumstances, was not an offer of violence—not an attempt to commit violence, would be, we think, to outrage principle and manifest an utter want of that solicitude for the preservation of peace, which characterizes our law, and which should animate its administrators.")

number of cases in which the crime was committed only "by intimidation"—that is, using only a successful *threat* of violence—would be implausibly small.

Petitioner offers only two examples that he claims might satisfy these conditions (Br. 25-26): An offender who fires at the victim, intending to hit him, but misses, merely frightening him away; and one who successfully obtains the car keys using only a threat, but who then harms or kills the victim before leaving with the car. While both of those scenarios may involve "intimidation," they also involve taking the victim's car "by force and violence."[11] Even if they did not, however, petitioner's interpretation of the statute would be unsatisfactory, because it excludes a wide range of cases that any ordinary English speaker would understand to be covered by the phrase "by intimidation."

Carjacking is a modern analogue to what was once colloquially known as "highway robbery." Surely the modern legislator, responding to that problem, would intend to encompass, under the rubric of "intimida-

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[11] In the first case, the offender by hypothesis intended to, and did, use violence; the fact that, through some happenstance, the force employed did not actually touch the victim hardly means that the offender did not commit the offense "by force and violence." In the second case, the offender might choose the sequence of his actions in order, for example, to avoid damaging the car, or to enlist the victim's involuntary assistance in moving the car to an unpopulated area in an effort to escape or delay detection; or he might decide only after initially obtaining possession that he should physically harm the victim in order to discourage or prevent later identification. In none of those circumstances would it make sense to hold that the defendant did not take the car "by force and violence," simply because he had achieved de facto possession before causing physical harm.

tion," the carjacker's contemporary variant on the highwayman's traditional demand: "Your money *or* your life." Cf. *United States* v. *Richardson*, 27 F. Cas. 798 (C.C.D.C. 1837) (No. 16,155). Yet, under petitioner's "unconditional intent" interpretation, federal law would reach only those carjackings in which the offender had a preexisting and essentially independent purpose to harm the victim, quite apart from stealing his car; or those in which an initially conditional intent ultimately crystallized, during the course of the offense, and resulted in the actual or attempted infliction of harm. See Br. 18-19. That is not a plausible result. See, *e.g.*, J.A. 42 (Petitioner's interpretation "would no doubt insulate from federal prosecution the large majority of carjackings, as carjackers generally do not intend to cause death or serious bodily injury, but in fact hope that the opposite will occur, i.e., that the victim will peaceably give up the car and suffer no harm at all.").

The conclusion that Congress could not have intended Section 2119 to apply only in cases that involve an unconditional intent to harm is reenforced by the structure of the Section's penalty provisions. The first penalty clause in Section 2119 authorizes a severe penalty—up to 15 years' imprisonment—for any carjacking. Clauses (2) and (3) then provide for enhanced penalties in cases in which serious bodily harm or death actually "results" from commission of the crime. Congress therefore must have anticipated that in a significant number of cases—indeed, it would seem, in the basic or ordinary case—an offender would act with the required "intent to cause death or serious bodily harm," and yet no such harm would "result[]." Moreover, as we have argued elsewhere, Congress's use of the passive construction "if death [or serious harm] results" in the statute's enhanced

penalty provisions suggests that it intended those provisions to apply even if the resulting death or injury was an incidental result, rather than a planned (or even contemplated) part, of the carjacking offense.[12]

These implications of the statutory text are fully compatible with a construction under which the intent to cause death or harm that the government must prove may be conditional. In the many cases in which a threatening demand suffices to procure the victim's car, the jury will often be able (although not required) to infer that the offender intended to carry out the threat if necessary, and yet no actual bodily harm will "result" from the offense. If bodily harm does result, then the offender will, appropriately, be subject to more severe punishment—whether the particular harm in question is one the offender intended to inflict if necessary, or merely an unintended but proximate result of the offense conduct. Under petitioner's construction of the statute, by contrast, it is difficult to imagine many cases in which the government will be able to prove an unconditional intent to cause serious harm, but in which such harm will not in fact have resulted.

Against all this, petitioner argues (Br. 26-28) that Congress intended Section 2119's intent requirement to limit the scope of the federal carjacking

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[12] See 97-6203 U.S. Br. at 17-18, 27 & n.11 (*Jones* v. *United States*). We have provided petitioner with a copy of our brief in *Jones*. The structural analysis in the text is, of course, independent of the result in *Jones*: Whether or not serious bodily harm or death must be pleaded and proved at trial in order to impose the enhanced sentences authorized by clauses (2) and (3) of Section 2119, Congress obviously viewed those showings as matters of proof in addition to the offense elements set out in the Section's initial paragraph.

prohibition, and that accepting proof of conditional intent would "read the specific intent to cause serious bodily harm right out of the statute." But permitting the government to meet the intent requirement with proof of a conditional intent to harm imposes a significant restriction on the scope of the federal prohibition. Many carjackings could be completed without intending to inflict serious bodily harm, even if the victim attempted to resist. In a case involving no harm, or only harm that was clearly accidental, a jury might well be unwilling to infer the intent required by Section 2119, and the crime would therefore not be covered by federal law.

Indeed, in this case, petitioner's counsel argued at length to the jury that the government had not proven the existence of any intent to cause harm, conditional or otherwise, and certainly had not shown that petitioner (who did not himself carry a gun during the crimes at issue) possessed such an intent. See 12/13/95 Tr. 280-300; *id*. at 280-281 ("We came in here and told you [the jury] from the very beginning what the issue in this case is. And that is whether or not [petitioner] intended to cause death or serious physical injury to any person."). The jury evidently chose to credit the testimony of petitioner's co-conspirator, Vernon Lennon, that he would have used his gun if necessary (see J.A. 36), and to infer from the circumstances—including petitioner's own behavior in punching one victim who hesitated to turn over his car (J.A. 51)—that petitioner shared that intent. That the jury reached that permissible conclusion does not, however, mean that the need to prove petitioner's intent did not impose a substantial limitation on the

government's ability to charge petitioner, and to obtain a conviction, under Section 2119.[13]

The intent requirement that Congress added in 1994 continued, in a different form, a previous statutory limit on federal criminal prosecutions. The amendment replaced the statute's original "possessing a firearm" requirement with another, more functional limitation, designed to focus on the class of carjackings most likely to produce serious bodily harm. After 1994, the applicability of federal law to a carjacking depends on the offender's intention to inflict harm if necessary, rather than on the fortuity of what sort of weapon he might use to inflict it. Requiring the government to plead and prove that a carjacker was fully prepared to cause death or serious bodily harm, if necessary, still functions to limit federal prosecutions to those offenses that present the most serious risk of bodily harm.

In sum, a careful textual analysis of Section 2119 reenforces the conclusion that flows from traditional criminal law principles: A refusal to recognize conditional intent as sufficient for liability would give rise to statutory anomalies, and would restrict the overall scope of the federal carjacking prohibition in a way that Congress could not plausibly have contemplated. The statute can, on the other hand, be read as a coherent and sensible whole, without doing any violence to its text, simply by interpreting its intent requirement in accordance with the long common-law

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[13] It is certainly not true that, under a conditional intent construction, carjackings will escape federal prosecution only if the "carjacker [can] show" the absence of an intent to harm (Pet. Br. 27). The affirmative burden of proving the existence of the requisite intent, beyond a reasonable doubt, always rests squarely on the government.

tradition of recognizing a present, but conditional, intent as sufficient to establish criminal liability in similar contexts. Under those circumstances, basic principles of construction require adoption of the more sensible reading of the statute.

C. Nothing In The Drafting History Of The 1994 Amendments Suggests That Section 2119 Should Be Construed To Impose An Unconditional Intent Requirement

As petitioner observes (Br. 21-22), the court of appeals concluded, from its review of the history of the 1994 amendments, that Congress's adoption of the new "intent" requirement with respect to all carjacking offenses "was, in all likelihood, an unintended drafting error" (J.A. 57). See J.A. 54-58 (discussing legislative history); J.A. 68-69, 72-73 (Miner, J., dissenting). In particular, the court acknowledged the district court's "speculat[ion]" that "Congress probably intended the heightened intent requirement to apply only to cases where the carjacking resulted in death, that is, those cases falling under § 2119(3)." J.A. 58; see J.A. 36-41 (district court opinion). The court also cited (J.A. 58) the Third Circuit's discussion in *United States* v. *Anderson*, 108 F.3d at 481-483, which endorsed the analysis of the district court in this case, and further remarked that the "intent" requirement was "[p]resumably" added "in an effort to avoid subjecting the [new] death penalty provision [enacted in 1994] to Eighth Amendment attack for authorizing the death penalty for an accomplice who neither killed nor intended to harm a victim" (*id.* at 482).[14]

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[14] The courts' treatment of this issue is based not only on legislative history, but on the actual text of the amending Act. Section 60003(a)(14) of the Federal Death Penalty Act of 1994,

Petitioner argues (Br. 22) that the court of appeals relied on these "speculations" concerning the legislative history of the 1994 amendments as a justification for "redrafting [Section 2119] to include conditional intent." See also J.A. 72 (Miner, J., dissenting). That is incorrect. To the contrary, the court specifically "decline[d] any invitation to redraft the statute." J.A. 58. The court accepted the "specific intent to kill" requirement added in 1994 as applicable to all carjacking cases, including this one, and properly confined its inquiry to determining whether that requirement should, as a matter of ordinary statutory construction, be interpreted to encompass "conditional" intent. J.A. 58-59.

In any event, there is no sufficient reason to conclude that Congress's placement of the new intent requirement in Section 2119's initial paragraph was an "unintended drafting error" (J.A. 57). The

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Pub. L. No. 103-322, Tit. VI, 108 Stat. 1970, directs that "Section 2119(3)" be amended "by striking the period after 'both' and inserting, 'or sentenced to death.'; and by striking, 'possessing a firearm as defined in section 921 of this title,' and inserting', with the intent to cause death or serious bodily harm'." See Pet. Br. 2 (reprinting original and amending provisions). If the initial reference to Section 2119(3) is read to qualify all that follows, then it is not possible for a codifier to comply literally with the amending language, because the "possessing a firearm" language appears, not in clause (3) of Section 2119, but in the introductory language of that Section. The directive to replace one phrase with another is nonetheless clear, and the courts that have interpreted the amended intent requirement have treated the text that appears in the 1994 United States Code as correctly reflecting the amendment as enacted. See, *e.g.*, J.A. 55-56. Neither petitioner nor the United States has ever contended otherwise. Cf. *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448-463 (1993).

amending Act, by its terms, substituted that requirement for the "possessing a firearm" element of the original statute. See note 14, *supra*. As we have discussed, that substitution is readily explained by a desire to continue limiting the scope of the federal prohibition to those offenses that pose a serious risk of bodily harm or death, while eliminating unjustified differentiation among particular *means* (gun, knife, club, rope, fist) that an offender might use to cause or threaten serious injury. Because the new intent element applies to all cases under the statute, a construction requiring unconditional intent would leave the statute with a substantially narrower scope than Congress could reasonably have intended. That, however, is an argument for adopting the correct interpretation of the words Congress used in the statute, not a reason for questioning where it placed them.

Similarly, there is little force to the argument that Congress's adoption of the intent requirement must have been linked to concerns about the constitutionality of the potential death penalty that was also authorized by the 1994 amendment to Section 2119. See *Anderson*, 108 F.3d at 482; see also Pet. Br. 22. First, the death penalty added to Section 2119 was only one of many that Congress added or amended in Sections 60003 through 60024 of the Federal Death Penalty Act of 1994, Pub. L. No. 103-322, Tit. VI, 108 Stat. 1968-1982. Section 2119 was amended by subsection (a)(14) of Section 60003 of the Act, which is entitled "Specific offenses for which death penalty is authorized." Congress addressed constitutional concerns about the proper implementation of the death penalty, not in its penalty-authorization amendments to individual substantive provisions like Section 2119, but in a separate section of the Act. Section 60002,

entitled "Constitutional procedures for the imposition of the sentence of death," created an entirely new capital-sentencing chapter of the United States Code, 28 U.S.C. 3591 *et seq.* Pub. L. No. 103-322, Tit. VI, § 60002, 108 Stat. 1959. There is no reason to think that Congress's addition of the intent requirement to Section 2119 was an effort to deal separately (and partially) in that Section with issues it was addressing comprehensively elsewhere in the same legislation. See, *e.g.*, 18 U.S.C. 3591(a)(2) (requiring a finding beyond a reasonable doubt, at the outset of the capital penalty phase, that the defendant's own acts and intentions were sufficiently culpable to satisfy threshold constitutional requirements).

Second, when Congress did act to ensure the constitutionality of its death penalty provisions, it clearly understood this Court's teaching that constitutional proportionality principles require only a mental state of criminal recklessness (combined with major participation in an offense that results in death). See *Tison* v. *Arizona*, 481 U.S. 137, 157-158 (1987); 18 U.S.C. 3591(a)(2)(D) (requiring a finding that the defendant at least "intentionally and specifically engaged in an act of violence * * * [demonstrating] a reckless disregard for human life and the victim died as a direct result of the act"). It is therefore unlikely that Congress was motivated primarily by constitutional concerns when it chose the more demanding intent standard in amending Section 2119.[15]

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[15] Certainly there is no reason to suppose that Congress sought to ensure the enforceability of its death penalty provision by requiring, instead of criminal recklessness, an intent to harm that is not only actual, but unconditional.

For these reasons, the argument that Congress acted inadvertently in structuring the 1994 amendments is unpersuasive. Moreover, we agree with the court of appeals' narrower, and more relevant, observation (J.A. 57) that "[t]here is no indication in the Congressional Record as to the purpose of the late-added heightened intent requirement." Under the circumstances, the legislative history is useful only for the general (and, in any event, self-evident) proposition that Congress was deeply concerned, both in 1992 and in 1994, with providing a federal criminal remedy for what it perceived as a very serious national problem. Beyond that, we agree with petitioner (Br. 19) that there is little reason in this case to "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994).

D. The Rule Of Lenity Does Not Require A Different Result In This Case

Because construing the intent requirement of Section 2119 to include conditional intent to harm or kill comports with the traditional understanding of intent in the criminal law, and with the language and structure of the statute, petitioner is ultimately reduced to reliance on the rule of lenity. Pet. Br. 31-32. That principle, which rests on concerns about providing fair notice of what conduct is prohibited, and about ensuring that society has actually made a legislative decision to punish the conduct of which an individual stands accused, has its primary application in cases in which there is some doubt whether the legislature intended to criminalize conduct that might otherwise appear to be innocent. See, *e.g.*, *Ratzlaf*, 510 U.S. at 148-149. The offense conduct at issue in this case lies far from that central core of the

lenity doctrine: Even if petitioner's "intent to cause death or serious bodily harm" to his carjacking victims was "conditional," he can claim no legitimate uncertainty about the criminality or blameworthiness of his acts.

In any event, as the Court has recently explained, the rule of lenity is not properly invoked simply because a statute requires some degree of construction to confirm its meaning. *Muscarello* v. *United States*, 118 S. Ct. 1911, 1919 (1998); see also *Caron* v. *United States*, 118 S. Ct. 2007, 2012 (1998) ("The rule of lenity is not invoked by a grammatical possibility."); *Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990). To the contrary, the Court "ha[s] always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *United States* v. *R.L.C.*, 503 U.S. 291, 305-306 (1992) (quoting *Moskal*, 498 U.S. at 108); see also *id.* at 311-312 (Thomas, J., concurring) (lenity is not appropriate until after the application of "innumerable rules of construction powerful enough to make clear an otherwise ambiguous penal statute"). As a tie-breaking rule, the lenity principle applies only if there is such "grievous ambiguity or uncertainty" in a statute that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 118 S. Ct. at 1919 (internal quotation marks and ellipsis omitted). In this case, consideration of Section 2119 in the light of common law and common sense leaves no substantial doubt about the correct interpretation of its intent requirement. The rule of lenity therefore has no application here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1998