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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

11 **UNITED STATES OF AMERICA,**)

12 **Plaintiff,**)

13 **v.**)

14 **DMITRI BARASHKOV,**)

15 **Defendant.**)

NO. CR 00-89-CAS

**NOTICE OF MOTION AND MOTION
FOR ORDER DISMISSING
INDICTMENT BASED ON (1)
FAILURE TO ALLEGE INDICTABLE
OFFENSE; (2) STATUTORY VOID
FOR VAGUENESS GROUNDS;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Hearing Date: October 2, 2000

Hearing Time: 2:30 p.m.

CTRM: The Hon. Christina A. Snyder

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**TO: UNITED STATES ATTORNEY ALEJANDRO MAYORKAS AND ASSISTANT
UNITED STATES ATTORNEY DUNCAN DEVILLE:**

**PLEASE TAKE NOTICE that on October 2, 2000, at 2:30 p.m., or as soon thereafter
as counsel may be heard, in the courtroom of the Honorable Christina A. Snyder, United
States District Judge, defendant DMITRI BARASHKOV, will bring for hearing a motion for
an order dismissing the indictment.**

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This motion is based upon two grounds: (1) the government’s failure to allege an indictable offense under the carjacking statute, 18 U.S.C. 2119, and (2) the unconstitutionality of the statute as applied to the facts of this case on vagueness grounds.

This motion is brought pursuant to Rule 12(b)(2) of the Federal Rules Of Criminal Procedure and is based on this motion, as well as the oral argument and any evidence presented at the hearing of this motion.

Respectfully submitted,

DATED: September 7, 2000

GREGORY NICOLAYSEN
Counsel for the Defendant,
DMITRI BARASHKOV

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 I. INTRODUCTION

4 A. Opening Statement

5 _____ By this motion, defendant Dmitri Barashkov (“Barashkov”) will establish that the
6 events of this case, even when viewed in the light most favorable to the government, do not
7 constitute carjacking as a matter of law and that the indictment should therefore be dismissed
8 for failure to state an indictable offense. In the alternative, Barashkov contends that the
9 carjacking statute is unconstitutionally vague as applied to the facts of this case, thus
10 warranting a dismissal of the charges.

11
12 B. Statement Of Facts Pertinent To This Motion

13 The following statement of facts is adopted directly from the discovery materials
14 provided to the defense by the government. In framing the statement of facts in support of
15 this motion, the defense is accepting the government’s representation of the events and
16 circumstances of this case at face value. The essential thrust of this motion is the position that
17 even if the government’s evidence is accepted, it does not constitute carjacking under 18
18 U.S.C. 2119 as a matter of law.

19 If this case proceeds to trial, witnesses whose statements are being accepted for
20 purposes of this motion will be cross-examined to test their credibility. The summary of events
21 set forth below is not meant to concede that the statements in the FBI interview reports are
22 accurate or that the defense will accept them if the case goes to trial. Rather, the government’s
23 version of events is being accepted solely for purposes of this motion, because this motion does
24 not seek to raise issues of fact. For this reason, no declaration is being submitted in support of
25 this motion either by the defendant or by defense witnesses. Instead, the government’s pretrial
26 discovery serves as the sole factual basis for this motion.

27 The circumstances giving rise to this indictment are based on a dispute over a vehicle,
28 specifically a black 1995 BMW 740i (“1995 BMW”), which was purchased by the alleged

1 victim, Mark Babaian (“Mark”), and his wife, Lisa (“Lisa”). They had entered into an
2 arrangement with one of the defendants in the case, Alexander Zinchenko, by which
3 Zinchenko could use the car and have his name placed on the insurance policy as an
4 authorized driver, in return for paying the car installments and insurance premiums. When
5 this arrangement broke down, the incidents giving rise to the Indictment in this case
6 occurred.¹

7 The arrangement in question, by which Zinchenko was permitted to use the car,
8 reflected a historical relationship that dates back to the days when Zinchenko and the
9 Babaians were in Russia, prior to their emigration to the United States. Although Mark
10 Babaian met Zinchenko for the first time here in Los Angeles, Lisa had known Zinchenko
11 from the Ukraine. She had met him in approximately 1987 and had participated as a witness
12 at his wedding.²

13 Shortly after the Babaians arrived in the U.S. in 1997, they encountered Zinchenko and
14 re-established a friendship here in Los Angeles. It was around this period in which Zinchenko
15 fell upon hard times, both emotionally and financially, and reached out to the Babaians for
16 support. Zinchenko’s wife left him; he lost the clothing store which he had operated as his
17 own business; his car was repossessed for nonpayment; and he fell into drug abuse. Zinchenko
18 would go to the Babaians’ residence, cry over his misfortunes, and seek their help. They took
19 pity on him and helped him to the extent they could, by providing him with financial
20 advances, allowing him to sleep over at their residence on occasion, and by taking him to a
21 local drug rehabilitation center. The Babaians even paid a fee for Zinchenko’s admission into
22 the drug rehab program.³

23 Lisa’s friendship with Zinchenko even included at least one minor mishap with the law,
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25 ¹ Sheriff’s Dept report of interview with Igor Krassi, dated September 17, 1999, Bate
26 Stamp 188 - 189, at page 189.

27 ² FBI-302 interview report of Mark Babaian, dated September 20, 1999, Bate Stamp 25-33
28 (“Mark’s 9/20/00 report”), at page 25; FBI-302 interview report of Lisa Babaian, dated September 19,
1999, Bate Stamp 35-40 (“Lisa’s 9/19/00 report”), at page 35. Both reports are included in Exhibit “A.”

³ Mark’s 9/20/00 report, at page 26; Lisa’s 9/19/00 report, at pages 35-36.

1 involving a shoplifting incident for which they were both arrested and jailed briefly.⁴

2 As time passed, Zinchenko's personal life improved: his wife returned to him, and they
3 started a family. During his wife's pregnancy, Zinchenko convinced the Babaians to enter into
4 a business venture by which the Babaians would advance funds to Zinchenko for him to take
5 to Russia for the purpose of buying merchandise and shipping it back to the U.S. for resale in
6 the U.S. market. The Babaians provided Zinchenko with \$15,000 and Zinchenko did, in fact,
7 travel to Russia as planned and ship merchandise back to the U.S. Unfortunately, the venture
8 did not prove profitable, and for this reason, the Babaians and Zinchenko did not pursue any
9 future business ventures together.⁵

10 The Babaians did, however, stay in touch with Zinchenko and his wife, as the two
11 families would have dinner together once a month. In the course of their relationship with
12 Zinchenko in the 1998 year, the Babaians also met Zinchenko's friends -- codefendants
13 Zhukov, Barashkov and Dzamshit -- on several occasions.⁶

14 In approximately February 1999, the Babaians were considering purchasing the 1995
15 BMW which is the subject of this prosecution. They had found a good deal on the car and
16 decided to go ahead and buy it, even though Lisa did not yet have a job or even a driver's
17 license and Mark was out of work at that particular time. Moreover, because the Babaians
18 already had a car, a silver BMW ("silver BMW") which they had purchased the prior year,
19 the 1995 BMW ended up sitting in their garage without being used.⁷

20 Around the same time in early 1999, Zinchenko and codefendant Zhukov drove the
21 Babaians' silver BMW to Mexico to pick up Mark's mother and brother and bring them into
22 the U.S. The mother and brother had tried unsuccessfully to obtain visas to enter the U.S.

24 ⁴ Mark's 9/20/00 report, at page 26.

25 ⁵ Mark's 9/20/00 report, at page 26.

26 ⁶ As an illustration of the cultural inner-circle within which the incidents involved in this
27 case occurred, Lisa's 9/19/00 report states, at page 36, that Zhukov's mother was a fortune teller who
28 conned her customers by lulling them into divulging personal secrets then extorting them.

⁷ Mark's 9/20/00 report, at pages 26-27.

1 from the Ukraine, and Zinchenko had told Mark that he could help by bringing them in by car
2 across the Mexican border.⁸

3 During the trip, Zinchenko learned that the Babaians were considering purchasing the
4 1995 BMW.⁹ Upon returning to Los Angeles, he spoke to Mark and expressed an interest in
5 the car. Zinchenko accompanied Mark and Lisa when they purchased the car, and afterwards
6 he asked if he could use the car until Lisa had obtained a job and a driver's license. Zinchenko
7 proposed the following arrangement: in exchange for using the 1995 BMW, he would make the
8 monthly car payments and also pay the insurance premiums. Because Mark Babaian was out
9 of work and the car was just sitting in the garage, Zinchenko's offer to make the payments was
10 appealing. Moreover, Mark was grateful to Zinchenko for bringing his mother and brother
11 into the U.S.¹⁰

12 Accordingly, the Babaians agreed that Zinchenko could take car and use it as long as he
13 made the payments as he had agreed to do. Mark Babaian made it clear to Zinchenko that if
14 Zinchenko failed to make the payments, Mark would take the car back.¹¹

15 To implement this arrangement, Mark contacted his insurance agent, Simon Gurfinkel,
16 at Farmers Insurance to advise him that Zinchenko was going to have possession of the car
17 and would be using it. Gurfinkel suggested adding Zinchenko to the policy as an authorized
18 driver, and both Zinchenko and the Babaians agreed. In March 1999, Gurfinkel added
19 Zinchenko as a driver on the insurance policy.¹²

20 Zinchenko proceeded to take possession of the 1995 BMW and used it. In accordance

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22 ⁸ See FBI-302 report of interview with Mark and Lisa Babaian, dated September 23, 1999,
23 which is a single-page report at Bate Stamp 54 ("Mark/Lisa 9/23/99 report"). The report is included in
24 Exhibit "A."

25 ⁹ Mark/Lisa 9/23/99 report.

26 ¹⁰ Mark's 9/20/00 report, at page 27; Mark/Lisa 9/23/99 report; FBI-302 report of
27 interview of Lisa Babaian, dated May 3, 2000, Bate Stamp 445-446, which is included in Exhibit "A."

28 ¹¹ Mark's 9/20/00 report, at page 27.

¹² See one-page "Memorandum Of Automobile Insurance Application," which was
produced by the government during discovery (Bate Stamp 113), which is included in Exhibit "A." See
also, Mark's 9/20/00 report, at page 27.

1 with his arrangement with the Babaians, he began to pay Lisa on a monthly basis to cover the
2 expenses he had agreed to absorb. The specific arrangement was that he would pay Lisa each
3 month, and she would write the checks to cover the monthly car installments. Zinchenko was
4 also obligated to pay the periodic insurance premiums.¹³

5 Zinchenko paid Lisa as required each month from the beginning of their arrangement
6 in May 1999 through August 1999. Although he was making the payments, Zinchenko also
7 complained to Mark about how expensive the car was. During their conversations, Zinchenko
8 made suggestions that he and Mark should devise a plan to strip the car, report the car as
9 stolen and collect the insurance proceeds, then reassemble the car after being paid. Mark
10 refused to do so.¹⁴

11 In light of Zinchenko's comments, Mark called Zinchenko one day and proposed that
12 he refinance and buy the car from the Babaians. Initially, Zinchenko agreed to do so, he did
13 not follow up on this idea.¹⁵

14 Also during the summer of 1999, Mark believed that Zinchenko's friends or
15 acquaintances, including the defendants Dzamshit and Barashkov, were also using the 1995
16 BMW. They were not authorized drivers, and Mark did not know the purpose for which they
17 were using the car.¹⁶

18 In early August, the Babaians received the bill for the insurance premium which was
19 due on September 7, 1999. Mark told Zinchenko about the bill and reminded him during
20 August of the upcoming due date. Zinchenko reassured Mark that he would pay the premium.
21 But in fact, Zinchenko failed to pay the premium. The September 7 deadline passed without
22 Zinchenko paying the Babaians.¹⁷

23 On the same day that the insurance was due, September 7, the Babaians learned that

24 ¹³ Lisa's 9/19/00 report, at page 36.

25 ¹⁴ Mark's 9/20/00 report, at page 28; Lisa's 9/19/00 report, at page 36.

26 ¹⁵ Mark's 9/20/00 report, at page 28.

27 ¹⁶ Mark's 9/20/00 report, at page 28.

28 ¹⁷ Lisa's 9/19/00 report, at page 36.

1 Zinchenko had driven the 1995 BMW to Utah and had sustained a DUI charge. Mark was
2 upset that Zinchenko had taken the out-of-state trip without clearing it with him in advance,
3 and was particularly upset about the effect the DUI would have on the insurance premiums,
4 given the fact that the Babaian's were the policyholders.¹⁸

5 Accordingly, in the morning of September 8, 1999, Mark Babaian went to Zinchenko's
6 residence for the purpose of taking back the car.¹⁹ Zinchenko's wife, Lena, who knew Mark
7 but did not know specifically why he had come over to their house that morning, let him in.
8 While Zinchenko was in the shower, Mark asked Lena for the car keys, and she showed him
9 where they were. As Mark was taking the car keys, Zinchenko encountered him coming out of
10 the shower. Mark proceeded to tell him that he was taking the car back because Zinchenko
11 had failed to make the payments as required and because Zinchenko apparently had a
12 suspended drivers license resulting from a recent DUI conviction. Mark then left the residence
13 with the keys and drove the 1995 BMW from the Zinchenko residence back to the Babaian's
14 residence and parked it in the garage.²⁰

15 Shortly after Mark drove away in the car from Zinchenko's residence, Zinchenko
16 telephoned the Babaian residence and spoke with Lisa concerning the repossession of the car.
17 Lisa explained to Zinchenko that she had told Mark to take the car back because Zinchenko
18 had failed to pay the insurance premiums and because he had sustained a DUI which would
19 cause the premiums to increase. Zinchenko tried to convince Lisa that he would pay the
20 insurance premiums, but she would not listen to him.²¹ Lisa also received a phone call from

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22 ¹⁸ Lisa's 9/19/00 report, at page 37.

23 ¹⁹ On September 8, Mark Babaian told Igor Krassi, his cousin, that "he (Mark) was having
24 problems with Zinchenko over the car that Babaian was letting Zinchenko use"; and he also told Krassi
25 that "he (Mark) had gone to Zinchenko's and taken his car back because Zinchenko wouldn't pay for it."
26 See FBI-302 interview report of Igor Krassi dated September 24, 1999, Bate Stamp pages 45-47
("Krassi's 9/24/99 report"), at page 45. The report is included in Exhibit "A." See also, Mark's 9/20/00
report, at page 28, which expressly states that Mark Babaian told Zinchenko on September 8, 1999 that
he had come over to Zinchenko's residence because "he was taking the car back."

27 ²⁰ Mark's 9/20/00 report, at pages 28-29; Lisa's 9/19/00 report, at page 37.

28 ²¹ Lisa's 9/19/00 report, at page 37, expressly states: "Zinchenko tried to convince Babaian
that he would pay for the insurance, but she would not listen to him."

1 **Lena (Zinchenko’s wife), in which Lena told her that Mark should not have taken back the**
2 **car.²²**

3 **Because she was receiving angry phone calls over the repossession of the car, Lisa**
4 **finally told the callers to come over to the Babaian’s home after her husband, Mark, had**
5 **returned from work.²³**

6 **Later that afternoon on September 8, Mark received a cellular phone call from**
7 **Ludmilla Barisova (“Barisova”), the babysitter at the residence, who told him that Zinchenko**
8 **and other men were there waiting to speak with him. The other men were the co-defendants in**
9 **this case.²⁴**

10 **When Mark returned home that afternoon, he saw Dzamshit’s car parked in front of**
11 **the house. When he entered the house, he saw Zinchenko in the backyard and heard**
12 **Barashkov and codefendant Zhukov in the garage where the car was parked.²⁵ Codefendant**
13 **Dzamshit was also in the house at the time.²⁶**

14 **Zhukov told Mark that they were going to take the car back.²⁷ Zinchenko proceeded to**
15 **demand the keys to the 1995 BMW from Mark, but Mark told him that the keys were not in**
16 **the house. Zinchenko told Mark that by taking the car earlier that day, he was leaving**
17 **Zinchenko without transportation. Zinchenko demanded that Mark give him back the car**
18 **and insisted that the car belonged to him, threatening to hurt the Babaian family if Mark did**
19 **not comply. Zinchenko began to strike Mark, a scuffle ensued, and Zinchenko brandished a**
20 **knife.²⁸**

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22 ²² **Lisa’s 9/19/00 report, at page 37.**

23 ²³ **Lisa’s 9/19/00 report, at page 37.**

24 ²⁴ **Mark’s 9/20/00 report, at page 29.**

25 ²⁵ **If the case proceeds to trial, the defense will establish that Barashkov was retrieving his**
26 **personal belongings from the car at this time.**

27 ²⁶ **Mark’s 9/20/00 report, at page 29.**

28 ²⁷ **Krassi’s 9/24/99 report, at page 45.**

²⁸ **Mark’s 9/20/00 report, at page 29; Lisa’s 9/19/00 report, at page 37.**

1 **During the confrontation, codefendant Zhukov also took out a knife and made slashing**
2 **movements at Mark. A cousin of Mark who was in the house at the time, Igor Krassi**
3 **(“Krassi”), tried to intervene, with the result that both Mark and Krassi sustained knife cuts.**
4 **While this was going on, Lisa went into the garage where Barashkov was, screaming for him to**
5 **leave. Barisova was also screaming for the four men to leave, which they did. They all got into**
6 **Dzamshit’s car and drove off.²⁹**

7 **The 1995 BMW was not taken. It had remained parked in the garage while the**
8 **confrontation was taking place in the living room and backyard of the house.³⁰**

9 **In the evening of September 8 -- just a couple of hours after the confrontation described**
10 **above -- Mark, Krassi and some of their friends went to Zinchenko’s apartment to discuss the**
11 **situation. All four defendants in this action (Zinchenko, Zhukov, Dzamshit and Barashkov)**
12 **were at the apartment, and when the group arrived, they all met outside the apartment**
13 **building and discussed the matter, together with Lena and Zhukov’s mother. The issue of**
14 **Zinchenko’s claim to the 1995 BMW was not resolved, but there was no violence.³¹**

15 **During the week following the incident, the Babaians received telephonic threats,**
16 **principally from Zinchenko, demanding the return of the car and warning of physical harm if**
17 **the Babaians went to the police. Zinchenko demanded compensation from the Babaians for**
18 **taking back the car, claiming that he needed the car for something and was losing money**
19 **because he did not have the car.³²**

20 **In the morning of September 17, 1999, as Mark was walking from a day care center**
21 **back to his parked silver BMW,³³ Zinchenko and his step-father, Viktor Ivlev, attacked Mark**

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23 ²⁹ **Mark’s 9/20/00 report, at pages 29-30.**

24 ³⁰ **Mark’s 9/20/00 report, at pages 29-30.**

25 ³¹ **FBI-302 report of interview with Lisa Babaian, dated February 11, 2000 (“Lisa’s 2/11/00**
26 **report”), Bate Stamp 442-443. This report is included in Exhibit “A.”**

27 ³² **Mark’s 9/20/00 report, at page 31.**

28 ³³ **Key Point: the vehicle involved in the 9/17/00 incident is the *silver* BMW, the car that the**
Babaians had already owned prior to purchasing the 1995 BMW. During the events of September 8, it
was the 1995 BMW that was at issue.

1 and demanded the keys to the car. A scuffle ensued and Zinchenko stabbed Mark, requiring
2 medical attention. However, the vehicle was not taken.³⁴

3 After September 17, Mark and Lisa continued to have dealings with Zinchenko and co-
4 defendant Zhukov regarding the ongoing issue of returning the 1995 BMW to them. On one
5 occasion, Mark encountered Zhukov and another Russian male at a store, during which
6 Zhukov demanded the return of the car, stated that he and Zinchenko were losing money
7 because they didn't have the car, and threatened to do things the "Russian way" if the matter
8 was not resolved soon.³⁵

9 Moreover, on December 10, 1999, Lisa telephoned Zinchenko to further address the car
10 situation. Early in the conversation, she asked Zinchenko, "How are we going to resolve this
11 problem?", to which Zinchenko responded, "How can a problem be resolved? Let's meet and
12 decide." Reluctant at first to meet in person, Lisa finally agreed.³⁶

13 Accordingly, on December 13, 1999, Lisa met at a restaurant with Zinchenko, Zhukov
14 and Dzamshit to further discuss the car situation.³⁷ The dinner meeting was also attended by
15 Krassi, who had been present at the September 8 altercation, and two additional Russian
16 males whom Lisa was meeting for the first time. One of them, a man named Tomas, served as
17 a mediator between Lisa and Zinchenko and listened as each presented his and her respective
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20 ³⁴ Mark's 9/20/00 report, at page 31. Barashkov (the moving party in this motion) is
21 not alleged in the indictment to have had any involvement in the September 17 incident and is
22 not named as a defendant in the charge pertaining to this incident. The indictment charges
23 defendant Barashkov with attempted carjacking solely in regard to the September 8 incident.

24 ³⁵ FBI-302 report of interview with Mark Babaian, dated 12/15/99, Bate Stamp 75-76, at
25 page 75. The report is included in Exhibit "A."

26 ³⁶ See transcript of recorded telephone conversation of December 10, 1999, translated from
27 Russian to English, Bate Stamp 266-271, at page 266. This transcript is included in Exhibit "A."

28 ³⁷ On December 13, Lisa had several recorded telephone conversations with Zhukov and
others regarding arrangements to have the meeting. In these conversations, Lisa expressed a clear desire
to get the car situation resolved, but she was concerned about violence. She was given repeated
reassurances that no violence would occur, and she eventually agreed to meet at a restaurant that same
day. The transcripts of these conversations are Bate Stamp 273-285. They are not enclosed as exhibits
to this motion.

1 positions regarding the 1995 BMW.³⁸

2 During this discussion, Lisa confronted Zinchenko about the fact that he had stabbed
3 her husband, Mark, and even, as an aside, expressed surprise that Zinchenko had used his left
4 hand to commit the stabbings, since she never knew he was left-handed. Krassi also
5 confronted Zhukov by claiming that Zhukov had cut a nerve in Krassi's hand with the knife;
6 and Zhukov apologized.³⁹

7 On the specific issue of the 1995 BMW, Lisa proceeded to explain to Zinchenko and to
8 Tomas, the mediator, that Mark had gone to Zinchenko's residence to repossess the car
9 because Zinchenko had failed to fulfill his obligations under their arrangement; specifically, he
10 had failed to put the car insurance in his own name and did not pay the insurance bill.
11 Zinchenko, on the other hand, maintained that Lisa's husband, Mark, offended him greatly by
12 breaking into his apartment to take the car keys in the morning of September 8; Mark's
13 behavior was therefore a key factor in causing the altercation that occurred later that day at
14 the Babaian's residence. In regard to regaining possession of the 1995 BMW, Zinchenko
15 stated that he no longer wanted the car but, rather, wanted to be compensated by the
16 Babaian's for various items and services.⁴⁰

17 Zinchenko's demand for compensation at the December 13 meeting complicated the
18 already tense dispute between the parties. Angry words were exchanged; and the mediator,
19 Tomas, who expressed criticism of Lisa and Mark for repossessing the car on September 8, was
20 unable to bring the parties to any resolution. Tomas did, however, schedule a follow-up
21 meeting for one week later, December 20, and everyone agreed to meet again on that date.⁴¹

22 The December 20 meeting was attended by Lisa, Zinchenko, Dzamshit, Krassi, Tomas
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25 ³⁸ FBI-302 report of interview of Lisa Babaiani, dated December 16, 1999, Bate Stamp 84-
26 87 ("Lisa's 12/16/99 report"); FBI-302 report of interview of Igor Krassi, dated December 18, 1999,
Bate Stamps 89-91 ("Krassi 12/18/99 report"). These reports are included in Exhibit "A."

27 ³⁹ Krassi 12/18/99 report, at page 89.

28 ⁴⁰ Krassi 12/18/99 report; Lisa's 12/16/99 report.

⁴¹ Krassi 12/18/99 report, at page 91.

1 and a new person, Igor Martynovitch (“Igor”), who had not been at the prior meeting.⁴² As
2 before, the purpose of the meeting was to attempt once again to resolve the dispute over the
3 car; and once again, Tomas tried to mediate the discussion.⁴³ Lisa reiterated the same position
4 she had stated on prior occasions: that the car had been taken back from Zinchenko due to his
5 violation of their arrangement, which included his failure to make payments. She also pointed
6 out that he had promised to register the car in his own name and failed to do so.⁴⁴

7 Zinchenko, on the other hand, reiterated his earlier position that the dispute had been
8 caused on September 8 by the fact that Mark had come to his residence and taken the car.⁴⁵
9 He also reiterated that he no longer wanted the car but, rather, wanted to be compensated by
10 the Babaians. He insisted that he had paid five thousand dollars towards the down payment of
11 the car, a claim which Lisa strongly disputed.⁴⁶ Igor criticized Zinchenko for using a knife and
12 bringing his friends to the Babaians’ home, rather than going by himself to meet with them to
13 resolve the matter.⁴⁷

14 It was a discussion that rambled back and forth from one speaker to the next, almost
15 interminably.⁴⁸

16 But finally, towards the end of the December 20 meeting, a general understanding was
17

18 ⁴² The December 20, 1999 meeting was recorded by more than one member of the
19 government’s investigative team. To date, the defense has been given one transcript of the meeting,
20 which is in Bate Stamp 294-386. Due to its size, the transcript has not been included as an exhibit to this
21 motion. References to the meeting in the Statement Of Facts to this motion have been taken directly from
22 this transcript. It should also be noted that the government has produced another transcript of the same
23 recorded meeting of December 20, which is Bate Stamp 455 - 536.

24 ⁴³ Transcript of December 20 meeting, at Bate Stamp 305.

25 ⁴⁴ Transcript of December 20 meeting, at Bate Stamp 308 - 313.

26 ⁴⁵ Transcript of December 20 meeting, at Bate Stamp 305.

27 ⁴⁶ Transcript of December 20 meeting, at Bate Stamp 332, 339, 34; Lisa’s 2/11/00 report, at
28 page 442.

⁴⁷ Transcript of December 20 meeting, at Bate Stamp 349, 351.

⁴⁸ This observation becomes obvious from reading the lengthy transcript of the December
20 meeting.

1 reached by which Lisa would transfer the registration of the 1995 BMW to Zinchenko within a
2 month's time, in exchange for a payment amount that would be resolved at a later date.⁴⁹

3 On January 18, 2000, Lisa spoke by telephone with Zinchenko twice for the purpose of
4 following up on the agreement to transfer the car to Zinchenko. Lisa wanted confirmation
5 that Zinchenko had the funds for the transaction, and he assured her that he did. They agreed
6 to speak the following day to set up a meeting to effectuate the transfer of the car.⁵⁰

7 The following day, January 19, 2000, Lisa and Zinchenko spoke again as planned. The
8 discussion concerned where to meet to conduct the transaction. They agreed to meet at a
9 parking lot of a bank located in West Hollywood.⁵¹

10 On January 21, 2000, a criminal complaint charging a violation of the carjacking
11 statute (18 U.S.C. 2119) was filed by the U.S. Attorney's Office against Zinchenko and
12 Dzamshit, commencing this action. The Indictment charging attempted carjacking against all
13 four defendants was filed on February 1.

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⁴⁹ Transcript of December 20 meeting, at Bate Stamp 381, 384.

⁵⁰ Transcript of Tape No. 13 (no date on the transcript; the audio cassette bears the date 1/18/00), Bate Stamp 453-454. The transcript is not attached as an exhibit to this motion.

⁵¹ The two telephone conversations of January 19, 2000 were recorded and transcribed by the government (Bate Stamp 393 - 404). The transcripts are not attached as exhibits to this motion.

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II.

**THE INDICTMENT SHOULD BE DISMISSED
BECAUSE THE ALLEGATIONS FAIL, AS A
MATTER OF LAW, TO ESTABLISH AN
INDICTABLE OFFENSE UNDER 18 U.S.C. 2119**

A. Brief History Of The Carjacking Statute

As originally enacted, the federal carjacking statute, 18 U.S.C. § 2119, made it a federal offense to take a motor vehicle, or attempt to take a motor vehicle, “from a person or presence of another by force or violence or by intimidation.” Federal jurisdiction exists where the carjacker had possession of a firearm and took a motor vehicle that had “been transported, shipped, or received in interstate or foreign commerce” prior to the theft. 18 U.C.S. § 2119 (1993).⁵²

Shortly after its enactment, in 1994, Congress amended the federal carjacking statute by substituting the phrase “with the intent to cause death or serious bodily harm” for the phrase “possessing a firearm as defined in section 921 of this title,” and added the death penalty in order to make carjacking a Federal offense without regard to whether the offense is committed with the use of a firearm. Violent Crime Control and Law Enforcement Act of 1994, § 60003(a)(14), Pub.L. No. 103-322, 108 Stat. 1796, 1970 (1994).⁵³

The statute now defines carjacking as follows:

“Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or

⁵² The original federal carjacking statute provided:

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 attempt to do so[.]

⁵³ In 1996, Congress specified that sexual assault was included in the term “serious bodily injury”. Pub.L. No. 104-217, §2, Oct. 1, 1996, 110 Stat. 3020.

1 received in interstate or foreign commerce from the person or
2 presence of another by force and violence or by intimidation, or
attempts to do so[.]”

3 18 U.S.C. § 2119 (2000).

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5 **B. Under Fed.R.Crim.P. 12(b)(2), The District Court May Dismiss An Indictment If It**
6 **Fails To Allege An Indictable Offense As Determined By Statutory Interpretation**

7 Under Federal Rule Of Criminal Procedure 12(b)(2), the District Court has the
8 authority to dismiss an indictment if it fails to state an offense. In this case, the issue of
9 whether the Indictment is fatally defective for failing to state a carjacking offense as to
10 defendant Barashkov hinges on the question of whether the undisputed facts satisfy the
11 statutory definition of carjacking under 18 U.S.C. 2119. This question is a matter of statutory
12 construction. A motion under Rule 12(b)(2) for failure to state an offense may be granted on
13 the basis of the court’s interpretation of the criminal statute at issue. United States v. Dauray,
14 2000 WL 770540 (2d Cir. 2000)

15 As a general proposition, the starting point in statutory interpretation is the statute's
16 plain meaning, if it has one. Tang v. Reno, 77 F.3d 1194, 1196 (9th Cir.1996) ["In interpreting
17 a statute, we must examine its language. If 'the statute is clear and unambiguous, that is the
18 end of the matter.' " (quoting Sullivan v. Stroop, 496 U.S. 478, 482 (1990))]; United States v.
19 Hagberg, 207 F.3d 569, 574 (9th Cir. 2000), citing Reno v. National Transp. Safety Bd., 45 F.3d
20 1375, 1379 (9th Cir.1995) ("[T]he plain meaning of language in a regulation governs unless
21 that meaning would lead to absurd results.").

22 In the case at bar, the plain meaning of 18 U.S.C. 2119 is that carjacking constitutes the
23 act of stealing a car by force while the driver is in it. Implicit in this plain reading of the
24 statute are certain factual assumptions: (a) the carjacker and victim are strangers to each
25 other and thus have no prior relationship; (b) the carjacker and victim have no prior
26 understandings or arrangements involving use of the vehicle; (c) the carjacker has no basis on
27 which to claim a right to use the vehicle, such as by being listed on the vehicle’s insurance
28 policy; (d) the act of carjacking is situational in nature, occurring at a specific moment in time;

1 it is not one incident in a chain of events comprising an ongoing dispute over the right to use
2 the car.

3 Applying this plain meaning of the statute to the case at bar, it is clear that carjacking
4 has not occurred here and that this motion to dismiss under Rule 12(b)(2) should be granted.

5 If this Court determines that the validity of the Indictment cannot be resolved solely by
6 applying a plain reading of the statute, the legislative history of 18 U.S.C. 2119 must be
7 considered. The Ninth Circuit has expressly observed that the legislative history is to be
8 examined if the statute does not have a plain meaning that resolves an issue of statutory
9 interpretation that is pending before the Court. In United States v. Bahe, 201 F.3d 1124, 1129
10 (9th Cir. 2000), which raised an issue of statutory interpretation in regard to 18 U.S.C. 3583
11 pertaining to Supervised Release, the Circuit provided the following useful observations:

12 Where statutory "language is not clear, Congress's intent must still be
13 ascertained." Tang, 77 F.3d at 1197. In interpreting § 3583(d), we must
14 therefore consider " '[t]he purpose, the subject matter, the context [and] the
15 legislative history' of this statute." [Ninth Circuit citations omitted]. Indeed,
16 "the meaning of statutory language, plain or not, depends on context."

17 Holloway v. United States, 526 U.S. 1 (1999) (internal quotation marks and
18 citations omitted). Context in this regard relates to "the design of the statute as
19 a whole and its object and policy." Gozlon-Peretz v. United States, 498 U.S. 395,
20 407 (1991) (quoting Crandon v. United States, 494 U.S. 152, 158 (1990)). We
21 therefore turn to an examination of the statute's legislative history, its language
22 and structure as a whole, the governing case law, and the applicable Sentencing
23 Guidelines.

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25 The following sections of this memorandum will discuss the legislative history of the
26 carjacking statute in order to provide a more complete context in which to assess the statute's
27 meaning. When the statute is viewed from this broader perspective, the inescapable
28 conclusion is that the case pending before this Court clearly does *not* constitute carjacking

1 under 18 U.S.C. 2119 and that this motion to dismiss should therefore be granted.

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3 **C. The Indictment Undermines The Legislative Intent Behind 18 U.S.C. 2119 Because The**
4 **Type Of Violent Criminal Behavior That Congress Federalized In Enacting The Statute**
5 **Clearly Did Not Occur In This Case**

6
7 **1. Catching The Attention Of Congress: The Growing Wave Of Violent Auto**
8 **Robberies**

9 During the early part of the 1990's, "[t]he nation's major cities reported an increase in
10 [a] terrifying version of car theft, a behind-the-wheel mugging that can leave a hapless driver
11 stranded, injured or dead." Nora Zamichow, Deadly Carjacking Raises Questions and Fears;
12 Crime Wave: Commandeering of Cars is on the Increase. San Diego has had 171 Cases this
13 Year, as the Nationwide Trend Continues. L.A. Times (San Diego Co. Ed.), Oct. 8, 1992, at
14 B1. The typical carjacker wants a ride or wants to command a profit enterprise. DeWayne
15 Wickman, Carjacking, Poverty May be Linked. Lansing St. J., Sept 16, 1992, at A4. As
16 "incidents of carjacking, or the crime of stealing a car by force while a driver is in it"⁵⁴
17 increased, the U.S. Congress responded to this "twisted innovation in car theft"⁵⁵ by enacting
18 the Anti-Car-Theft Act of 1992, making carjacking a new federal crime.⁵⁶

19 **2. Congress Responds: The Congressional Record Clearly Shows An Intent To**
20 **Federalize A Particularly Violent Type Of Auto Robbery That Cannot Be**
21 **Analogized To The Facts Of This Case**

22 The decision by Congress to federalize the crime of carjacking is a vivid example of a
23 legislative trend in recent years by which traditionally local crimes have become codified as
24 federal offenses. In its 1998 report entitled, The Federalization Of Criminal Law, the
25 American Bar Association comprehensively analyzed the growing pattern of converting local

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27 ⁵⁴ H.R. 4542 Anti-Car Theft Act (Oct. 5, 1992) (statement of Rep. Constance A. Morella).

28 ⁵⁵ 138 Cong. Rec. S5,5001 (Apr. 10, 1992) (statement of Sen. Pressler).

⁵⁶ Pub.L. 102-519, Title 1, Sec. § 101(a), Oct. 25, 1992.

1 crimes into federal crimes and cautioned against the adverse consequences of inappropriate
2 federalization, noting that “[t]his troubling federalization trend has contributed to a
3 patchwork of federal crimes often lacking a principled basis.”⁵⁷

4 In recognizing Congress’ decision to federalize carjacking, it is important to look closely
5 at the legislative history of the carjacking statute to understand the particular concerns that
6 prompted Congress to act. Attached to this motion as Exhibit “B” is a printout of excerpts
7 taken from the Congressional Record pertaining to the enactment of the carjacking statute.⁵⁸

8 The Congressional Record makes amply clear that Congress did not casually elevate to
9 the federal level the generic crime of auto theft or the assaultive behavior that might occur
10 between acquaintances when an arrangement they had over the use of a vehicle degenerates
11 into a dispute that gets out of hand.

12 Rather, Congress was responding to a very specific type of violent car robberies: the
13 taking of a car by force from a driver who is in the vehicle at the time. The scenarios that
14 motivated Congress to act were the violent, often gang-related, robberies where a stranger
15 brandishing a weapon confronts the owner of the vehicle who is often seated at the wheel,
16 sometimes with children in the back seat, and demands that s/he surrender the vehicle or face
17 serious bodily injury or death.⁵⁹

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19 ⁵⁷ To avoid even more weight to this already sizeable motion, counsel has not attached the
20 270-page report as an exhibit. However, counsel will lodge a copy with the court prior to the hearing of
21 this motion if requested to do so. The report is a paperback book which may be obtained through the
22 American Bar Association in either of two ways: (1) through the ABA’s web site, at the following
23 address: <http://www.abanet.org/crimjust/fedreport.html>; (2) by contacting the ABA Criminal Justice
24 Section at 740 15th St, N.W., Washington, D.C. 20005. The quotation from the report in the text of this
25 motion was taken from the opening statement of the report at page 5.

26 ⁵⁸ Exhibit “B” is a 146-page printout of excerpts from the Congressional Record that were
27 downloaded from the Thomas legislative web site located on the Internet at: <http://thomas.loc.gov>. This
28 web site is sponsored and maintained by the Library Of Congress. Due to time constraints in the
preparation of this motion, many but not all of the Internet codes have been removed from the printouts
from the Thomas web site. Counsel apologizes to the Court for submitting a document that has not been
completely edited.

⁵⁹ As an ancillary issue, Congress was also concerned about the way carjacking fuels the
illegal sale of stolen auto parts, including chop shops where stolen cars are dismantled so parts can be
sold on the black market. As Exhibit “B” demonstrates, this concern is addressed in tandem with the
overall discussion of carjacking as a national menace warranting federal intervention. While the issue of

1 The following excerpts reprinted below from Exhibit “B” provide vivid illustrations of
2 these concerns and demonstrate clearly that Congress was not at all considering the scenario
3 involved in this case when it concluded that federal intervention was necessary to curtail
4 violent car robberies.

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6 **Excerpt No. 1**

7 “Amid calls for FBI crackdowns and longer jail terms for *carjacking -- taking a vehicle*
8 *by force, while the driver is still in it* -- sociologists and criminal justice officials are seeking
9 causes for this trend toward deadly car theft.” [Emphasis added]⁶⁰

10
11 **Excerpt No. 2**

12 [Comments by Congresswoman Morella]: “Mr. Speaker, incidents of *carjacking, or the*
13 *crime of stealing a car by force while a driver is in it*, has been common over the past several
14 years. There has been an alarming rise of these incidents in several U.S. cities and its suburbs,
15 including my home district of Montgomery County, MD.” [emphasis added]⁶¹

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22 selling stolen auto parts is a secondary consideration in the federalization of carjacking, it serves to
further distance the intent of Congress from the factual scenario involved in this case.

23 ⁶⁰ Exhibit “B” at page 10. This interpretation of carjacking is consistent with the way
24 private industry has applied the term in developing anti-carjacking products. For example, at the web
25 site located at <http://carjacking.com>, the sales pitch reads in part as follows: “The Silent Scorpion is an
26 anti-theft system for your car. Unlike noisy car alarms, the Silent Scorpion actually prevents the
27 carjacker from driving the car more than a quarter mile, while using stealth technology so that the
28 criminal is not made aware of what is happening.” The product has clearly been designed with the view
that carjacking is committed when the driver is confronted while inside his/her vehicle and is forced to
surrender the vehicle to the robber.

⁶¹ Exhibit “B” at page 13.

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Excerpt No. 3

[Comments by then-Congressman Schumer]: “This bill would significantly toughen the Federal penalties for auto theft. It would create a new offense for armed *carjacking -- this is the most recent innovation in auto theft, in which the criminal brazenly walks up to a car waiting at a traffic light, points a gun at the driver, and demands that the car be turned over.* [emphasis added]⁶²

Excerpt No. 4

[Comments by Senator DeConcini]: “ Mr. President, I rise today to introduce a bill addressing a horrible crime that is becoming a monumental concern in many of our major cities. I am referring to the crime popularly known as carjacking . Almost daily around the country, there are now terrifying incidents of *car theft where a car is stolen while the driver is behind the wheel.*

“The seriousness of this form of robbery goes far beyond the fact that a valuable piece of property is taken. The horror of the situation is that the incident is almost six times more likely to result in a murder than other forms of robbery. In addition, it can happen almost anywhere, whether it be *in a parking lot or at a stop sign, in the city, or in the suburbs.* And unlike other forms of robbery, there is no easy precaution or prudent steps that *a driver can take* to avoid it. [emphasis added]⁶³

⁶² Exhibit “B” at page 23.

⁶³ Exhibit “B” at page 25.

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Excerpt No. 5:

[Comments by Senator Lautenberg]: “There are many dimensions to the vehicle theft problem, Mr. President. Perhaps the most disturbing is the emerging problem of violent carjackings. Increasingly, thieves are *using violence and intimidation to force drivers to give up their cars*. Many innocent people are losing their lives in the process. For others, *an evening drive with an open window is an experience now best avoided.*” [emphasis added] ⁶⁴

Excerpt No. 6

[Comments by Senator Mikulski]: “But we must start now to meet the problem. It is not enough to tell people to *keep their doors locked and their windows up*. Our goal must be to keep people from *becoming prisoners in their own cars*.

“To keep that mother from being afraid to drive her children to soccer practice. To keep dads from being *afraid to stop at a stop sign or to run out after dark to get milk for the next morning*. And I hope that we will be able to help lighten some of the anxiety of parents who know that their teenage and college age children are *on the roads alone in their cars*. What an awful situation that we have to live with this kind of dread.” [emphasis added]⁶⁵

Excerpt No. 7

“Most youths who steal cars are seeking status in the criminal subculture, said Andrew Ruotolo, a New Jersey prosecutor who works with the state's anti-car theft task force.

“Ruotolo said carjackings are a very small percentage of all auto theft cases the task force handles. Carjackers, he said, are the most extreme car thieves, often repeat offenders who don't want to be spotted driving in a car that appears to have been broken into.

“Carjacking is a crime of violence, certainly no different than armed robbery. By its nature you get the car intact and you get the keys. You get to keep it a little longer before it's

⁶⁴ Exhibit “B” at page 16.

⁶⁵ Exhibit “B” at page 28.

1 obvious it's stolen,' he said. `Our experience is cars are stolen by young adults and juveniles to
2 commit other crimes in. So, more often than not, you're dealing with a violent offender when
3 dealing with a car thief.'"⁶⁶

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5 **Excerpt No. 8**

6 "Sen. Larry Pressler, South Dakota Republican, who introduced the amendment, cited
7 the recent case of a suburban Maryland woman who died after she became entangled in a
8 seatbelt as her car was being highjacked.

9 "Pam Basu was taking her 22-month-old adopted daughter, Sarina, to preschool Sept. 8
10 when she was attacked. The child was thrown, unharmed, to the pavement in her car seat.
11 Mrs. Basu was dragged along the street for more than a mile.

12 "Mr. Pressler called the carjacking in Savage, Md., `an act of unparalleled brutality.'
13 He said there had been four carjackings at gunpoint in Washington alone in May."⁶⁷

14
15 **Excerpt No. 9**

16 "Other carjackings in and around the District of Columbia involved two girls, 14 and
17 15, armed with a semiautomatic pistol, who stole a car from a man and went on a joy ride; and
18 an 18-year-old high school football star was killed while trying to hijack an off-duty FBI
19 agent's car."⁶⁸

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21 **Excerpt No. 10**

22 "Attention has focused on carjacking since a Maryland woman was dragged to her
23 death earlier this month while her car was being stolen by an assailant who jumped into her
24 car at a filling station. Her infant daughter was thrown from the car but was uninjured.

25 "Without stricter laws and tougher law enforcement innocent citizens will continue to

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27 ⁶⁶ Exhibit "B" at page 11.

28 ⁶⁷ Exhibit "B" at page 3.

⁶⁸ Exhibit "B" at page 12.

1 be harassed by violent auto thieves,' Pressler said.”⁶⁹

2
3 The excerpts quoted above clearly distinguish the intent of Congress in enacting the
4 carjacking statute from the factual scenario involved in this case. Based on the Congressional
5 Record contained in Exhibit “B” and the excerpts therefrom printed above, the following
6 checklist highlights some of the obvious characteristics of carjacking that prompted Congress
7 to federalize this crime. These characteristics are entirely diametrical to the facts involved in
8 the prosecution pending before this Court:

- 9 (1) Carjacking involves a clear-cut delineation between the carjacker and the
10 victim. In other words, there is no room for debate between the person taking
11 the car and the person giving up the car as to who the victim is.⁷⁰
- 12 (2) The carjacker and victim are strangers to each other (they were not family
13 members, friends or acquaintances).⁷¹
- 14 (3) The carjacker confronts the victim while the victim is inside the car, most often
15 sitting behind the wheel, and sometimes with children in the back seat.⁷²
- 16 (4) The carjacker has no basis on which to claim a right to take possession of the
17 vehicle. The vehicle unquestionably belongs solely to the victim, who is being
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20 ⁶⁹ Exhibit “B” at page 5.

21 ⁷⁰ By contrast, in the case at bar, Zinchenko and the Babaiaans argued ad nauseum over who
22 had the right to the car and whether the Babaiaans had acted properly in retaking the car from Zinchenko
23 in the morning of September 8, 1999, which was the antecedent event that incited the confrontation later
24 that day at the Babaiaans’ residence. This entire prosecution centers on the issue of who had the rights to
25 the vehicle.

26 ⁷¹ By contrast, in the case at bar, Zinchenko and the Babaiaans knew each other and had a
27 historical relationship that is discussed in detail in the Statement of Facts to this motion. The carjacking
28 events in this case arose out of an arrangement between the parties to use the vehicle; that arrangement
29 was based entirely on the historical relationship. This is totally diametrical to the circumstances
30 contemplated by Congress in enacting the carjacking statute.

31 ⁷² By contrast, in the case at bar, the altercation on September 8 occurred in the living room
32 and backyard of the Babaian residence, while the 1995 BMW sat parked in the garage. (The September
33 17 altercation is not the focus of this motion because Barashkov is not charged in regard to that incident.)

1 **This Court should not permit such an unbridled application of the statute.**
2 **Accordingly, the only remedy is to dismiss the Indictment as to defendant Barashkov for**
3 **failure to allege an indictable offense.**

4
5 **D. The Published Case Law Addressing 18 U.S.C. 2119 Supports The Position That This**
6 **Case Does Not Constitute Carjacking As A Matter Of Law**

7 **It is instructive to note that the carjacking opinions published by various circuits**
8 **uniformly deal with situations that closely reflect the very situations addressed in the**
9 **Congressional Record. There is no published case law on the carjacking statute that involves**
10 **anything even close to the unique factual circumstances in this prosecution.**

11 **To illustrate this point, the following checklist of citations of carjacking cases is**
12 **provided, with a brief statement of the fact situation involved in each case.**

- 13
14 **1. Brandishing a handgun, the defendant ordered the driver and his passenger to**
15 **get out of their parked car. The defendant proceeded to lock the victims in the**
16 **trunk of the car and drive the car into a ditch, where it was abandoned and later**
17 **recovered by police. United States v.Hicks, 103 F.3d 837 (9th Cir. 1996).**
18
19 **2. While the driver was stopped at a red light in a Los Angeles intersection, the**
20 **defendant, brandishing a handgun, approached and demanded that she exit the**
21 **car. United States v. Rowe, 92 F.3d 928 (9th Cir. 1996).**
22
23 **3. Pointing a handgun at an approaching motorist, the defendant forced the**
24 **motorist to stop and surrender the vehicle. United States v. Martinez, 49 F.3d**
25 **1398 (9th Cir. 1995), cert. denied, 516 U.S. 1065 (1996).**
26
27 **4. A defendant who was running from the police and armed with a firearm**
28 **encountered the victim who was washing his car. Pointing the gun in the back of**

1 the victim's neck, the defendant forcibly took the car. United States v.
2 Anderson, 108 F.3d 478 (3rd Cir.), cert. denied, 118 S.Ct. 123 (1997).

3
4 5. Pointing a knife at an 83-year-old victim, the defendant took the vehicle and, in
5 the process, severely cut the victim by yanking the knife away when the
6 frightened victim grabbed the blade. United States v. Hope, 102 F.3d 114 (5th
7 Cir. 1996).

8
9 6. A group of nine men armed with firearms, including the defendant, approached
10 two men who were standing between two parked vehicles which were
11 approximately forty feet apart. Several members of the group ordered the two
12 men to the ground, kicked them and demanded their wallets as well as the keys
13 to one of the vehicles. United States v. Hawkins, 87 F.3d 722 (5th 1996).

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15 7. The defendant ran across a store parking lot and took a shopper's car at
16 gunpoint. United States v. Lumley, 135 F.3d 758 (11th Cir. 1998).

17
18 8. A group of armed robbers fleeing the scene of a credit union they had just
19 robbed discovered that their getaway driver had left them. They confronted a
20 credit union customer who was in the parking lot, took his car, and proceeded to
21 engage police in a high speed pursuit which involved the exchange of gunfire and
22 a collision with a city bus. United States v. Shaw, 91 F.3d 86 (9th Cir. 1996).

23
24 These cases confirm that the criminal behavior that has been codified by Congress as
25 carjacking under 18 U.S.C. 2119 does not encompass the events involved in this case. Clearly,
26 this case does not constitute carjacking as Congress contemplated. There may be state law
27 crimes involved – for example, aggravated assault, as well as threatening an individual with
28 physical harm. But there is no federal carjacking here.

1 the statute, either by reading the carjacking statute itself, by reading the Congressional
2 Record, or even by reading case law that has addressed the statute in the context of factual
3 situations.

4 Therefore, the only conclusion that can be drawn in this case is that adequate notice
5 was not given to defendant Barashkov (and arguably, to the other defendants as well) because
6 a reasonable person in the position of the defendants would not know that the conduct
7 involved in the case at bar is the type of conduct proscribed by the carjacking statute. Of
8 course, the defendants may still face criminal liability under state court statutes, such as
9 aggravated assault. The arguments presented by this motion are not meant to suggest that the
10 behavior of the defendants was lawful, especially where physical violence was involved. The
11 defects that are being raised by this motion, which warrant dismissal of the Indictment, are
12 specific to the application of the federal carjacking statute to the defendants' conduct.

13 14 15 IV. CONCLUSION

16 Based on the arguments presented in this motion, this Court should not allow this case
17 to proceed to trial. The essential facts that would be presented in the government's case in
18 chief are those that have been spelled out in the Statement of Facts in this motion. A jury is
19 not necessary to determine the facts of this case because defendant Barashkov maintains that
20 even if the government's evidence is accepted at face value, no carjacking violation has
21 occurred. Therefore, it would be a waste of judicial resources to take the time to commence a
22 trial, have the government presents its evidence to a jury, and then litigate a Rule 29 motion at
23 the close of the government's case. Instead, at this pretrial stage in the case, the focus of the
24 litigation should shift from *what happened* (the jury's domain) to the *legal significance of what*
25 *happened* (the Court's domain). That is the purpose for which this motion has been filed.

26 Accordingly, this Court should find, as a matter of law, that no carjacking violation has
27 been established by the Indictment; or alternatively, that the Indictment is void for vagueness
28 as applied to the case against Barashkov. Dismissal of the charges is therefore warranted.

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Respectfully submitted,

DATED: September 7, 2000

GREGORY NICOLAYSEN
Counsel for the Defendant,
DMITRI BARASHKOV

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PROOF OF SERVICE

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is: Encino Bank Bldg, 16000 Ventura Blvd, Suite 500, Encino, CA 91436.

On September 11, 2000, I served the foregoing document described as Motion For Dismissal Of Indictment, by delivering a true copy to:

**Duncan DeVille
Ass't U.S. Attorney
312 No. Spring St.
Los Angeles, Ca. 90012**

Executed on September 11, 2000, at Beverly Hills, CA. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

GREGORY NICOLAYSEN