SUPREME COURT OF THE UNITED STATES

No. 97–6203

NATHANIEL JONES, PETITIONER *v.* UNITED STATES

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

[March 24, 1999]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE BREYER join, dissenting.

The question presented is whether the federal carjacking statute, prohibiting the taking of a motor vehicle from the person or presence of another by force and violence or by intimidation, contains in the first paragraph a complete definition of the offense, with all of the elements of the crime Congress intended to codify. 18 U. S. C. §2119. In my view, shared by every Court of Appeals to have addressed the issue, it does. The Court adopts a contrary, strained reading according to which the single statutory section prohibits three distinct offenses.

Had it involved simply a question of statutory interpretation, the majority opinion would not have been cause for much concern. Questions of statutory interpretation can be close but nonetheless routine. That should have been so in today's case. The Court, however, is unwilling to rest its opinion on textual analysis. Rather, to bolster its statutory interpretation, the Court raises the specter of "'grave and doubtful constitutional questions,'" *ante*, at 12, without an adequate explanation of the origins, contours, or consequences of its constitutional concerns. The Court's reliance on the so-called constitutional doubt rule is inconsistent with usual principles of *stare decisis* and contradicts the approach followed just last Term in *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). Our precedents admit of no real doubt regarding the power of Congress to establish serious

bodily injury and death as sentencing factors rather than offense elements, as we made clear in *Almedarez-Torres*. Departing from this recent authority, the Court's sweeping constitutional discussion casts doubt on sentencing practices and assumptions followed not only in the federal system but also in many States. Thus, among other unsettling consequences, today's decision intrudes upon legitimate and vital state interests, upsetting the proper federal balance. I dissent from this unfortunate and unnecessary result.

Before it departs on its troubling constitutional discussion, the Court analyzes the text of §2119. This portion of the Court's opinion, it should be acknowledged, is careful and comprehensive. In my submission, however, the analysis suggests the presence of more interpretative ambiguity than in fact exists and reaches the wrong result. Like the Court, I begin with the textual question.

I

Criminal laws proscribe certain conduct and specify punishment for transgressions. A person commits a crime when his or her conduct violates the essential parts of the defined offense, which we refer to as its elements. As a general rule, each element of a charged crime must be set forth in an indictment, *Hamling* v. *United States*, 418 U. S. 87, 117 (1974), and established by the government by proof beyond a reasonable doubt, *In re Winship*, 397 U. S. 358, 364 (1970), as determined by a jury, assuming the jury right is invoked, *Sullivan* v. *Louisiana*, 508 U. S. 275, 277–278 (1993); *Almendarez-Torres* v. *United States*, 523 U. S., at 239. The same rigorous requirements do not apply with respect to "factors relevant only to the sentencing of an offender found guilty of the charged crime." *Id.*, at 228; see also *McMillan* v. *Pennsylvania*, 477 U. S. 79, 93 (1986). "[T]he question of which factors are which is normally a matter for Congress." *Almendarez-Torres* v. *United States*, 523 U. S., at 228.

In determining whether clauses (1)–(3) of §2119 set forth sentencing factors or define distinct criminal offenses, our task is to "look to the statute before us and ask what Congress intended." *Ibid*. The statute is as follows:

> "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 both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both." 18 U. S. C. §2119 (1988 ed., Supp. V).

As the Court is quite fair to acknowledge, the first reading or initial look of the statute suggests that clauses (1)–(3) are sentencing provisions. *Ante*, at 4. In my view, this conclusion survives further and meticulous examination.

Section 2119 begins by setting forth in its initial paragraph elements typical of a robbery-type offense. For all ordinary purposes, this is a complete crime. If, for instance, there were only a single punishment, as provided in clause (1), I think there could be no complaint with jury instructions drawn from the first paragraph of §2119, without reference to the punishment set forth in clause (1). The design of the statute yields the conclusion that the following numbered provisions do not convert each of the clauses into additional elements. These are punishment provisions directed to the sentencing judge alone. To be sure, the drafting could have been more clear, and my proffered interpretation would have been better implemented, if the

word "shall" at the end of the first paragraph had been followed by a verb form (*e.g.*, "be punished") and a period. Even as written, though, the statute sets forth a complete crime in the first paragraph. It is difficult to see why Congress would double back and insert additional elements for the jury's consideration in clauses (2) and (3). The more likely explanation is that Congress set forth the offense first and the punishment second, without intending to combine the two.

Unlike the Court, I am unpersuaded by other factors that this common-sense reading is at odds with congressional intent. As to the substance of clauses (2) and (3), the harm from a crime– including whether the crime, after its commission, results in the serious bodily injury or death of a victim– has long been deemed relevant for sentencing purposes. Like recidivism, it is "as typical a sentencing factor as one might imagine," *Almendarez-Torres* v. *United States, supra,* at 230, a point the Court cannot dispute. To fix punishment based on the harm resulting from a crime has been the settled practice under traditional, discretionary sentencing regimes. See, *e.g.*, U. S. Dept. of Justice, W. Rhodes & C. Conly, Analysis of Federal Sentencing X–13, XV–11 (Federal Justice Research Program Rep. No. FJRP–81/004, 1981) (under preguidelines practice, with respect to a variety of crimes, the amount of harm threatened or done to victims made a significant difference in the length of sentence). Even if we confine our attention to codified law, however, examples abound to prove the point. Other federal statutes, as the Court notes, treat serious bodily injury as a sentencing factor. *Ante*, at 7. As for state law, common practice discloses widespread reliance on victim-impact factors for sentencing purposes. See, *e.g.*, Alaska Stat. Ann. §12.55.125(c)(2) (1998) ("physical injury"); Ariz. Rev. Stat. Ann. §13.702(C) (Supp. 1998–1999) ("serious physical injury"); Colo. Rev. Stat. §18–1–105(9)(f) (1997) ("serious bodily injury"); Fla. Stat. Ann. §921.0016(3)(*l*) (Supp. 1999)

("permanent physical injury"); Haw. Rev. Stat. §706-662(5) (Supp. 1996) ("serious or substantial bodily injury" upon certain victims); Ill. Comp. Stat., ch. 730, §5/5–5–3.2(a) (1997) ("serious harm"); La. Code. Crim. Proc. Ann., Art. 894.1(B)(5) (West 1997) ("risk of death or great bodily harm to more than one person"); N. J. Stat. Ann. §2C:44–1(a)(2) (West 1995) ("gravity and seriousness of harm inflicted on the victim"); N. C. Gen. Stat. §15A–1340.16(d)(19) (1997) ("[t]he serious injury inflicted upon the victim is permanent and debilitating"); Ohio Rev. Code. Ann. §2929.12(B)(2) (1997) ("serious physical . . . harm"); Ore. Admin. Rules §213–008–0002(1)(b)(I) (1997) ("permanent injury"); Tenn. Code Ann. §40–35–114(12) (1997) ("death . . . or serious bodily injury"); Utah Code of Judicial Admin., App. D, Form 2 (1998) ("substantial bodily injury"). Given this widespread understanding, there is nothing surprising or anomalous in the conclusion that Congress chose to treat serious bodily injury and resulting death as sentencing factors in §2119.

In addition, the plain reading of §2119 is reinforced by common patterns of statutory drafting. For example, in one established statutory model, Congress defines the elements of an offense in an initial paragraph ending with the phrase "shall be punished as provided in" a separate subsection. The subsection provides for graded sentencing ranges, predicated upon specific findings (such as serious bodily injury or death). See, *e.g.*, 8 U. S. C. §1324(a)(1). Section 2119 follows a similar logic. It is true that clauses (1)–(3) are not separated into a separate subsection, thus giving rise to the textual problem we must resolve. Congress does not always separate sentencing factors into separate subsections, however. See, *e.g.*, 18 U. S. C. §1347 (1994 ed., Supp. III) (health-care fraud; enhanced penalties if the violation "results in serious bodily injury" or "results in death"). As with statutes like §1324, the structure of §2119 suggests a design which defines the offense first and the

punishment afterward.

In addition, there is some significance in the use of the active voice in the main paragraph and the passive voice in clauses (2) and (3) of §2119. In the more common practice, criminal statutes use the active voice to define prohibited conduct. See, *e.g.*, 18 U. S. C. §1116 (1994 ed., Supp. III) ("[w]hoever kills or attempts to kill"); 18 U. S. C. §2114 ("assaults," "robs or attempts to rob," "receives, possesses, conceals, or disposes"); Tex. Penal Code Ann. §29.03(a)(1), (2) (1994) (aggravated robbery; "causes serious bodily injury," or "uses or exhibits a deadly weapon"); cf. 18 U. S. C. §248(b) (setting forth, as sentencing factors, "if bodily injury results," and "if death results"); United States Sentencing Commission, Guidelines Manual §2B3.1(b)(3) (Nov. 1998) (robbery guideline; "[i]f any victim sustained bodily injury").

These drafting conventions are not absolute rules. Congress uses active language in phrasing sentencing factors in some instances. See, *e.g.*, 18 U. S. C. §2262(b)(3) (1994 ed., Supp. III) ("if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense"). Nevertheless, the more customary drafting conventions support, rather than contradict, the interpretation that §2119 sets forth but one offense.

The Court offers specific arguments regarding these background considerations, each deserving of consideration and response.

First, as its principal argument, the Court cites the three federal robbery statutes on which (according to the legislative history) §2119 was modeled. As the Court acknowledges, however, one of those statutes, 18 U. S. C. §2111, does not refer to "serious bodily injury" or "death" "result[ing]" at all. Because of the omission, the Court deems this statute irrelevant for our purposes. Yet the Committee Report cited by the Court states that "'[t]he definition of the offense'" in §2119 "'tracks the language used in other federal robbery statutes'" including §2111. *Ante,* at 8, n. 4 (quoting H. R.

Rep. No. 102–851, pt. 1, p. 17 (1992)). The definition of the offense in §2119 includes "tak[ing]" or "attempt[ing]" to take a motor vehicle, "from the person or presence of another," "by force and violence or by intimidation." This is altogether consistent with the definition of the offense in §2111, which provides in part that "[w]hoever . . . by force and violence, or by intimidation, takes or attempts to take from the person or presence of another" something of value "shall be imprisoned." Of course §§2111 and 2119 each include at least one element the other does not (*e.g.*, "within the special maritime and territorial jurisdiction of the United States" in the former, "transported, shipped, or received in interstate or foreign commerce" in the latter). Those elements, however, are included in unambiguous fashion in the offense-defining part of the statutes. With respect to the debatable interpretive question– whether serious bodily injury and death are part of the carjacking offense– the circumstance that the definition of the offense in §2119 is based on §2111 and that §2111 does not include these elements, suggests §2119 does not include the elements either.

Passing over §2111, the Court suggests §§2113 and 2118 support its reading of §2119. I disagree. Section 2113, captioned "Bank robbery and incidental crimes," consists of eight subsections. The last three are definitional and irrelevant to the question at hand. The first subsection, subsection (a), proscribes the crime of bank robbery in language that tracks the definition of the offense in §2119, *i.e.*, "tak[ing], or attempt[ing] to take," something of value "from the person or presence of another," "by force and violence, or by intimidation." Subsection (b) proceeds to define the offense of bank larceny and is cast in different terms– as is natural in light of the different conduct proscribed. Subsections (d) and (e) of §2113, the two subsections relied upon by the Court, provide as follows:

"(d) Whoever, in committing, or in attempting to

> commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.
>
> "(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment."

We have not held that subsections (d) and (e) set forth separate offenses. (The Court's citations to *Almendarez-Torres* and *McMillan* on this score are inapt. In neither case did we hold that §§2113(d) and (e) set forth distinct offenses.) Assuming they do, however, they fail to prove the Court's point, for two reasons. First, as a matter of structure, §2113 is divided into distinct subsections with a parallel form. Excluding the definitional provisions at the end, each of the five subsections begins with the word "[w]hoever," followed by specified conduct. Given that some of these subsections (*e.g.*, subsections (a) and (b)) set forth distinct offenses, it is fair to presume their like structured neighbors do so as well. One finds no analogous subsections in §2119 with which clauses (1)–(3) can be matched. On the contrary, clause (1) plainly fails to introduce anything that could be construed as an offense element, making it all the less likely that offense elements are introduced in clauses (2) and (3). Second, the phrases from §2113 cited by the Court– "assaults any person" and "puts in jeopardy the life of any person by use of a dangerous weapon or device"– are rather different from the "serious bodily injury results" and "death results"

language of §2119. The former phrases occur before, not after, the punishment-introducing clause "shall be. . . ." They are also phrased in the active voice, placing attention on the defendant's actions, rather than their consequences. The "or if death results" phrase at the end of subsection (e) is a closer analogue to clauses (2) and (3) of §2119, but there is no reason to assume that this phrase by itself– as opposed to the preceding portion of subsection (e)– defines an element of an offense.

With respect to §2118, the Court asserts without citation to authority that the phrase "another person . . . suffered significant bodily injury" in subsection (a)(3) is an element of the offense. *Ante*, at 8. Even assuming the Court is correct on the point, however, the differences in structure between that provision and §2119 show them not to be comparable. Clauses (1)–(3) in §2119 set forth alternative sentences; but the three clauses in §2118(a) set forth alternative ways of qualifying for the only punishment provided. The more natural reading is that the drafters of §2119 took from §2118 the same thing they took from §§2111 and 2113: the language defining the basic elements of robbery. It is this language, and not other provisions, that is common to all four statutes.

In short, even indulging the Court's assumptions, the federal robbery statutes do not support the conclusion that §2119 contains three substantive offenses. Rather, all four statutes employ similar language to define the elements of a basic robbery-type offense. It is in this sense that §2119 is modeled on §§2111, 2113, and 2118.

The Court next relies on the consumer product-tampering statute, 18 U. S. C. §1365(a), as support for its reading of §2119. It is indeed true, as the Court suggests, that the structure and phrasing of §1365(a) is similar to the carjacking statute. However, neither the Court nor, my research indicates, any Court of Appeals has held that §1365(a) creates multiple offenses. The only case cited for the

proposition that "the Courts of Appeals treat the statute . . . as defining basic and aggravated offenses," *ante*, at 6, establishes nothing of the kind. There, the Court of Appeals did no more than recite that the defendant had been charged and convicted on multiple counts of product tampering, under three subsections of §1365(a). *United States* v. *Meling*, 47 F. 3d 1546, 1551 (CA9 1995). None of the issues presented turned on whether the subsections set forth additional elements.

The Court's final justification for its reading of §2119 rests on state practice. Of course, the Court cannot argue that States do not take factors like serious bodily injury into account at sentencing; as discussed above, they do. Instead, the Court says many States have created a distinct offense of aggravated robbery, requiring proof of serious bodily injury or harm. This is unremarkable. The laws reflect nothing more than common intuition that a forcible theft, all else being equal, is more blameworthy when it results in serious bodily injury or death. I have no doubt Congress was responding to this same intuition when it added clauses (2) and (3) to §2119. Recognizing the common policy concern, however, gives scant guidance on the question before us: whether Congress meant to give effect to the policy by making serious bodily injury and death elements of distinct offenses or by making them sentencing factors. I agree with the Court that these state statutes are not direct authority for the issue presented here. *Ante*, at 10.

The persuasive force of the Court's state-law citations is further undercut by the structural differences between those laws and §2119. Ten of the thirteen statutes cited by the Court follow the same pattern. One statutory section sets forth the elements of the basic robbery offense. Another section (captioned "Aggravated robbery" or "Robbery in the first degree") incorporates the basic robbery offense (either by explicit cross-reference or by obvious implication), adds the bodily or physical injury element (in the active voice),

and then provides that the aggravated crime is subject to a higher penalty set forth elsewhere (*e.g.*, "a class A felony"). Two of the remaining three statutes, N. Y. Penal Law §160.15 (McKinney 1988), and Ky. Rev. Stat. Ann. §515.020 (Michie 1990), deviate from this pattern in only minor respects while the third, N. H. Rev. Stat. Ann. §636:1 (1996), has a singular structure.

Had Congress wished to emulate this state practice in detail, one might have expected it to structure §2119 in a similar manner to the majority model. Cf. 18 U. S. C. §§2113(e),(d). It did not do so. This suggests to me either (i) that Congress chose a different structure than utilized by the States in order to show its intent to treat "serious bodily injury" as a sentencing factor, or (ii) that Congress simply did not concentrate on state practice in deciding whether "serious bodily injury" should be classed as an element or a sentencing factor. Neither possibility sustains the Court's interpretation of §2119.

II

Although the Court, in my view, errs in its reading of §2119 as a simple matter of statutory construction, of far greater concern is its constitutional discussion. In order to inject the rule of constitutional doubt into the case, the Court treats the relevant line of authorities from *Winship* to *Almendarez-Torres* as if it had been the Court's purpose to write them at odds with each other, not to produce a coherent body of case law interpreting the relevant constitutional provisions. This attempt to create instability is neither a proper use of the rule of constitutional doubt nor a persuasive reading of our precedents. We have settled more than the Court's opinion says.

In re Winship, 397 U. S. 358 (1970), made clear what has long been accepted in our criminal justice system. It is the principle that in a criminal case the government must establish guilt beyond a reasonable doubt. To implement

this constitutional protection, it follows, there must be an understanding of the essential elements of the crime; and cases like this one will arise, requiring statutory analysis.

Nonetheless, the holding of the first case decided in the wake of *Winship*, *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), now seems straightforward. In homicide cases, Maine sought to presume malice from the fact of an intentional killing alone, subject to the defendant's right to prove he had acted in the heat of passion. This was so even though "the fact at issue . . .— the presence or absence of the heat of passion on sudden provocation— has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide." *Id.*, at 696. As we later explained, *Mullaney* "held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." *Patterson* v. *New York*, 432 U. S. 197, 215 (1977).

In *Patterson*, the Court confronted a state rule placing on the defendant the burden of establishing extreme emotional disturbance as an affirmative defense to murder. As today's majority opinion recognizes, *Patterson* stands for the proposition that the State has considerable leeway in determining which factors shall be included as elements of its crimes. We determined that New York was permitted to place the burden of proving the affirmative defense on defendants because "nothing was presumed or implied against" them. *Id.*, at 216.

In *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), we upheld a State law requiring imposition of a mandatory minimum sentence upon the trial judge's determination that the defendant had visibly possessed a firearm during the commission of an enumerated offense. Today's majority errs, in my respectful view, by suggesting *McMillan* is somewhat

inconsistent with *Patterson*. *McMillan*'s holding follows easily from *Patterson*. *McMillan* confirmed the State's authority to treat aggravated behavior as a factor increasing the sentence, rather than as an element of the crime. The opinion made clear that we had already "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." 477 U. S., at 84 (quoting *Patterson* v. *New York*, *supra*, at 214).

In today's decision, the Court chooses to rely on language from *McMillan* to create a doubt where there should be none. *Ante*, at 14-15. Yet any uncertainty on this score ought to have been put to rest by our decision last Term in *Almendarez-Torres*. To say otherwise, the majority must strive to limit *Almendarez-Torres*, just as it must struggle with *Patterson* and *McMillan*. *Almendarez-Torres*, however, controls the question before us.

As an initial matter, *Almendarez-Torres* makes clear that the constitutional doubt methodology employed by the Court today is incorrect. It teaches that the constitutional doubt canon of construction is applicable only if the statute at issue is "genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a 'fair' one." 523 U. S., at 238. For the reasons given in Part I, *supra*, the Court of Appeals' interpretation of §2119 is, in my view, superior to petitioner's reading. At a minimum, the question whether 8 U. S. C. §1326(b)— the statute at issue in *Almendarez-Torres*, set forth sentencing factors or elements of distinct offenses was a closer one than the statutory question presented here. Yet we found insufficient ambiguity to warrant application of the constitutional doubt principle there. 523 U. S., at 238. Unless we are to abandon any pretense of consistency in the application of the principle, it is incumbent on the Court to explain how it reconciles its analysis with *Almendarez-Torres*.

Not only is the proper construction of the statute clearer here, but there is less reason, in light of *Almendarez-Torres* itself, to question the constitutionality of the statute as construed by the Court of Appeals. The insubstantiality of the Court's constitutional concern is indicated by its quite summary reference to the principle of constitutional law the statute might offend. The Court puts the argument this way: "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Ante,* at 16 n. 6. It suggests the carjacking statute violates this principle because absent a finding of serious bodily injury, a defendant may be sentenced to a maximum of 15 years' imprisonment and, absent a finding of death, he may be sentenced to a maximum of 25 years' imprisonment. A finding of serious bodily injury increases the maximum penalty for the crime of carjacking from 15 to 25 years' imprisonment and a finding of death increases the maximum to life imprisonment.

If the Court is to be taken at its word, Congress could comply with this principle by making only minor changes of phraseology that would leave the statutory scheme, for practical purposes, unchanged. Congress could leave the initial paragraph of §2119 intact, and provide that one who commits the conduct described there shall "be imprisoned for any number of years up to life." It could then add that "if the sentencing judge determines that no death resulted, one convicted under this section shall be imprisoned not more than 25 years" and "if the sentencing judge determines that no serious bodily injury resulted, one convicted under this section shall be imprisoned not more than 15 years." The practical result would be the same as the current version of §2119 (as construed by the Court of Appeals): the jury makes the requisite findings under the initial paragraph, and the court itself sentences the defendant within one of the prescribed ranges based on the judge's own determina-

tion whether serious bodily injury or death resulted.

The Court does not tell us whether this version of the statute would pass constitutional muster. If so, the Court's principle amounts to nothing more than chastising Congress for failing to use to the approved phrasing in expressing its intent as to how carjackers should be punished. No constitutional values are served by so formalistic an approach, while its constitutional costs in statutes struck down or, as today, misconstrued, are real.

If, on the other hand, a rephrased §2119 would still violate the Court's underlying constitutional principle, the Court ought to explain how it would determine which sentencing schemes cross the constitutional line. For example, a statute that sets a maximum penalty and then provides detailed sentencing criteria to be applied by a sentencing judge (along the lines of the federal Sentencing Guidelines) would be only a more detailed version of the rephrased §2119 suggested above. We are left to guess whether statutes of that sort might be in jeopardy. (Further, by its terms, JUSTICE SCALIA'S view— "that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed," *ante*, at 1 (concurring opinion)— would call into question the validity of judge-administered mandatory minimum sentencing provisions, contrary to our holding in *McMillan*. Once the facts triggering application of the mandatory minimum are found by the judge, the sentencing range to which the defendant is exposed is altered.) In light of these uncertainties, today's decision raises more questions than the Court acknowledges.

In any event, the Court's constitutional doubts are not well founded. In *Almendarez-Torres*, we squarely rejected the petitioner's argument that "any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement"; as we said, the Constitution "does not impose that requirement." 523 U. S., at 247. See

also *Monge* v. *California*, 524 U. S. 721, 729 (1998) ("[T]he Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed"). Indeed, the dissenters in *Almendarez-Torres* had no doubt on this score. 523 U. S., at 260 (opinion of SCALIA, J.) (arguing that "there was, until today's unnecessary resolution of the point, 'serious doubt' whether the Constitution permits a defendant's sentencing exposure to be increased tenfold on the basis of a fact that is not charged, tried to a jury, and found beyond a reasonable doubt").

The Court suggests two bases on which *Almendarez-Torres* is distinguishable, neither of which is persuasive. First, the Court suggests that this case is "concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by Almendarez-Torres." *Ante*, at 21. This is not a valid basis upon which to distinguish *Almendarez-Torres*. The petitioner in *Almendarez-Torres* claimed that "the Constitution requires Congress to treat recidivism as an element of the offense" and that, as a corollary, "[t]he Government must prove that 'element' to a jury." 523 U. S. at 239.

The Court has not suggested in its previous opinions, moreover, that there is a difference, in the context relevant here, between, on the one hand, a right to a jury determination, and, on the other, a right to notice by indictment and to a determination based upon proof by the prosecution beyond a reasonable doubt. The Court offers no reason why the concept of an element of a crime should mean one thing for one inquiry and something else for another. There would be little to guide us in formulating a standard to differentiate between elements of a crime for purposes of indictment, jury trial, and proof beyond a reasonable doubt. Inviting such confusion is a curious way to safeguard the important procedural rights of criminal defendants.

Second, the Court is eager to find controlling significance

in the fact that the statute at issue in *Almendarez-Torres* made recidivism a sentencing factor, while the sentencing factor at issue here is serious bodily injury. This is not a difference of constitutional dimension, and *Almendarez-Torres* does not say otherwise. It is true that our statutory analysis was informed in substantial measure by the fact that recividism is a common sentencing factor. *Id.*, at 230. In our constitutional analysis we invoked the long history of using recidivism as a basis for increasing an offender's sentence to illustrate the novel and anomalous character of the petitioner's proposed constitutional rule— *i.e.*, that under *McMillan* v. *Pennsylvania* any factor that increases the maximum penalty for a crime must be deemed an element of the offense. We proceeded to reject that rule. *Almendarez-Torres* v. *United States*, 523 U. S., at 247. The dissenters there (like the Court today) misunderstood the import of this discussion, but they were correct in their observation that "[i]t is impossible to understand how *McMillan* could mean one thing in a later case where recidivism is at issue, and something else in a later case where some other sentencing factor is at issue." *Id.*, at 258 (opinion of SCALIA, J.).

The constitutional portion of *Almendarez-Torres* also rejected the argument that constitutional concerns were raised by a "different 'tradition'— that of courts having treated recidivism as an element of the related crime." *Id.*, at 246. We found this argument unconvincing because "any such tradition is not uniform." *Ibid.* Of course, the same is true with respect to the sentencing factors at issue here. See *infra*, at 4–5. In sum, "there is no rational basis for making recidivism an exception." 523 U. S., at 258 (SCALIA, J., dissenting) (emphasis omitted).

If the Court deems its new direction to be a justified departure from *stare decisis*, it does not make the case. There is no support for the view that *Almendarez-Torres* was based on a historical misunderstanding or misinterpretation. By the Court's own submission, its historical discussion

demonstrates no more than that "the tension between jury safeguard and exclusively judicial powers" would probably and generally have informed the Framers' conception of the jury right. *Ante*, at 17. That must be correct, but it does not call into question the principle that "[t]he definition of the elements of a criminal offense is entrusted to the legislature.'" *Staples* v. *United States*, 511 U. S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U. S. 419, 424 (1985)).

The Court's historical analysis might have some bearing on the instant case if §2119 disclosed the intent to serve the real objective of punishing (without constitutional safeguards) those who caused serious bodily harm, rather than to prevent the underlying conduct of carjacking. See *Almendarez-Torres* v. *United States*, *supra*, at 243, 246. No such inference or implication can be drawn from the text and statutory history of the offense here under consideration. In fact, the Court makes no attempt to argue that anything particular to the carjacking statute suggests the jury's role has been unconstitutionally diminished. The gravamen of the offense is carjacking coupled with a threat of bodily harm. The jury resolves these issues, *i.e.*, whether a vehicle is taken "by force and violence or by intimidation." Indeed, whether serious bodily injury results can be outside of the defendant's control. As already explained, it is not in the least a novel view that after the offense is established, the extent of the harm caused is taken into account in the sentencing phase. In this respect, today's case is far easier than *McMillan*, where the sentencing factor was inherent in the criminal conduct itself.

The rationale of the Court's constitutional doubt holding makes it difficult to predict the full consequences of today's holding, but it is likely that it will cause disruption and uncertainty in the sentencing systems of the States. Sentencing is one of the most difficult tasks in the enforcement of the criminal law. In seeking to bring more order

and consistency to the process, some States have sought to move from a system of indeterminate sentencing or a grant of vast discretion to the trial judge to a regime in which there are more uniform penalties, prescribed by the legislature. See A. Campbell, Law of Sentencing §§1:3, 4:6–4:8 (2d ed. 1991). These States should not be confronted with an unexpected rule mandating that what were once factors bearing upon the sentence now must be treated as offense elements for determination by the jury. This is especially so when, as here, what is at issue is not the conduct of the defendant, but the consequences of a completed criminal act.

A further disconcerting result of today's decision is the needless doubt the Court's analysis casts upon our cases involving capital sentencing. For example, while in *Walton* v. *Arizona*, 497 U. S. 639, 648 (1990), we viewed the aggravating factors at issue as sentencing enhancements and not as elements of the offense, the same is true of serious bodily injury under the reading of §2119 the Court rejects as constitutionally suspect. The question is why, given that characterization, the statutory scheme in *Walton* was constitutionally permissible. Under the relevant Arizona statute, Walton could not have been sentenced to death unless the trial judge found at least one of the enumerated aggravating factors. See Ariz. Rev. Stat. Ann. §13–703 (1989). Absent such a finding, the maximum potential punishment provided by law was a term of imprisonment. If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death. In fact, *Walton* would appear to have been a better candidate for the Court's new approach than is the instant case. In *Walton*, the question was the aggravated character of the defendant's conduct, not, as here, a result that followed after the criminal conduct had been completed.

In distinguishing this line of precedent, the Court suggests

Walton did not "squarely fac[e]" the key constitutional question "implicated by the Government's position on the meaning of §2119(2)." *Ante*, at 24. The implication is clear. Reexamination of this area of our capital jurisprudence can be expected.

* * *

The Court misreads §2119 and seeks to create constitutional doubt where there is none. In my view, *Almendarez-Torres* controls this case. I would hold §2119 as interpreted by the Court of Appeals constitutional, and I dissent from the opinion and judgment of the Court.