

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FRANCOIS HOLLOWAY, aka ABDU ALI, Petitioner v.

UNITED STATES

CASE NO: 97-7164 c.f.

PLACE: Washington, D.C.

DATE: Monday, November 9, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FRANCOIS HOLLOWAY, aka :

4 ABDU ALI, :

5 Petitioner :

6 v. : No. 97-7164

7 UNITED STATES :

8 - - - - -X

9 Washington, D.C.

10 Monday, November 9, 1998

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:03 a.m.

14 APPEARANCES:

15 KEVIN J. KEATING, ESQ., Garden City, New Jersey; on behalf
16 of the Petitioner.

17 BARBARA D. UNDERWOOD, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the Respondent.

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1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-7164, Francois Holloway v. the United
5 States.

6 We'll wait just a minute, Mr. Keating.

7 Mr. Keating.

8 ORAL ARGUMENT OF KEVIN J. KEATING

9 ON BEHALF OF THE PETITIONER

10 MR. KEATING: Mr. Chief Justice, and may it
11 please the Court:

12 This case presents an issue of fundamental
13 importance to the administration of criminal justice in
14 our Nation, whether judicial expansion of an unambiguous
15 statute based ostensibly on legislative purpose should be
16 permitted.

17 The Second Circuit's holding that the Federal
18 carjacking statute encompasses the unstated and expansive
19 mens rea element of conditional intent must be reversed,
20 as it contravenes the plain and unequivocal language of
21 the statute and thus violates this Court's longstanding
22 canons of statutory construction. This alone forecloses
23 the issue.

24 Moreover, if legislative history is relevant,
25 and we think it is not, the legislative history does not

1 support a finding of conditional intent in the statute.
2 In fact, a clear reading of the legislative history
3 reveals that Congress could not have intended this statute
4 to be a conditional intent statute.

5 Finally, the Government's assertion that the
6 concept of conditional intent can simply be read into the
7 specific intent element, as there is a traditional
8 recognition of the concept in our country in statutes
9 analogous to the carjacking statute is a complete fiction.

10 QUESTION: I have a little trouble with
11 understanding the concept of intent and conditional
12 intent. I don't find many cases dealing with the so-
13 called conditional intent, but intent is very broad, and
14 is it possible that someone who stops a motorist with a
15 gun, saying, give me your keys, and pointing the gun at
16 him, could be said -- could the fact-finder find intent to
17 cause death or serious bodily injury from that --

18 MR. KEATING: No, Your --

19 QUESTION: -- happening?

20 MR. KEATING: No, Your Honor.

21 QUESTION: And if not, why not?

22 MR. KEATING: The answer is no, Your Honor, and
23 that's precisely why the district court improperly
24 instructed the jury on conditional intent, because the
25 district court realized that that would not satisfy the

1 intent element.

2 Intent is generally defined --

3 QUESTION: Well, why? That's up to the jury,
4 and they can determine it from circumstantial evidence.
5 And if the circumstances are the use of a deadly weapon
6 and the demand for the keys and the vehicle and the use of
7 the weapon in hand, I would think the jury could find
8 intent to cause serious injury.

9 MR. KEATING: Your Honor, if we define intent as
10 one's conscious objective, which is generally in charges
11 how the concept is defined, the conscious objective of the
12 man who points a gun at somebody and says, give me your
13 keys, is not, not to cause the death or serious physical
14 harm. In fact, it's mutually exclusive. The conscious
15 objective --

16 QUESTION: Well, but if --

17 QUESTION: I think there's -- I think Justice
18 O'Connor's question is, could a jury find, from the kind
19 of evidence she referred to, could they infer a
20 conditional intent, and I think it's very difficult to say
21 they couldn't. They might well choose not to.

22 It seems to me what the case here turns on is
23 what is the meaning of the statutory intent, not what a
24 jury could find from a proper charge.

25 MR. KEATING: Your Honor, could they infer a

1 conditional intent? They could, clearly, from the facts
2 presented to the jury. That inference could be drawn.

3 Our argument here is not that the concept of
4 conditional intent is an unconstitutional one. Our
5 argument is relatively straightforward. It's not here.
6 This statute doesn't express the concept. The legislative
7 history never mentions the concept, and there is --

8 QUESTION: It seems to me that your answer to
9 Justice O'Connor should have been that the Government must
10 have proof of a fixed intent to injure, no matter, and
11 that given her hypothetical there was just not enough.
12 And if that's the answer -- I think that has to be your
13 answer. Maybe, maybe not.

14 If that's your answer, it seems to me that the
15 rejoinder is, well, this is very difficult to do. This
16 makes it a statute which is difficult to prosecute,
17 difficult to implement, and we shouldn't attribute to
18 Congress the objective of having a statute which is really
19 difficult to obtain convictions under.

20 MR. KEATING: Well, Your Honor, the statute
21 perhaps is difficult to prosecute if conditional intent is
22 read into it, if I'm understanding the Court's question.

23 If conditional intent is not somehow magically
24 read into the specific intent element, then the statute is
25 not difficult to prosecute. It's not unlike any other

1 criminal statute that has an actus reus, the taking of a
2 motor vehicle from another by force, violence --

3 QUESTION: Well, wait a minute. I don't think
4 you've answered Justice Kennedy's question. What do you
5 think the Government has to prove under subsection 1 to
6 permit the 15-year penalty because there is in fact no
7 serious injury? What do you think the Government has to
8 prove to get a conviction, as this statute is now written
9 under 1?

10 MR. KEATING: The Government would have to prove
11 that the defendant intended to cause the death or serious
12 physical harm.

13 QUESTION: No matter what.

14 MR. KEATING: No matter what. That --

15 QUESTION: Whether or not he got the car.

16 MR. KEATING: Certainly. If intent is to find
17 his conscious objective --

18 QUESTION: Well, if that was what Congress
19 intended, they sure made a hash of this statute, didn't
20 they, with their amendment. You think that's what
21 Congress thought they were doing here?

22 MR. KEATING: Yes, I do.

23 QUESTION: Yes.

24 MR. KEATING: I do, Your Honor, and --

25 QUESTION: Don't you think there are many

1 carjackings that occur all the time without the resulting
2 serious injury?

3 MR. KEATING: Yes.

4 QUESTION: And with somebody who says, well,
5 I'll do it if I have to. I'll hurt them if I have to, but
6 I'm going to get the car.

7 MR. KEATING: Yes.

8 QUESTION: But Congress didn't intend to cover
9 those cases, in your view.

10 MR. KEATING: Well, the -- I -- Your Honor --

11 QUESTION: I mean, that's kind of a -- I think
12 Congress might be surprised with your view of what it had
13 done.

14 MR. KEATING: Your Honor, I allow for the
15 possibility that this statute doesn't have the reach that
16 Congress intended. I allow for that possibility, and I
17 allow for the possibility that possibly Congress didn't
18 think it all the way through when they enacted the
19 amendment, but Your Honor, if you look at --

20 QUESTION: Isn't it, Mr. Keating, more than
21 that, because before the amendment, when the statute just
22 said, in possession of a gun, this conduct would have been
23 covered, right?

24 MR. KEATING: Yes.

25 QUESTION: So -- and my understanding was that

1 Congress was responding to carjackings that involved
2 weapons other than guns and wanted to take out the gun
3 part in order to broaden, not narrow the reach of the
4 statute. Is that not so?

5 MR. KEATING: That is so, Your Honor, but at the
6 same time cries were voiced by a number of Members of
7 Congress that by doing that they would be further diluting
8 the already-attenuated Federal nexus of the carjacking
9 statute.

10 If you simply strike the word firearm virtually
11 every carjacking committed in our country, some 35,000 at
12 the time of this offense, would be a State crime. And the
13 concern was raised regarding the principles of Federalism,
14 and this is important --

15 QUESTION: So you think --

16 QUESTION: Yes, but --

17 QUESTION: -- we should give it your
18 interpretation in the interests of Federalism and leave
19 these things to the States, because under your reading of
20 it very few are going to end up in Federal prosecutions.

21 MR. KEATING: Your Honor, I don't think that
22 very few would end up in Federal prosecutions.

23 If a carjacker approaches an individual on the
24 street, points a gun at them, and fires at him and misses,
25 that's a Federal prosecution.

1 QUESTION: Well, yes, but that's not the way you
2 engage in carjacking. Anyone who did that would not only
3 be a carjacker but insane. If you want to carjack, you
4 point a gun at somebody not because you want to cause him
5 death or a serious bodily injury but because you want the
6 car, and your interpretation would reduce the ambit of
7 this statute to screwballs, not carjackers.

8 (Laughter.)

9 MR. KEATING: Well --

10 QUESTION: Wouldn't it?

11 MR. KEATING: No, I don't believe so, Your
12 Honor. And if you look at what Congress did when they
13 amended this statute, when they amended the statute, the
14 word firearm was stricken. A version of the amended
15 statute came out of the House, a version came out of the
16 Senate. Neither of those versions had the specific intent
17 element. They were identical. They simply said, whoever
18 takes a motor vehicle from another by force, violence, or
19 intimidation --

20 QUESTION: May I just interrupt with one brief
21 question?

22 MR. KEATING: Sure.

23 QUESTION: Is it not fairly clear that they took
24 the word firearm out because they wanted to include
25 additional weapons?

1 MR. KEATING: Yes. That's precisely what they
2 wanted to do.

3 Those versions of the amended statute go into
4 committee. There's no record of what transpired in
5 committee.

6 Out of committee comes the statute with the
7 specific intent element. If the Government's
8 interpretation is adopted that the specific intent element
9 must be read as including a conditional intent, there
10 would have been no purpose whatsoever in adding the
11 specific intent clause, because the statute already said,
12 whoever takes a motor vehicle from another by force,
13 violence, or intimidation.

14 It's difficult to imagine a case where that
15 statute, left standing alone, where the Government would
16 not also be able to establish that the perpetrator
17 harbored a conditional intent to harm, so why add the
18 language?

19 QUESTION: Wasn't part of it so as to make
20 someone who would violate this eligible for the death
21 penalty?

22 MR. KEATING: The death penalty provision was
23 added to the statute, but if the Court is asking, is that
24 why the intent language was put into the statute --

25 QUESTION: Yes.

1 MR. KEATING: -- to constitutionalize the
2 imposition of the death penalty, I believe not, Your
3 Honor, for this reason. As the Court is aware in its
4 Tison decision it is not necessary to establish, in order
5 to constitutionalize the death penalty, that one intends
6 to cause the death of the victim.

7 QUESTION: Well, it says or serious bodily harm
8 anyway, which wouldn't suffice to comply with our
9 constitutional requirements.

10 MR. KEATING: That also would not be necessary
11 under the Tison decision.

12 QUESTION: But look --

13 QUESTION: We're talking about what Congress
14 thought, not what the law was.

15 MR. KEATING: Well, we would presume that
16 Congress -- and I'll add to it, Your Honor, that there's
17 another section of the amended statute which deals with
18 the constitutionality of the death penalty provisions.

19 QUESTION: Mr. Keating, your case ultimately
20 hangs, it seems to me, on the text. Whatever Congress
21 meant, whatever they intended, you come up here and you
22 say, this is what they wrote. And it seems to me that the
23 guts of your case is whether, indeed, that language, with
24 intent to cause death or serious bodily harm, is
25 susceptible of a conditional interpretation. And that, in

1 turn, depends upon whether there is this lengthy history
2 of interpreting provisions that way.

3 You started to say that there was no such
4 history. I'd like to hear you say more about it.

5 MR. KEATING: Your Honor --

6 QUESTION: The Government says that there -- you
7 know, this is -- we do this all the time.

8 MR. KEATING: That's right. And I'll begin by
9 saying, Your Honor, that it only depends on this lengthy
10 history if, in fact, the statute is deemed to be
11 ambiguous. And we argue that the statute, the language of
12 the statute is not ambiguous, and Rubin instructs that if
13 the language of a statute is unambiguous, the first canon
14 of statutory construction, that being that you look at the
15 text --

16 QUESTION: Well, it's ambiguous if language like
17 this has, for hundreds of years, been interpreted to be
18 satisfied by conditional intent, okay.

19 MR. KEATING: In --

20 QUESTION: Can we get to that?

21 MR. KEATING: In support of their assertion that
22 there is a longstanding recognition of conditional intent,
23 the Government cites to not a single Federal statute which
24 expresses the concept. They cite to not a single decision
25 of this Court which embraces the concept. They cite to a

1 handful of State --

2 QUESTION: Cite a handful? They cited two
3 things.

4 MR. KEATING: A handful of State court
5 precedents which seem to embrace the concept in varying
6 contexts. Some of these citations were to attempts.
7 Attempts is a different animal altogether than a completed
8 crime in the context of a conditional intent.

9 QUESTION: Well, I'm not too sure I've seen many
10 statutes in which the conditional intent is expressly
11 eliminated in favor of a fixed intent. I suppose you'd
12 say in this statute whoever hijacks a car and intends in
13 all events to cause injury or death, in order to
14 incorporate your view. I've just never seen a statute
15 like that.

16 I'm not sure which way that cuts. I don't know
17 if that helps you or hurts you.

18 MR. KEATING: Well, I suppose it cuts both ways,
19 but it would have been very simple, Your Honor, to do
20 this. With intent to cause death or serious physical harm
21 if necessary. If necessary. That's --

22 QUESTION: Well, have you ever seen a statute
23 like that?

24 MR. KEATING: No, and Your Honor, that proves
25 the point.

1 If conditional intent can simply be read into
2 the specific intent element, we would expect to see pages
3 upon pages of citations from the Government expressing
4 that concept.

5 QUESTION: Why?

6 QUESTION: I think maybe the opposite, because
7 if this had been a problem, it would have come up in
8 hundreds of criminal statutes, and it's never been a
9 problem.

10 MR. KEATING: Because it's never been applied,
11 Your Honor.

12 QUESTION: Well, you say never, but I mean, I
13 had my law clerk look up all those cites in the
14 Government's brief, and she came back that not only do you
15 have Lafave, you have such conservative things, AmJur, you
16 have about 15 State cases, and the Model Penal Code
17 couldn't be more explicit.

18 I mean, you know, when a particular purpose is
19 an element of an offense, the element is established,
20 although such purpose is conditional, unless the condition
21 negatives the harm or evil.

22 I mean, so Cong -- I agree with you this is a
23 total error that they put this language in this place. I
24 think they did want to -- they wanted to amend section 3
25 on the death penalty.

1 But nonetheless we have the statute in front of
2 us, and there is this history, so what -- I mean, if I've
3 looked up these sources, which my law clerk did, Lafave,
4 other treatises, the Model Penal Code, 10 cases, all of
5 which, or more, which read it that way is -- you've done a
6 heroic job, but is there something to say about that?

7 MR. KEATING: Yes, Your Honor.

8 QUESTION: Yes.

9 MR. KEATING: The Government cites 10 cases, 10
10 State cases that stand for the proposition; 10, of course,
11 out of 50, hardly a traditional recognition of the
12 concept.

13 With regard to the Model Penal Code, Your Honor,
14 while the Model Penal Code embraces the concept of
15 conditional intent, it then greatly limits its
16 application, and the Government provides half a definition
17 of the code's concept of conditional intent in the brief.

18 Conditional intent will always depend on the
19 attendant circumstances. I will take your car unless you
20 give -- or, I will shoot you unless you give me the keys.
21 The giving of the keys are the attendant circumstances.

22 The code states that where attendant
23 circumstances is an element, the element can be satisfied
24 if the actor is aware of the attendant circumstances or
25 hopes or believes in its existence. As awareness of the

1 attendant circumstance can never be guaranteed, the code
2 allows for conviction if the actor is aware of a high
3 probability.

4 Therefore, under the Model Penal Code they allow
5 for the recognition of conditional intent, but only if the
6 actor is aware of a high probability of the condition
7 occurring, or is aware or hopes in its existence. And
8 that interpretation of the code has been adopted by at
9 least one circuit, the First Circuit, in recognizing
10 conditional intent.

11 QUESTION: How would that apply here?

12 MR. KEATING: It would apply here, Your Honor,
13 at a minimum to the fact that the district court
14 improperly charged the jury on the notion of conditional
15 intent.

16 QUESTION: But we're reviewing the court of
17 appeals' opinion.

18 MR. KEATING: That is one of our points in the
19 opinion, Your Honor.

20 QUESTION: I thought that you're referring now
21 to 2.02(2)(a) small (ii), and small (ii) refers to the
22 instance well-known, I blow up the coach to kill the king,
23 and in fact the footman is also killed. I think, you
24 know, I didn't want the footman to be killed, but I knew
25 it was likely to happen. I think that's (2).

1 I don't -- I mean, I think it's as easy to put
2 this within (1), where it's -- the intent, the element of
3 the intent is part of the nature of the person's conduct.

4 I mean, I don't think it fits -- I thought maybe
5 you were awash on that. It's a wash. It could go in (1),
6 it could go in (2), and then they have the very explicit
7 thing I read.

8 MR. KEATING: Your Honor, at bottom the statute
9 doesn't express the concept of conditional intent. In
10 support of their position that there's a general
11 recognition of it, there's 10 States that seem to embrace
12 the concept out of 50.

13 QUESTION: How many States do you --

14 QUESTION: When you say 10 States, you suggest
15 that perhaps 40 have gone the other way, but I gather that
16 it's 10 States who have weighed in, a total. Or have some
17 States rejected the idea of conditional intent?

18 MR. KEATING: Some have rejected it, as cited in
19 our brief. They cite for approximately -- I think it was
20 12 States. We cite to five States who have rejected the
21 concept altogether. And if, in fact, there are only -- if
22 it is 10 States, again, we would expect to see some
23 statutory construction. There aren't any which embrace
24 the concept of conditional intent.

25 Your Honor, the Second Circuit's decision here

1 was in part based upon the view that congressional
2 inadvertence had led to this statute that has unintended
3 consequences. If that's the case, if this Court feels
4 that that's the case, the Court has already passed on that
5 issue. The Casey case in 1991, where that exact claim was
6 made that a congressional omission had led to a statute
7 with unintended consequences, the Court held that so long
8 as the text is unambiguous, the text is the text.

9 In 1926, the Court held the same in the Iselin
10 case. There, the claim was --

11 QUESTION: Could you just help me? Which is the
12 Casey case again? I don't remember that one.

13 MR. KEATING: Casey was in 1991, Your Honor.

14 QUESTION: Is it cited in your brief?

15 MR. KEATING: I think it's cited in the amicus
16 brief.

17 QUESTION: Oh. Do you have the citation?

18 MR. KEATING: Yes.

19 QUESTION: Was it a criminal case? Do you know
20 if it was a criminal case?

21 MR. KEATING: I don't recall, Your Honor,
22 candidly.

23 QUESTION: Why don't you file it later?

24 QUESTION: File it later, then.

25 MR. KEATING: I will.

1 QUESTION: Mr. --

2 MR. KEATING: Your Honor, the principle is
3 applied with equal force to claims of congressional
4 forgetfulness. In Iselin, the very claim was made that
5 again an omission by Congress led to a statute with
6 unintended consequences, and once more, this Court held
7 that to rewrite the statute transcends the function of the
8 Court.

9 It's important to note the Government's retreat
10 on this issue. Earlier, in the Second Circuit, the
11 Government argued, indeed, that this statute resulted from
12 congressional inadvertence. They now --

13 QUESTION: May I just follow -- your position is
14 that even if we're totally convinced that Congress meant
15 the statute to read the way the Government would have us
16 read it, we should nevertheless reject that reading
17 because the plain language counsels a different result.

18 MR. KEATING: Could you repeat that, Your Honor,
19 please?

20 QUESTION: Your view is that even if each of us
21 is totally convinced that Congress intended to enact the
22 statute that the -- reading the way the Government reads
23 it, we should nevertheless reject that construction
24 because the text is controlling.

25 MR. KEATING: Yes, that is our view, and our

1 view is also that Congress did not intend it to be a
2 conditional intent statute. They couldn't have, for the
3 reasons I've already argued, because it would read the
4 specific intent element right out of the statute. There
5 would be no purpose at all in putting the specific intent
6 element in.

7 QUESTION: Yes, there would, actually.

8 QUESTION: Well --

9 QUESTION: You can intimidate somebody by
10 saying, your money or your life, all right, and you point
11 the gun at them, but you know the gun is empty, all right.
12 That person would have satisfied the intimidation element,
13 but that person would not have -- you know, the specific
14 intent would have been different. That person wouldn't
15 satisfy that. They wouldn't satisfy it under the
16 Government's reading.

17 MR. KEATING: Maybe that's one hypothetical that
18 fits, Your Honor. I can't imagine that Congress decided
19 to enact this statute for the purposes of that
20 hypothetical. The --

21 QUESTION: It's not just a hypothetical. I
22 mean, it's bluffing, and there certainly is a difference
23 between somebody who says, your car or I'll shoot, and has
24 a loaded gun, and somebody who has a toy pistol. In the
25 latter case they're intending to hijack the car but

1 they're not going to shoot, so that seems to me is a line
2 that comes out of this statute, that the bluffer doesn't
3 qualify, but the one who says, I don't want to do it, but
4 if I have to I will, does.

5 MR. KEATING: Well, under the Government's
6 reading, though, with conditional intent, of course, they
7 all qualify, and they all would have qualified, Your
8 Honor, under the prior statute, without the specific
9 intent element.

10 QUESTION: Well, I don't see how the Government
11 would prosecute the person with the water pistol. Am I
12 wrong about that?

13 MR. KEATING: Under which version, Your Honor?

14 QUESTION: Justice Ginsburg gave you the idea of
15 the toy pistol, or the water pistol. Under the present
16 statute that doesn't --

17 MR. KEATING: Under the present statute --

18 QUESTION: That doesn't meet even the
19 Government's standard, does it?

20 MR. KEATING: No.

21 QUESTION: No.

22 MR. KEATING: It would be difficult to prove a
23 conditional intent to --

24 QUESTION: Is the word conditional intent
25 something we have to be stuck with?

1 It seems to me that specific intent is difficult
2 enough to do -- how specific. The hijacker intends to
3 hijack the car and rape the woman because he saw the woman
4 in the store. It turns out to be a different woman, but
5 he rapes her anyway. Well, in a way that's not quite
6 specific enough. In a way it meets the usual standard of
7 specific intent.

8 It seems to me it's a question of how specific,
9 not whether or not conditional or not.

10 MR. KEATING: Your Honor, I don't agree. I
11 don't think it's a matter of specificity. They are
12 different terms altogether. One is a conscious intention.

13 If somebody points a gun at another person,
14 their intent to cause their death or serious physical harm
15 is evidenced by one thing, pulling that trigger. They
16 have a conscious design, a conscious intention to cause
17 death or serious physical harm.

18 QUESTION: It's the difference between first
19 degree murder and manslaughter, or at least second degree
20 murder. You intend the death, and that's a traditional
21 distinction in the common law, isn't it?

22 MR. KEATING: Yes, but there's no conditionality
23 of purpose --

24 QUESTION: No, I'm -- I'm not attacking you.

25 MR. KEATING: Right, I understand.

1 (Laughter.)

2 MR. KEATING: I understand. I'm just -- I'm
3 expanding on that thought, Your Honor.

4 QUESTION: It's a fairly well-known distinction
5 in the common law, to require a specific intent to kill.
6 I mean, that's what first degree murder statutes are based
7 on.

8 MR. KEATING: I agree, Your Honor, and it's
9 evidenced by one thing, one's conscious design.

10 QUESTION: But here the debate really isn't over
11 whether there was a specific intent to kill, because there
12 was, on a condition. I mean, it isn't that we're talking
13 about a broader intent, but a specific intent to kill, but
14 it was not unconditional.

15 MR. KEATING: Not at the time of the commission
16 of the crime, Your Honor. At the time this crime was
17 committed, the taking of the motor vehicle, there was not
18 an intention to kill.

19 QUESTION: You say a jury could not find the
20 intent to kill from the facts presented here?

21 MR. KEATING: No, which is precisely why the
22 district court charged on conditional intent.

23 QUESTION: Well, but -- oh, you're saying after
24 the vehicle was turned over, there was no intent to kill.

25 MR. KEATING: There was no conduct at all which

1 evidenced an intention to kill. There was conduct which
2 evidenced the fact that the defendants prepared, perhaps,
3 or anticipated forming an intention to kill in the future,
4 but there was nothing the jury can rest on to conclude
5 that they intended to kill these people.

6 QUESTION: You're saying they couldn't even --
7 they couldn't conclude that they intended to kill them if
8 the car was not turned over?

9 MR. KEATING: That they could have concluded
10 that, and that fits the conditional intent --

11 QUESTION: Yes.

12 MR. KEATING: -- requirement, of course.

13 QUESTION: So we're talking not about kind of a
14 very specific intent to kill, as opposed to a more general
15 type of intent to -- but we're talking about a conditional
16 intent of a very specific kind.

17 MR. KEATING: Yes, Your Honor.

18 QUESTION: Well, I thought here the perpetrators
19 had a weapon and told a victim, I have a gun, I'm going to
20 shoot, let me have the car, in effect, or the keys, and
21 that was the evidence.

22 MR. KEATING: That was one of the three
23 carjackings, yes.

24 QUESTION: Right.

25 MR. KEATING: In the other two carjackings, in

1 one of them the gun never came out of the pocket, which
2 was possessed by a codefendant. In one of the others, the
3 gun was brandished but a threat was not uttered.

4 QUESTION: And one was, get out of the car or
5 I'll shoot, and so forth.

6 MR. KEATING: That's correct, Your Honor.

7 QUESTION: Uh-huh.

8 MR. KEATING: If there are no further questions,
9 I'll reserve time for rebuttal.

10 QUESTION: Very well, Mr. Keating. Ms.
11 Underwood, we'll hear from you.

12 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

13 ON BEHALF OF THE RESPONDENT

14 MS. UNDERWOOD: The carjacking statute makes it
15 a Federal crime to take a car from a person by force or
16 intimidation with intent to cause death or serious bodily
17 harm.

18 Petitioner suggests that the statute only
19 punishes carjackers who intend to cause death or serious
20 bodily harm whether or not their victims resist, but that
21 interpretation makes no sense.

22 The way this phrase came into the statute, the
23 traditional meaning of the phrase used in this way in
24 penal codes and at common law, and the structure of the
25 statute, all show that Congress could not have used the

1 word intent with that limited meaning.

2 I'd like to talk about the way the phrase came
3 into the statute.

4 In 1992, Congress made it a crime to take a car
5 by force and violence or intimidation from a person while
6 possessing a firearm.

7 In 1994, Congress took out the firearm and
8 substituted the requirement of intent to cause death or
9 serious bodily harm. When they took out the firearm
10 requirement, as several justices have noticed, they
11 thought they were broadening the statute, not narrowing
12 it.

13 The supporters of the amendment wanted to reach
14 the carjacker who drags the victim along behind the car,
15 or who uses a knife or a pipe or some other instrument
16 rather than a gun.

17 The original proposal was to take out the
18 firearm requirement without putting anything new in, but
19 Congress eventually decided to replace one limitation with
20 another. It substituted a dangerous state of mind for a
21 dangerous weapon, so that Federal carjackings would
22 continue to be those that present a serious risk of death
23 or serious bodily harm.

24 And precisely what that condition rules out is
25 the extremely common, not at all uncommon practice of

1 committing a robbery with an unloaded gun or a water
2 pistol or a toy gun, or a finger in a pocket purporting to
3 be a gun, a frightening experience but not one that risks
4 killing someone the way committing a robbery with a
5 weapon, under the old statute, or with intent to kill,
6 under the new statute does.

7 Both of those, those are alternative ways of
8 restricting Federal carjacking to the most dangerous sorts
9 of carjacking.

10 QUESTION: Is there anything that would not be
11 covered by your interpretation of the statute, short of
12 the water pistol or the index finger in the pocket?

13 MS. UNDERWOOD: Its intent to scare,
14 essentially, and it is just what this defendant argued to
15 the jury.

16 QUESTION: I mean, suppose they hadn't put in,
17 with intend to cause death or serious bodily harm, would
18 there be any difference between a statute without that
19 phrase, and your interpretation of the statute with that
20 phrase --

21 MS. UNDERWOOD: Yes.

22 QUESTION: -- except the instance of the water
23 gun and the, you know, the phony pistol?

24 MS. UNDERWOOD: Well, it's the water gun, the
25 phony pistol, or even a loaded gun if the jury is

1 convinced, or is not convinced that he intended to use it.

2 That is, this defendant argued to the jury when
3 he lost on the construction of the statute that
4 nevertheless I never intended that this gun be fired. I
5 never intended -- I was only intending to scare.

6 He didn't testify to this effect. It was his
7 lawyer's argument that the Government had not proved that
8 he had any intent that his threat would materialize, and
9 that was a fair -- that argument was allowed to go to the
10 jury, and if they had failed to find intent actually to
11 deliver on the threat, he should have been acquitted.
12 That's what the jury was charged.

13 There was additional evidence beyond the loaded
14 gun in this case. There was the evidence that he and his
15 accomplice had discussed the use of the gun, and there was
16 the evidence that he had actually used physical force, not
17 deadly force, that he had punched one of the victims, so
18 it was a case in which the claim that he didn't actually
19 intend to deliver on the threat was less likely to be well
20 received.

21 QUESTION: So one possibility is that this
22 language was put in to remove from the statute any
23 instance in which the offender either could not or did not
24 intend to carry out the threat.

25 MS. UNDERWOOD: That's correct.

1 QUESTION: All right. The other possibility is
2 that this language appears in the statute because
3 Congress, in committee, thought it was doing what it says
4 up here. It was amending 21193, namely the death penalty
5 provision, and it thought that it had to put this intent
6 language in there about death, anyway, in order to make
7 their death penalty constitutional, and then they thought
8 for good measure they'd put in an intent to do a seriously
9 bodily harm, and then they wrote language that amended the
10 wrong words in the statute, and I mean --

11 MS. UNDERWOOD: Well, sometimes it's --

12 QUESTION: -- there's certainly a good case that
13 that's what happened.

14 MS. UNDERWOOD: I think the evidence is to the
15 contrary, though, for two reasons. One is that Congress
16 in this omnibus crime bill added the death penalty to a
17 great many crimes and didn't adjust the intent
18 requirements for those crimes.

19 It took care of that problem in a separate
20 statute, in separate provisions that were also part of
21 this omnibus crime bill where it said, established the
22 procedures for the death penalty and found that in
23 addition to finding the defendant guilty of whatever crime
24 it was, the appropriate intent requirements had to be
25 satisfied, so there was no need to adjust the particular

1 crime, the carjacking crime and, indeed, no other of the
2 crimes that were made capital were adjusted in that way in
3 their intent requirements.

4 The other --

5 QUESTION: Why didn't Congress just say what it
6 meant, if it meant what you say it meant? It could have
7 said, by threat of force or violence, which the -- which
8 the individual was prepared to follow through on.

9 MS. UNDERWOOD: Well --

10 QUESTION: But the language, with intent to
11 cause death or serious bodily harm, I mean, you know,
12 whatever Congress meant, I don't think that if I threaten
13 someone with a gun hoping that the person will turn over
14 the car, I don't want to kill the person. Why do I want
15 to be running from a murder rap instead of a carjacking?
16 I definitely hope not to have to kill the person. I just
17 don't describe that by the intent to cause death or
18 serious bodily harm. It's a very unreasonable
19 interpretation of that language, it seems to me.

20 MS. UNDERWOOD: Well, except for the fact that
21 there is a long tradition of using it precisely that way
22 where the phrase is being used as an aggravator, as it is
23 here.

24 That is to say, the more usual place for such a
25 phrase is in an assault statute, assault, and then assault

1 is made more serious when it's committed with intent to
2 kill, or with intent to do bodily injury.

3 QUESTION: And doesn't that require the actual
4 assault intending to hurt the person?

5 MS. UNDERWOOD: No. What that requires, it's
6 just those cases -- many of the cases that we've cited for
7 this conditional intent proposition are cases of assault
8 with intent to injure or do serious bodily harm. And
9 there's a Federal case involving some because the Federal
10 assault statute, the one about assault on special maritime
11 or special Federal territorial jurisdiction, has such a
12 provision.

13 And in the Shaffer case cited in the brief
14 somebody escapes from a military stockade, points a gun at
15 the guards and says, wait in the latrine or I'll shoot.
16 And he then escapes, doesn't shoot, and he is convicted,
17 and the conviction is sustained over just such an attack,
18 on the grounds that his intent was to injure if the threat
19 wasn't enough, and that that satisfies the requirement of
20 this statute.

21 It's a particular way of structuring statutes
22 where there's a base crime and then they're made more
23 serious --

24 QUESTION: Not in my lexicon. I mean -- you
25 mean if someone -- you think it's assault with intent to

1 do serious bodily harm if you tell someone, get out of the
2 way or I'll punch you in the nose. That is assault with
3 intent to do serious bodily harm.

4 MS. UNDERWOOD: With the qualification that I'm
5 not sure punching you in the nose qualifies as seriously
6 bodily harm, but with intent to --

7 QUESTION: I'll break your nose, okay.

8 (Laughter.)

9 MS. UNDERWOOD: At the point -- well, serious
10 bodily harm -- how about, I'll shoot, or I'll -- you know.

11 QUESTION: Let's keep guns out of it. I mean,
12 this is an assault statute, serious bodily harm. It seems
13 to me -- it seems to me you have to intend to hurt the
14 person, not just intend to get the person out of the way.
15 Maybe you have a case or two that interprets it the other
16 way, but that's not how I read the language, anyway. It
17 just doesn't mean that.

18 MS. UNDERWOOD: Well, I think, 1) the words bear
19 that meaning; 2) this kind of statute, this -- not just
20 the phrase intent sitting by itself, but intent to cause
21 death or serious bodily harm is a standard phrase that is
22 used to escalate a statute.

23 The other place it appears is in burglary
24 statutes. Burglary is commonly defined as entering a
25 premises, sometimes entering it unlawfully, and then

1 there's a further intent, an intent to do a crime therein,
2 sometimes there's a list of specified crimes, and the
3 intent need not be carried out, and it need not be
4 unconditional.

5 One example that is given is assault with -- I
6 mean, burglary, entering a house with intent to have
7 consensual sexual relations with the person inside, but if
8 not successful in accomplishing that, then to rape.

9 QUESTION: Well, what about, you enter a house
10 to steal a TV and you find there's no TV in the house.

11 MS. UNDERWOOD: That's another example of an
12 intent that --

13 QUESTION: A less likely one, perhaps.

14 (Laughter.)

15 QUESTION: What about if you intend to go to the
16 Super Bowl if the Patriots are in it?

17 (Laughter.)

18 QUESTION: But aren't those --

19 MS. UNDERWOOD: Those various conditions --

20 QUESTION: Aren't those examples of cases where
21 the evidence could show the necessary intent? The jury
22 could determine it from the evidence. I don't see how it
23 necessarily invokes the conditional intent doctrine.

24 MS. UNDERWOOD: Well, I agree that you don't
25 need to use the word, conditional intent, if you adopt an

1 appropriate notion of intent, but if we -- but on these
2 instructions, this defendant was found --

3 QUESTION: Well, you go into a house, break and
4 enter with the intent to steal a television and it turns
5 out there isn't a television. If there's evidence
6 introduced that can establish that that was the intent,
7 that would suffice. I don't think you'd speak in terms of
8 conditional intent, would you?

9 MS. UNDERWOOD: You don't need to speak in terms
10 of conditional intent.

11 QUESTION: No.

12 QUESTION: You don't in that case because you
13 hope that there will be a television set there, and the
14 difference here is that you don't hope that the person
15 will resist and cause you to kill him. Your hope is just
16 the opposite.

17 MS. UNDERWOOD: That's correct.

18 QUESTION: In the television set case, I agree
19 with you, that kind of statute covers the person breaking
20 in and there's no television set, but he hoped that there
21 would be a television set, and the whole intent in
22 breaking in was to take it.

23 Whereas here, he doesn't hope to kill the
24 person. He had no intent to kill the person. I mean --

25 MS. UNDERWOOD: He did have intent --

1 QUESTION: -- no intent in the normal -- in the
2 way I normally use intent, anyway.

3 MS. UNDERWOOD: He had intent to kill the person
4 in precisely the way that intent has commonly been
5 understood in statutes of this general form.

6 QUESTION: Well, can you say anything --

7 QUESTION: The example that the Chief gave I
8 think is more in line with the distinction you're trying
9 to draw, and it is the explanation in the Model Penal Code
10 commentary. That is, he hopes that she will submit, but
11 if she doesn't, he will rape her.

12 MS. UNDERWOOD: That's correct, and that's --

13 QUESTION: Yes, but --

14 MS. UNDERWOOD: -- burglary, entering a house
15 with intent to rape, even though it isn't necessary to use
16 force, then the rape won't happen, and he undoubtedly
17 hopes he won't have to.

18 I'd like to --

19 QUESTION: I can -- I mean, I can accept the
20 Model Penal Code thing if you're hoping for something that
21 is very unlikely to occur.

22 You break into a house of a woman you don't know
23 from Adam, and you hope she'll consent to have sex with
24 you, but you know, the chances are 99 -- 999 to 1,000 that
25 she won't, and now I'm perfectly willing to put that

1 person away for breaking with intent to commit rape,
2 because he knew that what he was hoping for, you know,
3 would virtually be impossible to happen.

4 But it's not virtually impossible to happen when
5 you point a gun at somebody and say, your car or your
6 life, it's very unlikely the -- you know, the old Jack
7 Benny bit, he's not going to say, well, you know, I'm
8 thinking. I'm thinking.

9 (Laughter.)

10 QUESTION: Take the car.

11 MS. UNDERWOOD: Another common circumstance for
12 finding burglary, entry with intent to commit a crime, is
13 when a person breaks -- you have essentially domestic
14 violence, when a person breaks -- goes into either the
15 house of his ex-wife or his girlfriend and hopes that they
16 will reconcile, but if they -- but has the plan that if he
17 can't persuade her to reconcile he will shoot her, and
18 that's been found to be burglary, entering the house with
19 intent to commit a crime, even though he hopes he won't
20 have to commit the crime.

21 I don't say that -- the point is, Congress used
22 these words against a background in which that kind of
23 phrase, as an aggravator to an underlying --

24 QUESTION: Well, that gets us to how clear that
25 background is, and is there more than just a handful of

1 State cases?

2 MS. UNDERWOOD: There's --

3 QUESTION: How do we know that's the background?

4 MS. UNDERWOOD: Well, we have -- we have the
5 State cases that we've cited. We have some Federal cases
6 that we've also cited. The one I've just described is one
7 of them. We have the universal view, universal view of
8 the treatise writers, and if I might just address the
9 suggestion that the Model Penal Code is awash because of
10 this provision about attendant circumstances, that
11 provision has absolutely nothing to do with what we have
12 here.

13 That's a provision -- an attendant circumstance
14 is an element of the crime in the Model Penal Code's
15 terminology, other than what he does or what he thinks.

16 For example, in this case, the fact that the car
17 had to travel in interstate commerce is an attendant
18 circumstance, and what the Model Penal Code is talking
19 about is, what kind of intent -- when the statute requires
20 the defendant to intend or know about attendant
21 circumstances, what does that mean, and since you don't
22 intend, it doesn't make sense linguistically to talk about
23 intending something you don't do. They say what it means
24 is, you have to know about it, or believe it's true, or
25 hope it's true, or something like that.

1 This is not a case involving an attendant
2 circumstance. This is a case involving the defendant's
3 intent to kill, or to inflict serious bodily injury. That
4 provision simply has nothing to do with the matter. We're
5 simply construing intent, and we're construing it against
6 the background of the use of the phrase, and we're -- and
7 the fact, I would say, that there are not more cases, that
8 might be said to be awash.

9 It is so traditionally understood that this is
10 so, you only get an appellate case when somebody raises
11 the suggestion that the evidence is insufficient, or the
12 charge was wrong, and there's litigation about it. This
13 is an accepted and traditional use.

14 QUESTION: The Government would have to prove
15 that if the car wasn't turned over, that the defendant in
16 fact would use --

17 MS. UNDERWOOD: That he had the intent to --
18 that he ex -- that he had the plan to do so, that it was
19 his purpose to do so if necessary to effectuate the
20 objective here if necessary to get the car, or if the car
21 wasn't turned over.

22 That's exactly what this jury was charged, and
23 this defendant took issue with that, and put his case to
24 the jury that he didn't have that intent, and the jury
25 found that he did. And so the question now is only

1 whether -- whether that's enough, whether that satisfies
2 Congress' purpose here, and it did.

3 I think the structure of the statute makes that
4 plain. The statute provides for taking a car either by
5 force or by intimidation. It's pretty hard to injure or
6 kill somebody by intimidation alone, so it's hard to see
7 how someone with unconditional intent to injure or kill
8 could commit a carjacking by intimidation. And the
9 statute provides three penalty levels, one of them
10 involving no serious injury. And again, it would be an
11 unusual case where a person took a car by force from a
12 person right up close, intending to injure him no matter
13 what, and didn't succeed in injuring him.

14 Petitioner says that the provision --

15 QUESTION: Now, these -- the people before us
16 here, were they prosecuted under the first subsection,
17 because no serious bodily injury occurred?

18 MS. UNDERWOOD: Yes.

19 QUESTION: Thank you.

20 MS. UNDERWOOD: Yes, they were.

21 Petitioner says that these provisions, the
22 intimidation provisions --

23 QUESTION: Excuse me, what would they have been
24 prosecuted for if subsection (1) was not applicable?
25 Would they have gotten off Scott free, or is there some

1 other offense they could have been convicted of?

2 MS. UNDERWOOD: Some Federal offense? I don't
3 think there --

4 QUESTION: No other Federal --

5 MS. UNDERWOOD: I don't believe there -- there
6 would be a State robbery prosecution.

7 QUESTION: State robbery --

8 MS. UNDERWOOD: Well, I'm sorry. There were
9 chop shop offenses here. I mean, this was -- the reason,
10 or a reason why this was prosecuted federally is that this
11 is a group of people who are stealing cars to order, and
12 the indictment also charges the conspiracy and charges the
13 chop shop offenses.

14 QUESTION: How about the Dyer act? Was it
15 transported interstate?

16 MS. UNDERWOOD: I don't -- these are cars which
17 could be proved to have traveled interstate. I'm not sure
18 there was proof --

19 QUESTION: But it has to be --

20 MS. UNDERWOOD: -- that these defendants --

21 QUESTION: Yes. It would have be stolen, then.

22 MS. UNDERWOOD: Right. I don't believe there's
23 proof of that in this case.

24 On petitioner's interpretation, the statute
25 punishes simply a combination of two unrelated crimes,

1 robbery of a car, and murder or attempted murder or
2 serious assault.

3 People who set out to steal a car don't usually
4 have the independent intent to kill or injure no matter
5 what, and if they do we call the crime murder or attempted
6 murder. We don't call it robbery of a motor vehicle
7 resulting in death.

8 Congress put this crime in the robbery chapter
9 of Title 18, along with all the other robberies, and
10 captioned it motor vehicles, showing that the heart of
11 this offense was forcibly stealing a car.

12 QUESTION: But it wouldn't be attempted murder.
13 They didn't try to kill anybody. They stole a car. It's
14 not totally irrational to say that if you steal a car with
15 the intent to do serious personal injury or murder you're
16 going to get a higher offense, a higher Federal crime.

17 I mean, they -- this isn't attempted murder.
18 You couldn't have gotten them on attempted murder. I
19 mean, assuming somebody had the intent.

20 MS. UNDERWOOD: No, but the intent that
21 petitioner would like to read into the statute turns it
22 into attempted murder. You have to actually -- you intend
23 to kill somebody and rob and take his car, and you take
24 some steps toward that end. Namely, you take the car and
25 stick -- and point a gun at him.

1 If you have that state of mind, you are
2 engaging, I would say, in attempted murder, and that is
3 not what Congress was driving at here. What Congress was
4 driving at, dangerous -- or, dangerous robberies.

5 QUESTION: Don't you have to go further along
6 the line? I mean, to intend to murder somebody is not
7 attempted murder.

8 MS. UNDERWOOD: No.

9 QUESTION: Don't you have to have -- taken a
10 certain number of steps along the line to be guilty of an
11 attempt?

12 MS. UNDERWOOD: You do, but I would suggest that
13 taking a gun and pointing it at him and saying -- and
14 taking his car could well qualify as getting to the point
15 of attempted murder.

16 QUESTION: You may not even have to go that -- I
17 mean, doesn't the Model Penal Code use substantial steps?

18 MS. UNDERWOOD: Yes, it does.

19 QUESTION: And I suppose if you take the gun and
20 you set out in the direction, I suppose you've taken a
21 substantial step, haven't you?

22 MS. UNDERWOOD: No, I mean, there are cases
23 about when mere preparation becomes attempt, but it seems
24 to me when you've come into direct confrontation with him
25 and taken out the gun with an -- with, contrary to what we

1 believe the statute requires, or perhaps what the evidence
2 proved, you have an unconditional intent to kill him.

3 QUESTION: But there's no Federal attempted
4 murder statute. There's no Federal general murder
5 statute. It's not irrational for Congress to say, you
6 know, we're going to expand Federal criminal law, but
7 we're not going to expand it to all carjackings. We're
8 going to expand it to a carjacking where there's attempted
9 murder involved, if --

10 MS. UNDERWOOD: They might have done that, but
11 what they had -- remember that where this came from is, it
12 was a statute that punished carjackings with weapons. The
13 weapon was removed to reach analogous crimes that happened
14 without -- excuse me, without firearms but with something
15 else, and then there was a concern that that expanded the
16 statute too far, so the idea was to bring it back to close
17 to where it was before, but put in a dangerous intent
18 instead of a dangerous -- instead of a dangerous weapon.

19 QUESTION: But there's nothing that shows that
20 Congress was homing in on the difference between the
21 bluffer and the one who says, well, if I have to do it, I
22 will.

23 MS. UNDERWOOD: No. There's no -- what we have
24 in this case is no expressed statement about what that
25 was -- what was happening when that provision came in.

1 We have that it was -- it resolved a compromise
2 between the Senate, which had taken out the weapon and not
3 put anything in, and the House, which did not take out the
4 weapon. That's how matters stood when this went to
5 conference.

6 They both were adding the death penalty to fatal
7 carjackings, but -- actually, another indication --

8 QUESTION: If the petitioner were correct and we
9 were to adopt the conditional intent rule, and you have a
10 case where the person -- or, the case that Justice
11 O'Connor put at the very outset of the argument -- points
12 a gun and say, give me your car or I'll shoot, and the
13 person gives the car, could you go to the jury on that
14 under a conditional intent theory, or would you have to
15 have something more?

16 MS. UNDERWOOD: Well, I would say you could go
17 to the jury on an unconditional intent theory, but it
18 would be somewhat unlikely that you could persuade a jury
19 beyond a reasonable doubt that the person had an
20 unconditional intent to kill in circumstances in which
21 it's -- which he didn't in fact shoot and in which he got
22 his -- in which he got the car.

23 So I think you could go to the jury on that, but
24 might not prevail.

25 What we went to the jury on in this -- the

1 Government went to the jury on in this case was an
2 instruction that said, if you find that he intended to
3 kill or inflict serious bodily injury if necessary to
4 effectuate his objectives, that's sufficient.

5 That's what we've been describing, is
6 conditional intent, but you could as well simply describe
7 it as embraced within the concept of intent, and that's
8 how this conviction was obtained.

9 I want to say something about the -- another
10 piece of evidence about what Congress was thinking about,
11 since that question was asked, is that originally Senator
12 Lieberman introduced in May of '93 a provision that
13 clearly was designed to do two separate things -- this was
14 before the omnibus crime bill -- to add the death penalty
15 to fatal carjackings, and to remove the weapons
16 requirement from all carjackings, and there isn't the
17 little problem about which section number is being
18 modified in that proposal.

19 A few months later, when the omnibus crime bill
20 was in the Congress, in the Senate, and there was a long
21 list of crimes to which the death penalty was to be added,
22 he added to the provision that said, add the death penalty
23 to carjackings, his old proposal to also remove the
24 weapons requirement. And it was that amendment that was
25 adopted by the Senate and ultimately went to a compromise.

1 The House simply adopted the -- didn't have
2 that. The House added the death penalty to carjackings
3 but didn't fool around with this other element.

4 QUESTION: They knew all this background that
5 you're telling us now.

6 MS. UNDERWOOD: I'm not suggesting that the
7 House knew all that background. I am describing where it
8 came from, and to the extent we're looking for an
9 indication about what it was doing, what is clear --
10 forget intent about all this background -- is that the
11 intent requirement comes in as a substitute for the
12 weapons requirement. And that, I think, without reading
13 anybody's mind, shows that it was designed to do what the
14 weapons requirement had previously done, and not to fix --
15 to adapt this statute for death penalty purposes, which
16 was a separate project.

17 QUESTION: Of course, removing the weapons
18 requirement removed the unloaded gun case from the
19 statute, the unloaded gun, water pistol, finger --

20 MS. UNDERWOOD: Put them all in. I mean, made
21 them all criminal, that's right.

22 QUESTION: It --

23 MS. UNDERWOOD: That's right.

24 QUESTION: Well, before, they would have been
25 criminal. A firearm -- you can have an unloaded firearm.

1 You would have been guilty of carjacking in the
2 original --

3 MS. UNDERWOOD: Probably not a water pistol,
4 though. I guess I'm not sure --

5 QUESTION: No, but an unloaded firearm.

6 MS. UNDERWOOD: Perhaps. I'm not sure. In New
7 York State law a firearm has to be loaded to qualify as a
8 firearm in a --

9 QUESTION: Yes, but it's -- firearm as defined
10 in section 921 of a Federal statute.

11 MS. UNDERWOOD: That's right.

12 QUESTION: Not the New York statute.

13 MS. UNDERWOOD: That's right.

14 QUESTION: And I would think such a firearm
15 would make it a carjacking even if unloaded, under the old
16 statute.

17 MS. UNDERWOOD: Quite likely, but the carjacking
18 with a pipe or with a knife weren't, and so that's why the
19 weapons requirement came out, and then there was the
20 search for some compromise, because the House hadn't
21 removed the weapons requirement and the compromise was
22 this new intent requirement.

23 If there are no further questions --

24 QUESTION: Thank you, Ms. Underwood.

25 Mr. Keating, you have 3 minutes remaining.

1 REBUTTAL ARGUMENT OF KEVIN J. KEATING

2 ON BEHALF OF THE PETITIONER

3 MR. KEATING: Thank you, Your Honor.

4 The burglary example. When the burglar enters
5 the dwelling in an unauthorized fashion, at that time he
6 has an intention to commit a crime therein. That is why
7 the burglary cases don't stand for the proposition, or
8 don't stand for a recognition of conditional intent,
9 absent a hypothetical involving --

10 QUESTION: But why isn't it a conditional
11 intent, intent to commit rape if necessary? I mean,
12 granting the probability Justice Scalia talks about, why
13 isn't that a conditional intent?

14 MR. KEATING: But Your Honor, at the time of the
15 commission of the crime --

16 QUESTION: Entering the building.

17 MR. KEATING: Entering the building, that
18 intention he has. He had --

19 QUESTION: If. If necessary.

20 MR. KEATING: Well, he may have alternative
21 intentions at that time, but he has the presently-held
22 intention to do future harm.

23 QUESTION: Well, the carjacker has a presently-
24 held intention to do future harm if necessary.

25 MR. KEATING: Your Honor, I would disagree under

1 the facts of this case. At the time of --

2 QUESTION: Well, that's what the jury found.

3 MR. KEATING: Well, I think there is a
4 distinction between a conditional intent and alternative
5 intentions. The carjacker at the time he took the car,
6 the jury found that had certain future acts occurred,
7 which they didn't, they would have done something,
8 different from, at the time of the commission of the crime
9 he has the presently-held intention to cause harm.
10 That's --

11 QUESTION: If necessary.

12 MR. KEATING: In the future, not at the time of
13 the commission of the crime, unlike the burglar who enters
14 the dwelling.

15 Conditional intent was not expressed in the
16 statute. The concept was never discussed in the
17 legislative history. 10 States recognize it in various
18 forms. Five don't, as cited in our brief.

19 The Model Penal Code, of course, has never been
20 adopted. The Model Penal Code doesn't stand for the
21 concept of conditional intent endorsed by the Government.

22 Our argument is simple. What happened here is
23 that the court below was unhappy with the reach of this
24 statute. It didn't reach out to where it thought it
25 should, and the court below twisted the statute to get the

1 bad guy. That's what happened here, and for that reason,
2 this conviction should be reversed.

3 Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Keating.

6 The case is submitted.

7 (Whereupon, at 11:59 a.m., the case in the
8 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

FRANCOIS HOLLOWAY, aka ABDU ALI, Petitioner v. UNITED STATES
CASE NO: 97-7164

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Fedrico

(REPORTER)