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## Conditional Intent to Kill is Enough for Federal Carjacking Conviction

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## CONDITIONAL INTENT TO KILL IS ENOUGH FOR FEDERAL CARJACKING CONVICTION

Holloway v. United States, 119 S. Ct. 966 (1999)

### I. INTRODUCTION

In *Holloway v. United States*,<sup>1</sup> the United States Supreme Court considered whether the scienter requirement of the federal carjacking statute<sup>2</sup> was satisfied where the assailant's intent to cause death or serious bodily harm<sup>3</sup> was conditioned upon the victim's refusal to give up the vehicle. The Court stated that because the statute's *mens rea* element describes the defendant's state of mind at the exact moment he takes the vehicle, and because neither conditional nor unconditional intent are mentioned specifically, the most reasonable reading of § 2119 encompasses both species of intent.<sup>4</sup> Further, the Court argued that requiring proof of unconditional intent to kill would exclude from coverage the vast majority of crimes that the law obviously intended to federalize. The Court found that it was "reasonable to presume that Congress was familiar with the cases and the scholarly writing that have recognized that the 'specific intent' to commit a wrongful act may be conditional."<sup>5</sup> Thus, over the dissents of two Justices,<sup>6</sup> the Court held that proof of conditional intent was sufficient for conviction.<sup>7</sup> Finally, the majority stated that because Congress' intent in enacting this statute was clear, the rule of lenity was inapplicable.<sup>8</sup>

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<sup>1</sup> 119 S. Ct. 966 (1999).

<sup>2</sup> 18 U.S.C.A. § 2119 (West Supp. 1999).

<sup>3</sup> For the purposes of this Note, "intent to cause death or serious bodily harm" will be expressed as "intent to kill."

<sup>4</sup> See *Holloway*, 119 S. Ct. at 970.

<sup>5</sup> *Id.* at 971.

<sup>6</sup> *Id.* at 972, 977. Justices Scalia and Thomas each wrote separate dissenting opinions.

<sup>7</sup> *Id.* at 972.

<sup>8</sup> *Id.* at 972 n.14. The rule of lenity is "the judicial doctrine by which courts decline to interpret criminal statutes so as to increase penalty imposed, absent clear evidence

This Note argues that the majority in *Holloway* erred in holding that proof of conditional intent to kill satisfies the scienter requirement of § 2119. Contrary to the Court's conclusion, the most reasonable interpretation of the statute does not cover conditional intent. Moreover, the legislative history is unclear, and it is entirely plausible that Congress intended this statute to cover only a specific type of carjacking. At the very least, the statute is ambiguous, and therefore the rule of lenity should apply.

## II. BACKGROUND

### A. CONDITIONAL INTENT IN THE CRIMINAL COMMON LAW

A survey of the criminal common law reveals two competing approaches to the issue of whether conditional intent<sup>9</sup> is sufficient for conviction where a statute requires proof of intent. In the majority of jurisdictions, conditional intent is enough.<sup>10</sup> However, a significant number of courts have held the opposite.<sup>11</sup>

#### 1. *Conditional Intent is Sufficient: The Connors Position*

Although it was decided almost ninety years ago, the leading case for the proposition that conditional intent is sufficient remains the Supreme Court of Illinois' *People v. Connors*.<sup>12</sup> *Connors*

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of legislative intent to do otherwise; in other words, where there is ambiguity in a criminal statute, doubts are resolved in favor of defendant." BLACK'S LAW DICTIONARY 1332 (6th ed. 1990).

<sup>9</sup> Conditional criminal intent is the intent to perform an illegal act only if the victim fulfills or fails to fulfill a specific condition. See BLACK'S LAW DICTIONARY, *supra* note 8, at 294.

<sup>10</sup> See, e.g., *People v. McMakin*, 8 Cal. 547, 548-49 (Cal. 1857); *Monroe v. United States*, 598 A.2d 439 (D.C. 1991); *State v. Mathewson*, 472 P.2d 638, 640 & nn.1-3 (Idaho 1970); *People v. Connors*, 97 N.E. 643 (Ill. 1912); *Eby v. State*, 290 N.E.2d 89, 91 & n.2 (Ind. Ct. App. 1972); *Commonwealth v. Richards*, 293 N.E.2d 854, 860 (Mass. 1973); *People v. Vandelinder*, 481 N.W.2d 787, 788-89 (Mich. Ct. App. 1992); *State v. Simonson*, 214 N.W.2d 679, 682 (Minn. 1974); *State v. Klein*, 547 P.2d 75, 78 (Mont. 1976); *Vanderpool v. State*, 211 N.W. 605, 606-07 (Neb. 1926); *State v. Morgan*, 25 N.C. 186, 189-90 (N.C. 1842); *State v. Bond*, 478 S.E.2d 163, 175 (N.C. 1996).

<sup>11</sup> See, e.g., *Carter v. State*, 408 N.E.2d 790, 796 & n.6 (Ind. Ct. App. 1980); *Cradock v. State*, 37 S.2d 778 (Miss. 1948); *State v. Kinnemore*, 295 N.E.2d 680 (Ohio Ct. App. 1972); *State v. Irwin*, 285 S.E.2d 345 (N.C. Ct. App. 1982).

<sup>12</sup> 97 N.E. 643 (Ill. 1912).

involved a confrontation between two rival labor unions. The members of one union pointed guns at the members of the other and threatened to "fill [them] full of holes" if they didn't stop work.<sup>13</sup> The workers obeyed, and no one was hurt.<sup>14</sup> The gunmen were convicted of assault with intent to murder, and the court upheld their conviction.<sup>15</sup>

In so holding, the court asserted that the intent to kill may be conditional.<sup>16</sup> The court argued that it would be unjust to allow criminal defendants to insulate themselves from conviction where intent is required merely by coupling this intent with an "unlawful condition or demand."<sup>17</sup> Where such coupling occurs, the court declared that "the unlawful character of the demand eliminates it from consideration and the act will be judged in its naked criminality."<sup>18</sup>

## 2. *Conditional Intent is Not Enough: Irwin and Kinnemore*

Despite the influence of *Connors*, however, there is a considerable amount of precedent that holds the opposite: where "intent" is required by statute, proof of conditional intent is insufficient for conviction.<sup>19</sup> Two cases, *State v. Irwin*<sup>20</sup> and *State v. Kinnemore*,<sup>21</sup> are representative of this approach.

In *Irwin*, the North Carolina Court of Appeals considered the case of a foiled jailbreak.<sup>22</sup> The defendant was briefly re-

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<sup>13</sup> *Id.* at 644-45.

<sup>14</sup> *Id.* at 645.

<sup>15</sup> *Id.* The court deemed proper the trial judge's instruction to the jury that read, in part:

The court instructs you as to the intent to kill alleged in the indictment that though you must find that there was a specific intent to kill . . . still, if you believe from the evidence beyond a reasonable doubt that the intention of the defendants was only in the alternative . . . and if that specific intent was formed in the minds of the defendants and the shooting . . . with intent to kill was only prevented by the happening of the alternative . . . then the requirement of the law as to the specific intent is met.

*Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 648.

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., *Carter v. State*, 408 N.E.2d 790, 796 & n.6 (Ind. Ct. App. 1980); *Cradock v. State*, 37 S.2d 778 (Miss. 1948); *State v. Kinnemore*, 295 N.E.2d 680 (Ohio Ct. App. 1972); *State v. Irwin*, 285 S.E.2d 345 (N.C. Ct. App. 1982).

<sup>20</sup> 285 S.E.2d 345 (N.C. Ct. App. 1982).

<sup>21</sup> 295 N.E.2d 680 (Ohio Ct. App. 1972).

<sup>22</sup> *Irwin*, 285 S.E.2d at 349-50.

leased from behind bars to answer a phone call, and instead of returning to his cell he grabbed a jail matron, held a knife to her neck, and said "[D]on't any of [you] be no damn hero, I will kill this woman."<sup>23</sup> The court held that this threat was evidence of a conditional intent to kill and that such an intent was insufficient to fulfill the charge of assault with a deadly weapon with intent to kill.<sup>24</sup> In so holding, the court reasoned that "[t]he State's evidence shows only that the defendant committed an assault with the intent to intimidate."<sup>25</sup> Because the prosecution failed to prove that Irwin had a specific intent to kill by means of the assault, the conviction was reversed.<sup>26</sup>

*State v. Kinnemore* involved the assault of a department store employee by an assailant armed with a pair of scissors.<sup>27</sup> The defendant grabbed the woman, pressed the scissors to her neck, and threatened to kill her if he was not allowed to leave.<sup>28</sup> The attempted escape was thwarted, however, and Kinnemore was disarmed, arrested, and charged with assault with intent to kill.<sup>29</sup> Appealing his subsequent conviction, the defendant claimed that his conditional intent did not satisfy the intent to kill required by statute.<sup>30</sup> The court agreed, stating "an assault coupled with a present intent to kill necessarily involves continuous, sequential, and uninterrupted conduct."<sup>31</sup> The evidence was sufficient to prove that Kinnemore assaulted his victim with intent to escape but not sufficient to show that he maintained the continuous intent to kill required for conviction.<sup>32</sup>

#### B. CONDITONAL INTENT IN LEGAL SCHOLARSHIP

In legal scholarship, an expression of conditional intent has generally been found to satisfy a statutory requirement of intent.<sup>33</sup> With regard to intent to kill, this view agrees with the

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<sup>23</sup> *Id.* at 349.

<sup>24</sup> *Id.* at 350.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 349.

<sup>27</sup> *State v. Kinnemore*, 295 N.E.2d 680, 681 (Ohio Ct. App. 1972).

<sup>28</sup> *Id.* at 681-82.

<sup>29</sup> *Id.* at 682.

<sup>30</sup> *Id.* at 682-83.

<sup>31</sup> *Id.* at 683.

<sup>32</sup> *Id.*

<sup>33</sup> The quintessential expression of this notion is found in the treatise *Substantive Criminal Law* by Wayne R. LaFave and Austin W. Scott, Jr.:

*Connors* court that where such intent is conditioned on the surrender of property that the perpetrator has no right to demand, or the performance of an act that he has no right to expect, the statutory requirement of intent is satisfied.<sup>34</sup> Proponents of this position do, however, recognize that some courts have disagreed on the subject.<sup>35</sup>

The Model Penal Code supports this general trend in legal scholarship. The Code specifically embraces the idea of conditional intent, stating "[w]hen 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."<sup>36</sup> For example, if one takes money with the intent of returning it if he wins the lottery, this condition does not "negative the harm or evil" of theft.<sup>37</sup> On the other hand, if one takes money believing it is rightfully his own and intends to return it if he discovers that it is not, the evil of the theft is negated.<sup>38</sup>

There is, however, a line of legal thought that disagrees with the majority approach. Glanville Williams explained this position in his book *The Mental Element in Crime*.<sup>39</sup> Williams argues that conditional intent only rises to the required level of intent where the end is either desired or foreseen as inevitably accom-

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

1 WAYNE R. LAFAYE & AUSTIN W. SCOTT JR., *SUBSTANTIVE CRIMINAL LAW* § 3.5, at 312 (1986). See also, ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 835 (3d ed. 1982) ("The 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.").

<sup>34</sup> LAFAYE & SCOTT, *supra* note 33, §3.5, at 312.

<sup>35</sup> See *id.* at 312 n.43 (citing *Irwin* and *Kinnemore*). See *supra* Part III.A.2.

<sup>36</sup> MODEL PENAL CODE § 2.02(6) & cmt. 8 (Official Draft 1962 & Revised Comments 1985).

<sup>37</sup> See LAFAYE & SCOTT, *supra* note 33, § 3.5, at 313.

<sup>38</sup> See *id.*

<sup>39</sup> GLANVILLE WILLIAMS, *THE MENTAL ELEMENT IN CRIME* (1965).

panying the desired result; otherwise, such "conditional intent" is actually recklessness.<sup>40</sup> Thus, a man who threatens (and intends) to shoot another if he doesn't remove his overalls is only guilty under an "intent to kill" statute if the need to fire is "foreseen as the certain accompaniment" of the desired and demanded act.<sup>41</sup> If he can show at trial that he did not foresee that use of his gun would be inevitable, and further that he had no desire to shoot his victim, then the prosecution will be unable to prove the requisite intent to kill.<sup>42</sup>

### C. 18 U.S.C. § 2119: THE CARJACKING STATUTE

#### 1. *The Legislative History of 18 U.S.C. § 2119*

In September 1992, two assailants stole a car belonging to a Maryland woman named Paula Basu.<sup>43</sup> The men forced her from the vehicle and sped away. Desperate in the realization that her infant daughter was still in the car, Ms. Basu clung to the door and was dragged to her death.<sup>44</sup>

In the wake of this tragic event and the subsequent public outrage, Congress passed the Anti Car Theft Act of 1992, codified as 18 U.S.C. § 2119.<sup>45</sup> As initially enacted, this law read:

Whoever, possessing a firearm as defined in section 921 of this Title, 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

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<sup>40</sup> *Id.* at 53. Williams writes:

[A]n intent occurs where an end is truly desired (desired, perhaps, only in certain circumstances, but still desired in those circumstances), and that it extends to consequences that, though not in themselves desired, are foreseen as the *certain* accompaniment of what is desired. *It is not a case of intent, but only of recklessness, where the consequence, though foreseen as possible, is not desired and is not foreseen as the inevitable accompaniment of what is desired.*

*Id.* (emphasis added).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *United States v. Holloway*, 921 F. Supp. 155, 157 (E.D.N.Y. 1996).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

both, and (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.<sup>46</sup>

During 1993, the Congress added death penalty provisions to a number of federal criminal statutes, including 18 U.S.C. § 2119.<sup>47</sup> Additionally, Congress broadened the statute's application by removing the firearm requirement. In doing so, the legislature federalized about 14,000 additional carjacking cases per year.<sup>48</sup> The statute was amended in the following manner:

(14) CARJACKING—Section 2119(3) of Title 18, United States Code is 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.”<sup>49</sup>

A straightforward reading of this amendment reveals that it was intended to alter the language of only subsection (3) of § 2119. However, because the firearm clause was not part of this penalty subsection, the new intent element was placed in the

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<sup>46</sup> Pub. L. No. 102-519, 106 Stat. 3384 (1992).

<sup>47</sup> See *Holloway*, 921 F. Supp. at 157.

<sup>48</sup> See *id.* at 159 (citing Mary C. Michenfelder, *The Federal Carjacking Statute: To Be Or Not To Be? An Analysis of The Propriety Of 18 U.S.C. 2119*, 39 ST. LOUIS U. L.J. 1009, 1012-13 (1995)).

<sup>49</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title VI, § 60003(a)(14), 108 Stat. 1796, 1970 (1994). A form of the bill considered earlier read, in part:

Section 2119 of title 18, United States Code, is amended to read as follows:

...

(b) Offenses.—

A person who, while in possession of a firearm (as defined in section 921) or other weapon or dangerous device—

(1) intentionally strikes or otherwise makes physical contact with a covered motor vehicle with a motor vehicle operated by the person, with any other thing, or with any part of the person's body, in one of the circumstances described in subsection (c); or

(2) takes a covered motor vehicle from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall be punished under subsection (d).

(c) CIRCUMSTANCES IN WHICH OFFENSE OCCURS.— The circumstances referred to in subsection (b)(1) are that—

(1) the person makes the contact with the intent to injure an occupant of the motor vehicle or to take or cause damage to the motor vehicle; or

(2) in the course of events immediately following the contact, an occupant of the motor vehicle is injured or the motor vehicle is taken or damaged.

...

body of the law itself. As a result, the intent to cause death or serious bodily harm amendment is applicable to all violations of § 2119, not only those resulting in death.<sup>50</sup>

Congress considered removing the scienter element of 18 U.S.C. § 2119 on three separate occasions.<sup>51</sup> First, in the Violent Crime Control and Law Enforcement Improvement Act of 1995, where the title to section 717 read: "Elimination Of Unjustified Scienter Element For Carjacking. Eliminates scienter requirement in 18 U.S.C. § 2119, the so-called carjacking statute."<sup>52</sup> The text of this section was brief and to the point: "Section 2119 of Title 18, United States Code, is amended by striking 'with the intent to cause death or serious bodily harm.'"<sup>53</sup> However, this amendment did not pass.

Two years later, in section 807 of the Omnibus Crime Control Act of 1997,<sup>54</sup> Congress considered an amendment with the exact same language. Again, the proposal was not enacted.

The intent requirement of § 2119 was addressed for a third time by the Anti-Gang and Youth Violence Act of 1997.<sup>55</sup> In Senator Leahy's comments on behalf of this proposal, he stated "[t]his section would eliminate an unjustified and unique scienter element created for the offense of carjacking . . . [because] [t]his unique new element will inappropriately make carjackings difficult or impossible to prosecute in certain situations."<sup>56</sup>

<sup>50</sup> See *Holloway*, 921 F. Supp. at 158.

<sup>51</sup> As of the completion of this note, a bill that removes the intent language from § 2119 is in "final negotiations" in House and Senate Joint Conference. See 145 CONG. REC. S14,433 (1999) (statement of Sen. Feinstein). However, the statute remains as amended in 1994.

<sup>52</sup> 141 CONG. REC. S75 (1995).

<sup>53</sup> *Id.*

<sup>54</sup> 143 CONG. REC. S163 (1997).

<sup>55</sup> 143 CONG. REC. S1659 (1997).

<sup>56</sup> 143 CONG. REC. S1659, S1661-62 (daily ed. Feb. 26, 1997) (statement of Senator Leahy). Presciently, Senator Leahy continued:

The new requirement of an intent to cause death or serious bodily harm will likely be a fertile course of argument for defendants in cases in which no immediate threat of injury occurs, such as where a defendant enters an occupied vehicle while it is stopped at a traffic light and physically removes the driver. Even when a weapon is displayed, the defendant may argue that although it was designed to instill fear, he had no intent to harm the victim had the victim in fact declined to leave the car.

....

To give defendants who take cars from the person or presence of their occupants by force and violence or intimidation a new legal tool with which to resist their prosecution is unjustified.

Once again, however, this proposed change to § 2119 was not passed, and the statute remained as amended in 1994.

## 2. *The Circuit Courts' Interpretations of 18 U.S.C. § 2119*

Between the enactment of the 1994 amendment and the Supreme Court's decision in *Holloway*, the question of whether or not conditional intent satisfies the intent requirement of 18 U.S.C. § 2119 was considered by five United States Circuit Courts of Appeals. The Second, Third, Eighth, and Tenth Circuits held that proof of conditional intent to kill was sufficient for conviction under the federal carjacking statute; the Ninth Circuit disagreed.

In *United States v. Anderson*,<sup>57</sup> decided in March 1997, the Third Circuit held that proof of conditional intent is enough for conviction under § 2119.<sup>58</sup> This decision was based on two factors. First, the court relied on the authority of legal scholarship.<sup>59</sup> Second, the court conducted a survey of other courts' considerations of statutes that contain analogous intent provisions and concluded that proof of conditional intent was sufficient in the majority of jurisdictions.<sup>60</sup> Five months later, in *United States v. Romero*,<sup>61</sup> the Tenth Circuit followed this precedent, quoting *Anderson* extensively in its decision that conditional intent was enough for conviction under § 2119.<sup>62</sup>

Less than a month after *Romero*, in *United States v. Arnold*,<sup>63</sup> the Second Circuit also concluded that conditional intent was sufficient to satisfy the requirements of § 2119.<sup>64</sup> The majority analyzed the statute's legislative history and concluded that "the application of the heightened intent requirement to all three of the carjacking categories was, in all likelihood, an unintended drafting error."<sup>65</sup> Nonetheless, the court claimed a disinclina-

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*Id.*

<sup>57</sup> 108 F.3d 478 (3d Cir. 1997).

<sup>58</sup> *Id.* at 485.

<sup>59</sup> *Id.* at 483-84.

<sup>60</sup> *Id.* at 484. Sixteen months later, in *United States v. Lake*, 150 F.3d 269, 272 (3d Cir. 1998), the Third Circuit followed its holding in *Anderson*.

<sup>61</sup> 122 F.3d 1334 (10th Cir. 1997).

<sup>62</sup> *Id.* at 1339.

<sup>63</sup> 126 F.3d 82 (2d Cir. 1997). This case was ultimately granted certiorari by the Supreme Court as *Holloway v. United States*, 118 S. Ct. 1558 (1998).

<sup>64</sup> *Id.* at 89.

<sup>65</sup> *Id.* at 86.

tion to redraft the statute, calling this "a task better left to the legislature."<sup>66</sup> Accordingly, the court defined the sole issue on appeal as "whether the 'specific intent to kill,' as now reflected in 18 U.S.C. § 2119, encompasses a conditional intent."<sup>67</sup>

The Second Circuit determined that conditional intent was enough to satisfy the federal statute.<sup>68</sup> This conclusion was based on three considerations. First, the majority stated that, unlike "reckless indifference," the analogue suggested by petitioner, conditional intent to kill involves contemplation and planning.<sup>69</sup> Second, they asserted that the inclusion of conditional intent under the rubric of intent is "a well-established principle of criminal common law" and is supported by the Model Penal Code.<sup>70</sup> Finally, the majority concluded that such inclusion was implicit in the legislative purpose of § 2119, arguing that "[a] statute should not be literally applied if it results in an interpretation clearly at odds with the intent of the drafters."<sup>71</sup>

In dissent, Judge Miner dismissed the majority's assumption that the statutory language was a drafting error, arguing that Congress might very well have intended "to narrow in some respects, as well as broaden in some respects, the statute's coverage."<sup>72</sup> Further, he pointed to Congress' three failed attempts to eliminate the scienter element and concluded that these attempts might well have fallen short of passage because the lawmakers intended this element to do precisely what the petitioner suggested—make proof of unconditional intent to kill a requirement for conviction under § 2119.<sup>73</sup>

Next, Judge Miner noted that "it is of more than passing interest that carjacking is essentially a state offense, and it may well be the intent of Congress to limit the scope of the federal offense."<sup>74</sup> In closing, he pointed out that "[t]here is no federal common law of crimes," and that the majority's interpretation

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 86-87.

<sup>68</sup> *Id.* at 89.

<sup>69</sup> *Id.* at 87.

<sup>70</sup> *Id.* at 88. See *supra* note 36 and accompanying text.

<sup>71</sup> *Id.* at 88-89.

<sup>72</sup> *Id.* at 90 (Miner, J., dissenting).

<sup>73</sup> *Id.* at 91 (Miner, J., dissenting).

<sup>74</sup> *Id.* (Miner, J., dissenting).

of the statute in light of criminal common law and the never-adopted Model Penal Code led it down the unfortunate path of "clear judicial usurpation of congressional authority."<sup>75</sup>

In *United States v. Williams*,<sup>76</sup> decided in February 1998, the Eighth Circuit agreed with the Second, Third, and Tenth Circuits that proof of conditional intent to kill was enough for conviction under § 2119. This decision analyzed the structure of the carjacking statute, and concluded that Congress did not intend to limit its reach to those situations where an assailant "unconditionally intends death or serious bodily injury regardless of whether the victim surrenders the vehicle."<sup>77</sup>

Finally, taking a different approach from its four sister circuits, in *United States v. Randolph*,<sup>78</sup> the Ninth Circuit held that conviction under the post-1994 amendment version of § 2119 required proof of more than conditional intent.<sup>79</sup> The court argued that neither such threats as "you'll be okay if you do what I tell you" nor the simple act of "brandishing of a weapon" satisfy the intent element of the amended version of the law.<sup>80</sup> More generally, the court stated that "[t]he mere conditional intent to harm a victim *if* she resists is simply not enough to satisfy § 2119's new specific intent requirement."<sup>81</sup> This conclusion asserted that the "plain language" of the statute required proof that the defendant actually intended to cause the victim's death or serious injury in order to secure a conviction.<sup>82</sup>

### III. FACTS AND PROCEDURAL HISTORY

Teddy Arnold operated a "chop shop" in Queens, New York. His son, Vernon Lennon, supplied the operation with stolen vehicles.<sup>83</sup> In September 1994, Lennon asked his childhood friend Francois Holloway to help him steal cars.<sup>84</sup> The plan of attack was to follow the targeted car, generally to the driver's

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<sup>75</sup> *Id.* at 92 (Miner, J., dissenting).

<sup>76</sup> 136 F.3d 547 (8th Cir. 1998).

<sup>77</sup> *Id.* at 551.

<sup>78</sup> 93 F.3d 656 (9th Cir. 1996).

<sup>79</sup> *See id.* at 667.

<sup>80</sup> *Id.* at 665 & n.6.

<sup>81</sup> *Id.* at 665.

<sup>82</sup> *See id.*

<sup>83</sup> *See United States v. Holloway*, 921 F. Supp. 155, 156 (E.D.N.Y. 1996).

<sup>84</sup> *See id.*

home, and then commit the robbery.<sup>85</sup> This *modus operandi* required two perpetrators: one to drive the stolen car, and a second to remain in the original vehicle.<sup>86</sup> Lennon told Holloway that they would use a gun to steal the cars, and showed his friend the gun, a .32 caliber revolver.<sup>87</sup> Holloway agreed to help Lennon for a fixed fee per car.<sup>88</sup>

The duo's first charged carjacking occurred in Queens on October 14, 1994.<sup>89</sup> Holloway and Lennon followed a 1992 Nissan Maxima to the home of its driver, Stanley Metzger.<sup>90</sup> When Metzger got out of his car, Lennon accosted him with the .32, and demanded the keys.<sup>91</sup> Angered by Metzger's momentary hesitation, Lennon threatened to shoot him.<sup>92</sup> Metzger gave up the keys, and was ordered to hand over his wallet.<sup>93</sup> He complied, and the carjackers drove off.<sup>94</sup>

At approximately 8:00 P.M. on the next day, October 15, 1994, Holloway and Lennon targeted a 1991 Toyota Celica driven by Donna DiFranco.<sup>95</sup> They followed DiFranco from the Whitestone Shopping Center in Queens to a friend's house.<sup>96</sup> As she left her car, Lennon approached her, brandishing his gun, and demanded her car keys and money.<sup>97</sup> DiFranco unlocked her club and turned off her car alarm, and the carjackers took her vehicle.<sup>98</sup>

About two hours later, Holloway and Lennon committed their final charged carjacking.<sup>99</sup> They followed a 1988 Mercedes Benz driven by Ruben Rodriguez to the driver's home in the Jamaica Estates neighborhood of Queens.<sup>100</sup>

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<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *See id.*

<sup>97</sup> *See id.*

<sup>98</sup> *See id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

Both carjackers got out of their car, and approached Rodriguez as he exited his Mercedes.<sup>101</sup> Lennon asked Rodriguez to direct him to a particular address.<sup>102</sup> Feeling that "something was up," Rodriguez got back into his vehicle.<sup>103</sup> Lennon pointed the gun at him, and threatened to shoot if he did not get out of the car.<sup>104</sup> Rodriguez complied, and Lennon demanded his money and keys.<sup>105</sup> The victim hesitated, as his money was in the car, and he was afraid Lennon would shoot if he leaned in to get it.<sup>106</sup> Angered by Rodriguez's hesitation, Holloway punched him in the face.<sup>107</sup> Rodriguez stumbled backwards, and used this moment of confusion to flee on foot.<sup>108</sup> As their victim fled, Holloway and Lennon drove off.<sup>109</sup>

As determined later at trial, on each of these three occasions the two men intended to leave their victims unharmed.<sup>110</sup> They planned to use the .32 only to obtain possession of the car.<sup>111</sup> In each carjacking, however, Lennon was prepared to use the gun if the victim resisted, and there was sufficient evidence to convince a rational juror that Holloway shared this conditional intent.<sup>112</sup>

On February 2, 1995, Holloway was indicted in the Eastern District of New York for conspiracy to operate and the operation of a chop shop, three separate counts of carjacking, and three separate counts of use of a firearm during and in relation to the charged hijackings.<sup>113</sup>

At trial, the defense did not call any witnesses.<sup>114</sup> Instead, at the close of the government's case, defense counsel moved for dismissal of all carjacking and firearm counts pursuant to Rule

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<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at 156-57.

<sup>103</sup> *Id.* at 157.

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

<sup>110</sup> *See id.*

<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See id.* at 155-56.

<sup>114</sup> *United States v. Arnold*, 126 F.3d 82, 84 (2d Cir. 1997).

29 of the Federal Rules of Criminal Procedure<sup>115</sup> on the ground that the government had not presented, as required under § 2119, legally sufficient proof that Holloway acted with the specific intent to cause death or serious bodily harm to any of the carjacking victims.<sup>116</sup>

The Rule 29 motion was denied.<sup>117</sup> Trial judge John Gleeson instructed the jury that § 2119 was satisfied if Holloway had an intent to cause death or serious bodily harm only if the victims refused to surrender their cars.<sup>118</sup> In December 1995, a jury found Holloway guilty of all charges.<sup>119</sup>

Following the verdict, the defense moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure,<sup>120</sup> arguing that the incorrect statutory analysis with regard to intent in Judge Gleeson's jury instructions entailed reversible error.<sup>121</sup> In a decision issued on April 5, 1996, Judge Gleeson denied Holloway's motion.<sup>122</sup>

On appeal, the United States Court of Appeals for the Second Circuit affirmed the District Court's decision 2-1, holding

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<sup>115</sup> Rule 29 reads, in part:

Motion for Judgment of Acquittal:

(a) Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

FED. R. CRIM. P. 29.

<sup>116</sup> *Arnold*, 126 F.3d at 84.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 87. Judge Gleeson's instructions to the jury read, in part:

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs. In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

*Id.*

<sup>119</sup> *United States v. Holloway*, 921 F. Supp 155, 156 (E.D.N.Y. 1996).

<sup>120</sup> Rule 33 reads, in part: "New Trial. On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." FED. R. CRIM. P. 33.

<sup>121</sup> *Arnold*, 126 F.3d at 84-85.

<sup>122</sup> *Id.* at 85.

that conditional intent was sufficient to satisfy the requirements of § 2119.<sup>123</sup>

The Supreme Court granted certiorari<sup>124</sup> on April 27, 1998 in order to resolve the conflict between the interpretations of § 2119 by the Second Circuit in *Arnold* and the Ninth Circuit in *Randolph*.

#### IV. SUMMARY OF OPINIONS

##### A. THE MAJORITY OPINION

Justice Stevens delivered the opinion of the Court.<sup>125</sup> Affirming the decision of the Second Circuit, the majority held that 18 U.S.C. § 2119 is satisfied "when the Government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car (or, alternatively, if unnecessary to steal the car)."<sup>126</sup> Additionally, the majority dismissed the petitioner's request for application of the rule of lenity, stating that the sufficient clarity of the carjacking statute's meaning made this rule inappropriate.<sup>127</sup>

The majority opinion began by asserting that the language of the statutes enacted by Congress provides "the most reliable evidence of its intent."<sup>128</sup> Further, the Court stated, the critical language of each statute must be interpreted with regard to "its placement and purpose in the statutory scheme."<sup>129</sup>

The Court next declared that this case turned on what Congress meant to describe when it amended § 2119 to include the words "with the intent to cause death or serious bodily harm," (i.e., whether it was referring to conditional intent or uncondi-

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<sup>123</sup> *Id.* at 89. This decision is discussed *supra* notes 63-75 and accompanying text. The court of appeals also held that (1) the performance of Holloway's trial counsel was not constitutionally deficient so as to require reversal and a new trial; and (2) the trial judge did not abuse his discretion by sentencing Holloway to consecutive sentences pursuant to 18 U.S.C. §924(c). *See id.* at 89-90.

<sup>124</sup> *Holloway v. United States*, 118 S. Ct. 1558 (1998).

<sup>125</sup> *Holloway v. United States*, 119 S. Ct. 966 (1999). Justice Stevens was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer.

<sup>126</sup> *Id.* at 972.

<sup>127</sup> *Id.* at 972 n.14.

<sup>128</sup> *Id.* at 969 (quoting *United States v. Turkette*, 452 U.S. 576, 593 (1981)).

<sup>129</sup> *Id.* (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)).

tional intent).<sup>130</sup> Considering whether the statutory language was meant to describe "(1) the former, (2) the latter, or (3) both species of intent,"<sup>131</sup> the Court concluded that (3) was the correct reading.<sup>132</sup> In doing so, the Court rejected the petitioner's arguments that the plain text of § 2119 describes only the latter and that, accordingly, "Congress would have had to insert the words 'if necessary' into the disputed text in order to include the conditional species of intent within the scope of the statute."<sup>133</sup>

This conclusion was essentially a result of what the majority considered a "commonsense reading" of the intent language both within the context of § 2119 standing alone and with regard to the statute's "placement and purpose within the statutory scheme."<sup>134</sup> The Court asserted that the carjacking statute was meant to establish a federal penalty for a specific kind of robbery.<sup>135</sup> Consequently, the *mens rea* component of § 2119 should be read to modify the act of "taking" the car.<sup>136</sup> If the defendant had the required state of mind at the precise moment that he demanded the car, the Court declared, then the statute's intent element is satisfied.<sup>137</sup>

The Court dismissed the petitioner's reading of § 2119 as "improperly transform[ing] the *mens rea* element from a modifier into an additional *actus reus* component of the carjacking statute."<sup>138</sup> Such a reading, the Court stated, would ignore the fact that this statute was essentially enacted to criminalize carjacking as robbery, not carjacking as a context for assault or murder.<sup>139</sup>

Furthermore, the Court continued, the addition of the qualification "if necessary" would not fix the problem that the petitioner believed plagued this statute.<sup>140</sup> The Court argued

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<sup>130</sup> See *id.*

<sup>131</sup> *Id.* at 970.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (quoting Reply Brief for Petitioner at 2, *Holloway v. United States*, 119 S. Ct. 966 (1999)).

<sup>134</sup> *Id.* at 969.

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> *Id.*

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

that such an addition would only confuse the issue further by excluding "the unconditional species of intent—the intent to harm or kill even if not necessary to complete a carjacking," thus necessitating the addition of something like "or even if not necessary" in order to cover both kinds of intent.<sup>141</sup> Because the text does not include these qualifying phrases, the Court concluded that the correct reading encompasses both conditional and unconditional intent.<sup>142</sup>

Next, the Court discussed two factors supporting the determination that Congress meant § 2119 to cover both kinds of intent.<sup>143</sup> First, it posited that the statute was certainly intended to establish federal prosecution as a compelling deterrent to carjacking.<sup>144</sup> This end, the Court stated, would be best served by construing the text to cover both conditional and unconditional intent.<sup>145</sup> The Court concluded that petitioner's reading of § 2119 would "exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit."<sup>146</sup> Second, the Court asserted that it was fair to assume that the legislature knew of the cases and legal scholarship that found "the 'specific intent' to commit a wrongful act may be conditional."<sup>147</sup> The Court conducted a brief survey of authorities in support of this proposition.<sup>148</sup>

The Court next confronted the petitioner's claim that such an interpretation of § 2119's *mens rea* element rendered unnecessary the statute's "by force and violence or by intimidation" language.<sup>149</sup> Although "an empty threat, or intimidating bluff" would satisfy this element, the Court asserted that the intent language serves the independent function of requiring the government to prove that the defendant would have at least at-

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<sup>141</sup> *Id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *See id.* at 971. In support of this, Stevens cited *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (statutory language should be interpreted consonant with "the provisions of the whole law . . . its object and policy").

<sup>146</sup> *Holloway*, 119 S. Ct. at 971.

<sup>147</sup> *Id.* (citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-698 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law. . . .")).

<sup>148</sup> *See id.*; *see supra* Part II.B.

<sup>149</sup> *See id.* at 972.

tempted to seriously harm or kill the driver necessary to steal the car.<sup>150</sup>

The majority concluded: "In short, we disagree with petitioner's reading of the text of the Act and think it unreasonable to assume that Congress intended to enact such a truncated version of an important criminal statute."<sup>151</sup> In a final footnote, the Court dismissed Holloway's argument for application of the rule of lenity, stating that their preceding analysis showed that Congress' intent was clear enough to render this rule inapplicable.<sup>152</sup>

#### B. JUSTICE SCALIA'S DISSENT

Justice Scalia opened by rejecting the majority's assertion that Congress theoretically may have meant the scienter language in § 2119 to describe either solely conditional, solely unconditional, or both kinds of intent.<sup>153</sup> Instead, Justice Scalia declared that in "customary English usage" the word "intent" standing alone "*never* connotes a purpose that is subject to a condition which the speaker hopes will not occur."<sup>154</sup> "Conditional intent," Justice Scalia continued, "is no more embraced by the unmodified word 'intent' than a sea lion is embraced by the unmodified word 'lion.'"<sup>155</sup>

Justice Scalia supported this assertion with the analogy of a hypothetical trip to Louisiana.<sup>156</sup> If one has made a decision to go to Louisiana, Justice Scalia asserted, he may accurately say that he "intends" to go to Louisiana.<sup>157</sup> This is so even if the potential traveler recognizes some "remote and unlikely contingencies" that might prevent the trip.<sup>158</sup> Justice Scalia further admitted that one might say "I intend to go to Louisiana" if his intent to do so is conditioned upon the occurrence of "an event which, though not virtually certain to happen (such as my con-

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<sup>150</sup> See *id.*

<sup>151</sup> *Id.*

<sup>152</sup> See *id.* at 972 n.14.

<sup>153</sup> See *id.* (Scalia, J., dissenting).

<sup>154</sup> *Id.* at 972-73 (Scalia, J., dissenting).

<sup>155</sup> *Id.* (Scalia, J., dissenting).

<sup>156</sup> See *id.* (Scalia, J., dissenting).

<sup>157</sup> *Id.* (Scalia, J., dissenting).

<sup>158</sup> *Id.* (Scalia, J., dissenting).

tinuing to live), is reasonably likely to happen, and which [he hopes] will happen.”<sup>159</sup>

But, insisted Justice Scalia, saying that one “intends” to do something when one’s plans are contingent upon an event that is neither certain to occur nor desired is “unheard-of usage.”<sup>160</sup> Here, Justice Scalia explained: “When a friend is seriously ill . . . I would not say that ‘I intend to go to his funeral next week.’ I would have to make it clear that the intent is a conditional one: ‘I intend to go to his funeral next week if he dies.’”<sup>161</sup> Justice Scalia argued that a carjacker who intends to kill only if resisted is in the same situation: “he has an ‘intent to kill if resisted’; he does not have an ‘intent to kill.’”<sup>162</sup> This interpretation, Justice Scalia insisted, is the only one that comports with “normal” and “exclusive” use of the English word “intent.”<sup>163</sup>

Next, Justice Scalia confronted two of the Government’s contextual arguments. First, he argued that requiring proof of unconditional intent would not necessarily make the number of carjackings accomplished by intimidation unreasonably small, because it is not unusual for a criminal to force his way into the passenger seat and order the person at the wheel to drive away, planning to kill the driver in a more secluded spot.<sup>164</sup> Second, Justice Scalia dismissed the Government’s assertion that “it would be hard to imagine an unconditional-intent-to-kill case in which the first penalty provision of § 2119 [the provision that covers carjackings where neither death nor bodily harm results] would apply.”<sup>165</sup> This argument, Justice Scalia suggested, is as specious as saying that there should be no criminal category for attempted murder, because “someone who intends to kill always succeeds.”<sup>166</sup>

Justice Scalia continued by dismissing the idea that “intent” might have a “term-of-art” status in criminal law whereby proof

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<sup>159</sup> *Id.* (Scalia, J., dissenting). Scalia used the example of conditioning the trip upon the receipt of one’s “usual and hoped-for end-of-year bonus.” *Id.*

<sup>160</sup> *Id.* (Scalia, J., dissenting). This argument is quite similar to the position taken by Glanville Williams. See WILLIAMS, *supra* note 40 and accompanying text.

<sup>161</sup> *Holloway*, 119 S. Ct. at 973 (Scalia, J., dissenting).

<sup>162</sup> *Id.* (Scalia, J., dissenting).

<sup>163</sup> *Id.* (Scalia, J., dissenting).

<sup>164</sup> See *id.* (Scalia, J., dissenting).

<sup>165</sup> *Id.* (Scalia, J., dissenting).

<sup>166</sup> *Id.* (Scalia, J., dissenting).

of conditional intent is enough.<sup>167</sup> He acknowledged that the majority cited precedent for this proposition.<sup>168</sup> But, because there are cases in other jurisdictions that disagree, Justice Scalia declared that it is not truly established that proof of conditional intent satisfies the need to prove intent: "[A]n accepted convention is not established by the fact that some courts have thought so some times."<sup>169</sup>

Next, Justice Scalia stated that if the question of whether conditional intent is sufficient to fulfill a requirement for intent is to be determined on a statute-by-statute basis, a considerable portion of the federal criminal code would be confusing and difficult to apply.<sup>170</sup> Justice Scalia complained that "[t]he course selected by the Court . . . would require us to sift through these many statutes one-by-one, making our decision on the basis of such ephemeral indications of 'congressional purpose' as the Court has used in this case."<sup>171</sup>

On that note, Justice Scalia continued by asserting that under the Court's method of statutory analysis "any interpretation of [§ 2119] that would broaden its reach would further the purpose the Court has found. Such reasoning is limitless and illogical."<sup>172</sup> Further, he stated, the Court was out of line in asserting that the petitioner's reading of § 2119 would exclude

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<sup>167</sup> *Id.* (Scalia, J., dissenting).

<sup>168</sup> *See id.* at 973-74 (Scalia, J., dissenting). Scalia noted that this precedent represents "the majority view among the minority of jurisdictions that have addressed the question." *Id.* at 973 (Scalia, J., dissenting).

<sup>169</sup> *Id.* at 974 (Scalia, J., dissenting).

<sup>170</sup> *See id.* (Scalia, J., dissenting). Justice Scalia considered 18 U.S.C. § 2113 (1996) (the intent to steal), 18 U.S.C. § 152(5) (1996) (the intent to defeat the provisions of the Bankruptcy Code), 18 U.S.C. § 962 (1994) (the intent that a vessel be used in hostilities against a friendly nation), and 18 U.S.C. § 1204 (1993) (the intent to obstruct the lawful exercise of parental rights). In particular, he discussed the problem with allowing conditional intent to satisfy 21 U.S.C. § 841 (1998), which makes it a crime to possess certain drugs with intent to distribute them. Justice Scalia pointed out the ridiculousness that might ensue:

Suppose that a person acquires and possesses a small quantity of cocaine for his own use, and that he in fact consumes it entirely himself. But assume further that, at the time that he acquired the drug, he told his wife not to worry about the expense because, if they had an emergency need for money, he could always resell it. If conditional intent suffices, this person who has never sold drugs and has never "intended" to sell drugs in any normal sense, has been guilty of possession with intent to distribute.

*Id.*

<sup>171</sup> *Holloway*, 119 S. Ct. at 975 (Scalia, J., dissenting).

<sup>172</sup> *Id.* at 975 (Scalia, J., dissenting).

from the statute the majority of the carjackings that Congress obviously meant to cover.<sup>173</sup> Justice Scalia argued that it is not implausible that Congress actually intended to narrow the statute's scope.<sup>174</sup> In closing his discussion of the intent issue, Justice Scalia stated that if Congress meant this statute to be construed broadly, it could have eliminated ambiguity by defining the offense as "carjacking under threat of death."<sup>175</sup>

Finally, Justice Scalia declared that because Congress did not choose to define the crime in such a manner, § 2119 is "entirely unambiguous as to whether the carjacker who hopes to obtain the car without inflicting harm is covered."<sup>176</sup> Nevertheless, he continued, even if there was ambiguity, the rule of lenity would require resolving the case in Holloway's favor.<sup>177</sup> He closed by stating: "If the statute is not, as I think, clear in the defendant's favor, it is at the very least ambiguous and the defendant must be given the benefit of the doubt."<sup>178</sup>

### C. JUSTICE THOMAS' DISSENT

In a brief dissent, Justice Thomas agreed with Justice Scalia that the term "intent" in § 2119 could not reasonably be interpreted to include the concept of conditional intent.<sup>179</sup> He noted the existence of some authority to support the argument that the specific intent to commit a particular act may be conditional, but stated that this authority is insufficient to show that

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<sup>173</sup> See *id.* (Scalia, J., dissenting).

<sup>174</sup> See *id.* (Scalia, J., dissenting). Justice Scalia added:

Note that I am discussing what was a *plausible* congressional purpose in enacting this language—not what I necessarily think was the real one. I search for a plausible purpose because a text without one may represent a "scrivener's error" that we may properly correct. There is no need for such correction here; the text as it reads, unamended by a meaning of "intent" that contradicts normal usage, makes total sense. If I *were* to speculate as to the *real* reason the "intent" requirement was added by those who drafted it, I think I would select neither the Court's attribution of purpose nor the one I have hypothesized [that Congress intended to narrow the scope of the statute]. Like the District Court and the Court of Appeals for the Third Circuit, I suspect the "intent" requirement was inadvertently expanded beyond the new subsection 2119(3), which imposed the death penalty—where it was thought necessary to ensure the constitutionality of that provision. Of course, the actual intent of the draftsmen is irrelevant; we are governed by what Congress enacted.

*Id.* at 975 n.2 (Scalia, J., dissenting) (citations omitted).

<sup>175</sup> *Id.* at 976. (Scalia, J., dissenting).

<sup>176</sup> *Id.* (Scalia, J., dissenting).

<sup>177</sup> See *id.* (Scalia, J., dissenting).

<sup>178</sup> *Id.* (Scalia, J., dissenting).

<sup>179</sup> See *id.* at 977 (Thomas, J., dissenting).

“such a usage was part of a well-established historical tradition.”<sup>180</sup> Further, he argued that the statute’s failure to include a section of general definitions defining the term “intent” to include conditional intent was problematic.<sup>181</sup> Accordingly, Justice Thomas concluded that “it cannot be presumed that Congress was familiar with this usage when it enacted the statute.”<sup>182</sup>

## V. ANALYSIS

The majority opinion authored by Justice Stevens in *United States v. Holloway* was incorrect in holding that conditional intent to kill satisfies the scienter requirement of the federal carjacking statute. This Note argues that a reasonable reading of § 2119’s legislative history shows that it is entirely plausible that Congress intended the law to reach only those carjackings where the perpetrator has a specific intent to kill. Further, although the dominant approach in legal scholarship finds proof of conditional intent sufficient for conviction where intent is required, this position confuses the necessary distinction between the *mens reas* of negligence, recklessness, and purposefulness. Accordingly, the Court should have adopted the minority approach in deciding *Holloway*, and held that proof of conditional intent is not enough for conviction under § 2119. Finally, this Note asserts that the Court erred in not applying the rule of lenity in this case, as the facts of this case make it particularly appropriate.

### A. A REASONABLE READING OF THE LEGISLATIVE INTENT BEHIND § 2119 FAVORS THE REQUIREMENT OF UNCONDITIONAL INTENT FOR CONVICTION

It is undeniably true that the legislative intent behind amending § 2119 to include the phrase “with the intent to cause death or serious bodily harm” is murky. Nonetheless, the most reasonable and just interpretation of Congress’ purpose finds insufficient evidence that the statute was meant to embrace conditional intent.

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<sup>180</sup> *Id.* (Thomas, J., dissenting).

<sup>181</sup> *See id.* (Thomas, J., dissenting). Justice Thomas cited three state statutes that include such a section: DEL. CODE ANN. tit. 11, § 254 (1995); HAW. REV. STAT. § 702-209 (1993); and 18 PA. CONS. STAT. § 302(f) (1998).

<sup>182</sup> *Holloway*, 119 S. Ct. at 977 (Thomas, J., dissenting).

The confusion surrounding Congress' purpose in adding the intent language to § 2119 is due primarily to the fact that this language was not added until very late in the legislative process, when the bill was in the Conference Committee.<sup>183</sup> This language was not debated on the floor; as a result, there is almost no indication of why it was adopted.<sup>184</sup>

The only clue is in the section entitled "Joint Explanatory Statement of the Committee of Conference."<sup>185</sup> This section reads, in pertinent part: "Offenses: [the Committee makes] the following modifications: . . . (6) the addition of an intent standard for carjacking."<sup>186</sup> Although somewhat cryptic, this passage at least arguably supports the contention that the scienter language was meant to apply to the entire statute. If the committee members had intended this amendment to apply only to death penalty cases, they could have expressed this modification as "the addition of an intent standard for carjackings that result in death." As it stands, the description is most reasonably read to add the "intent to kill" to all carjackings regardless of result.

Moreover, if Congress did not want the intent requirement to remain in § 2119, they would have removed it. Such clarification of the statute is not unprecedented. In *United States v. Rivera*,<sup>187</sup> the First Circuit overturned the conviction of a defendant who had raped his carjacking victim, arguing that rape is not "serious bodily injury" unless it causes actual physical wounds.<sup>188</sup> Congress, justifiably dissatisfied with this result, clarified the statute to explicitly include rape under "serious bodily injury."<sup>189</sup> It is important to note that this change was enacted after the first unsuccessful attempt to change § 2119's confusing intent

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<sup>183</sup> *United States v. Arnold*, 126 F.3d 82, 86 (2d Cir. 1997).

<sup>184</sup> *Id.*

<sup>185</sup> 140 CONG. REC. H. 8872 (daily ed. Aug. 21, 1994).

<sup>186</sup> *Id.*

<sup>187</sup> 83 F.3d 542 (1st Cir. 1996).

<sup>188</sup> *Id.* at 547.

<sup>189</sup> The Carjacking Correction Act of 1996 read, in part:

SEC. 2. CLARIFICATION OF INTENT OF CONGRESS WITH RESPECT TO THE FEDERAL CARJACKING PROHIBITION.

Section 2119(2) of title 18, United States Code, is amended by inserting, "including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title" after "(as defined in section 1365 of this title)."

Carjacking Correction Act of 1996, Pub.L. 104-217, § 2, 110 Stat. 3020, 3020 (1996).

language.<sup>190</sup> Congress considered amending the scienter requirement, but decided not to; they considered amending the "serious bodily harm" element, and enacted the amendment. The juxtaposition of these two legislative moments suggests that the will of Congress as a whole was to retain "intent to kill or cause serious bodily injury" as part of the prosecution's burden of proof. This suggestion is bolstered by the two subsequent failed amendments to § 2119.<sup>191</sup>

Further, Justice Scalia was entirely correct to recognize the possibility that the legislature might very well have intended the federal statute to cover only very specific and heinous types of carjacking, leaving other carjackings to state law.<sup>192</sup> When they removed the firearm requirement from § 2119, Congress potentially federalized an additional 14,000 carjacking cases per year.<sup>193</sup> It is not unlikely that the lawmakers intended to rein in this explosion of possible federal cases by adding a specific intent requirement to the statute, particularly given the fact that there was a strong sentiment in Congress at the time against the rampant federalization of crimes that were traditionally covered by state law.<sup>194</sup>

<sup>190</sup> See *supra* Part II.C.1.

<sup>191</sup> See *supra* Part II.C.1.

<sup>192</sup> *Holloway*, 119 S. Ct. at 975 (Scalia, J., dissenting).

<sup>193</sup> See *supra* note 49 and accompanying text.

<sup>194</sup> A particularly interesting expression of this sentiment is found in the hearing of the Senate Judiciary Committee on the nomination of Eric Holder to be Deputy Attorney General, which included the following question:

SEN. LEAHY: And lastly, tell us: What is the role of the federal government, federal law enforcement, federal prosecutors, federal courts, in the area of crime? And I say this because we have—in recent years, the Congress, has suddenly started federalizing everything. If there is something on the headlines, the morning carjacking, or anything else, suddenly we're rushing to the floor for the new federal law on this. You and I have had experience that in most cases, most prosecution is done by the state or local level, and not by federal law enforcement. Are we going—are we putting too much in the lap of federal law enforcement?

*Hearing on the Nomination of Eric Holder for Deputy Attorney General, Before Senate Judiciary Comm.*, 105th Cong. (1994). See also *Gun Free Schools Bill, 1995: Hearing on S. 890 Before the Senate Judiciary Committee Subcommittee on Youth Violence*, 104th Cong. (1995) (prepared statement of Senator Fred Thompson) which read, in part:

Many crimes that have been historically prosecuted by the states have now been made federal crimes, often without thought. If someone offers an amendment to make carjacking a federal crime, the amendment is passed without hearings, debate, discussion, or thought. Such an amendment was recently passed even though carjacking was already a severely punishable offense under the laws of every state in the Union. Members fear a 30 second sound bite that a vote against making carjacking a federal crime is a vote favoring

B. THE COURT'S DECISION BLURRED THE DISTINCTION BETWEEN NEGLIGENCE, RECKLESSNESS, AND PURPOSEFULNESS

In relying on the general trend in legal scholarship that finds conditional intent sufficient to satisfy a statutory requirement of intent,<sup>195</sup> the *Holloway* majority overlooked two fundamental problems with this approach. First, it oversimplifies the Model Penal Code's treatment of the issue, and second, it blurs the distinction between the necessarily separate concepts of negligence, recklessness, and purposefulness.

The majority's assertion that the Model Penal Code accepts conditional intent as nearly always sufficient to satisfy a statutory requirement of intent ignored the drafter's careful limitation of this concept.<sup>196</sup> Although Section 2.02 (6) standing alone seems clear,<sup>197</sup> it must be read in the context of the Code as a whole. Where an element of a crime involves attendant circumstances, section 2.02 (2) of the Code defines "purposefulness" as follows: "A person acts purposely with respect to a material element of an offense . . . [if] he is aware of the existence of such circumstances or he believes or hopes that they exist."<sup>198</sup>

In a carjacking, a conditional intent to kill will only be realized if the attendant circumstance of the victim's resistance occurs.<sup>199</sup> It follows that in order to get a conviction the prosecution should be required to prove that the defendant was either aware that the victim would resist, that the defendant believed the victim would resist, or that the defendant hoped the victim would resist.<sup>200</sup> In the case of Francois Holloway, none of these three possibilities were proved at trial. At the very least, if the Model Penal Code is used as a guide, in order to convict

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carjacking. But that is nonsense. Consider that all items in stores have moved in interstate commerce. If a member opposes an amendment to make shoplifting a federal crime, is the member in favor of shoplifting? Of course not. States criminalize parking in a no parking zone or exceeding the time paid into a meter. Should we have federal meter maids writing tickets for overtime parking because cars move in interstate commerce, and prolonged usage of parking spaces deters commerce in business districts? No, we definitely should not.

48 Pub. L. 103-322, 108 Stat. 1970 (1994).

<sup>195</sup> *Holloway*, 119 S. Ct. at 971 n.11.

<sup>196</sup> Petitioner's Brief at 9, *Holloway* (No. 97-7164).

<sup>197</sup> See *supra* Part II.B.

<sup>198</sup> MODEL PENAL CODE § 2.02(2)(a)(ii) (Official Draft & Revised Comments 1985).

<sup>199</sup> Petitioner's Brief at 10, *Holloway* (No. 97-7164).

<sup>200</sup> *Id.*

under § 2119 the prosecution should be required to address this issue.

Moreover, by ignoring section 2.02(2), the majority's acceptance of conditional intent blurs the Model Penal Code's distinction between the *mens reas* of purposefulness, recklessness, and negligence. The Code's definition of recklessness requires that a person "*consciously disregard[]* a substantial and unjustifiable risk that the material element exists or will result from his conduct."<sup>201</sup> Glanville Williams argues that unless the end is either desired or foreseen as inevitably accompanying the desired result, "conditional intent" is actually just a euphemism for recklessness.<sup>202</sup> In fact, this is an understatement; the interpretation of conditional intent adopted by the *Holloway* majority is functionally equivalent to negligence.

The Code defines negligence to require that a person "*should be aware of* a substantial and unjustifiable risk that the material element exists or will result from his conduct."<sup>203</sup> Granted, the Code does not insist on actual knowledge to fulfill the requirement of awareness of a future attendant circumstance; this would require the impossible. Instead, it states that the awareness requirement for conditional intent is satisfied by "a high probability of [the circumstance's] existence."<sup>204</sup> Indeed, it is perhaps justified to presuppose that a carjacker should be aware of a high probability that his victim will resist. Even if such awareness is imputed, however, this still falls far short of the Code's definition of purposefulness. Therefore, if conditional intent to kill is enough for conviction under § 2119, the scienter element should be replaced with language that describes a negligent *mens rea*.

#### C. THE SUPREME COURT SHOULD HAVE APPLIED THE RULE OF LENITY

*Holloway v. United States* was an ideal case for the application of the rule of lenity. The intent requirement of the federal carjacking statute is ambiguous, and therefore the law should only

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<sup>201</sup> MODEL PENAL CODE § 202.2(c) (Official Draft & Revised Comments 1985) (emphasis added).

<sup>202</sup> WILLIAMS, *supra* note 40.

<sup>203</sup> MODEL PENAL CODE § 202.2(d) (Official Draft & Revised Comments 1985) (emphasis added).

<sup>204</sup> *Id.* § 2.02(7).

be construed to cover conduct that is clearly under its ambit. Where a carjacker has an "intent to kill" that is conditioned on his victim's resistance, this should not be sufficient for conviction under § 2119.

The rule of lenity, which requires that "penal laws are to be construed strictly, is perhaps not much less old than construction itself."<sup>205</sup> The rule exists to ensure that notice of the law is available in straightforward language.<sup>206</sup> Most recently, the Court stated that the rule "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."<sup>207</sup>

The rule of lenity also serves the valid and important function of encouraging the legislature to pass laws that are clear and just.<sup>208</sup> In the words of Chief Justice Marshall, the rule "is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature, not in the judicial department."<sup>209</sup> When Congress passes an ambiguous statute this power is abused. The rule of lenity gives the courts an important tool for confronting such abuses, and prompting their correction.

As written, the federal carjacking statute did not clearly cover the particulars of the crime considered in *Holloway*. On the contrary, given the trial court's conclusion that the defendant's intent to kill was purely conditional, the most reasonable interpretation of the statute clearly did not cover his crime. Had the legislative history showed conditional intent to suffice, this still would not have removed this case from the realm of lenity. The Supreme Court has reasoned that "longstanding

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<sup>205</sup> *United States v. Wiltberger*, 18 U.S. 76, 95 (1820).

<sup>206</sup> *See* *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

<sup>207</sup> *United States v. Lanier*, 520 U.S. 259, 266 (1997). *See also* *Bell v. United States*, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.").

<sup>208</sup> William Eskridge described the rule of lenity as an important tool for furthering the "representation-reinforcing goal of protecting a relatively powerless group . . . and the normativist goal of injecting due process values of notice, fairness, and proportionality into the political process." William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 413-14 (1991).

<sup>209</sup> *Id.*

principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history.”<sup>210</sup> Where a criminal statute’s language is clearly ambiguous, it is not the Court’s role to scour the legislative record for answers. Instead, the Court must reach a decision that favors the criminal defendant.

Finally, Justice Thomas was correct to point out that Congress could have removed this ambiguity by including a definitions section in Title 18 of the United States Code.<sup>211</sup> This approach would have removed all doubt regarding the breadth of § 2119’s scienter language by explicitly showing that Congress intended the statute to cover both unconditional and conditional intent. As written, however, § 2119 is certainly ambiguous, and therefore the rule of lenity should have been applied.

## VI. CONCLUSION

In *Holloway v. United States*, the Supreme Court incorrectly held that conditional intent to kill satisfies the scienter requirement of the federal carjacking statute. The most reasonable reading of § 2119 does not cover conditional intent. Furthermore, there is not enough legal precedent to show convincingly that proof of conditional intent is sufficient where a statute demands proof of intent. Given the significant number of cases that hold just the opposite, the question at common law is unsettled at best. It is possible that the 1994 amendment was intended to heighten the intent requirement only in cases where the carjacking in question resulted in death, but the legislative history suggests a broader reading. Ultimately, consideration of this legislative history and Congress’ subsequent refusals to “correct their error” leads to the conclusion that conditional intent should not be sufficient for conviction under § 2119.

Chris Norborg

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<sup>210</sup> *Hughey v. United States*, 495 U.S. 411, 422 (1990).

<sup>211</sup> *Holloway v. United States*, 119 S. Ct. 966, 977 (1999) (Thomas, J., dissenting).