NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL LOWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When applying the felony murder rule under 18 U.S.C. § 1111(a) to the crime of carjacking, what must a defendant show to establish that he has reached a point of "temporary safety" separating the carjacking itself from subsequent events?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Sentencing Guidelines

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Daniel Lowell, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on June 28, 2021.

OPINION BELOW

The published decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Lowell*, 2 F.4th 1291 (10th Cir. 2021) is found in the Appendix at A1.

JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on June 28, 2021. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. On July 19, 2021, this Court rescinded that extension in cases for which the relevant lower court judgment was issued after that date, but retained the 150-day extension for judgments issued before that date, as occurred here. As 150 days from June 28, 2021 is November 25, 2021, the Thanksgiving holiday, Mr. Lowell's petition is due on November 26. *See*

Sup. Ct. R. 13, Sup. Ct. R. 30.1, 5 U.S.C. § 6103. It is being filed that day, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

U.S.S.G. § 2B3.1 (Robbery), provides, in relevant part:

> . . .
>
> (c) Cross Reference
>
> (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder).

18 U.S.C. § 1111 (Murder), provides, in relevant part:

> (a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.
>
> . . .

STATEMENT OF THE CASE

In November 2017, Daniel Lowell stole a truck and some credit cards, which he and his girlfriend planned to sell to fuel their drug addictions. But on their way to do so, they encountered a border checkpoint on Interstate 10, just outside Las Cruces, New Mexico. When the truck was flagged as stolen, they fled, and a chase ensued. After blowing a tire, they carjacked another vehicle at gunpoint, and the chase continued. But as the pair headed towards Las Cruces and its local roads, the border patrol terminated pursuit and let them get away.

Over roughly the next two and a half hours, the two traveled freely around the city in the newly-stolen car. They did drugs, visited a gym and an apartment complex looking for cars to break into to steal money, and shoplifted from a local Wal-Mart. Law enforcement continued looking for them though, and eventually spotted the vehicle. Another chase began, which this time ended tragically after Mr. Lowell collided with a motorcycle, killing the rider.

The federal government eventually charged Mr. Lowell with numerous counts arising out of this incident, including as relevant here, the offense of "carjacking resulting in death," in violation of 18 U.S.C. § 2119(3). This is a capital offense, although the government did not seek the death penalty here; only life

imprisonment. Shortly before trial, Mr. Lowell pleaded guilty to the indictment. He did so openly, and without a plea agreement.

In Mr. Lowell's Presentence Investigation Report ("PSR"), his guidelines range was driven by the carjacking resulting in death count. All carjackings begin with the general robbery guideline, § 2B3.1. *See* U.S.S.G. Guidelines Manual (Nov. 1, 2018) at 568 (Appendix A). That guideline, however, contains a cross reference instructing that "[i]f a victim was killed under circumstances that would constitute murder under 18 U.S.C. 1111 . . . , apply § 2A1.1 (First Degree Murder)." § 2B3.1(c). Section 1111, in turn, sets forth numerous ways a person can commit federal first-degree murder, including, as relevant here, felony murder. Specifically, § 1111(a) provides that "[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery . . . is murder in the first degree." (emphasis added).

The PSR applied that cross reference because, in its view, the offense constituted felony murder—the death occurred in perpetration of a "robbery," one of § 1111's enumerated felonies. (Vol. 2 at 83-84.) Mr. Lowell objected to the application of the cross reference on the grounds that the carjacking did not constitute felony murder robbery. That is, he argued, the carjacking had been

completed and he had reached a point of temporary safety after escaping the Border Patrol on I-10 and traveling unhindered through Las Cruces. The subsequent death during the second police chase hours later and miles away from the site of the carjacking, therefore, was not "in perpetration of" the carjacking.

The district court overruled Mr. Lowell's objection. Applying the first degree murder provisions of § 2A1.1, Mr. Lowell's recommended guideline sentence was life imprisonment. The court departed downward from that recommendation, however, pursuant to a guidelines provision that recommends a departure for felony murders where the defendant did not intend to cause death. § 2A1.1 cmt. Application Note (B). The court ultimately sentenced Mr. Lowell to a total term of 449 months' imprisonment (over 37 years).

On appeal, Mr. Lowell pressed his challenge that the death here did not occur "in perpetration of" the carjacking, as required to constitute felony murder under § 1111. The Tenth Circuit affirmed, concluding that "Mr. Lowell did not reach a point of temporary safety so as to terminate the scope of the carjacking" because "although he had unchallenged possession of the vehicle for two and a half hours and his location was unknown to police, law enforcement's pursuit and Lowell's flight were both ongoing." In doing so, however, it observed:

> Whether a defendant reached a point of temporary safety is a highly fact-intensive inquiry that must be assessed on a case-by-case basis. Although we conclude these facts do not warrant a finding that Lowell reached a point of temporary safety, we might reach a different conclusion based on other facts. As the First Circuit put it: "If the carjacking is so successful that the defendant completely evades capture and simply retains the vehicle for his own use, it cannot be the case that any subsequent traffic accident, after any interval of time whatsoever, is part of the carjacking." *United States v. Martinez-Bermudez*, 387 F.3d 98, 102 n.6 (1st Cir. 2004).

United States v. Lowell, 2 F.4th 1291, 1300 & n.5 (10th Cir. 2021).

REASONS FOR GRANTING THE WRIT

To constitute felony murder under § 1111, the killing must be committed "in the perpetration of" the enumerated felony—here, robbery. *See* § 1111(a). (This Court previously has explained that "carjacking is a type of robbery," *Jones v. United States*, 526 U.S. 227, 235 (1999), a crime "essentially [] aimed at providing a federal penalty for a particular type of robbery," *Holloway v. United States*, 526 U.S. 1, 8 (1999).) Mr. Lowell asked the courts below not to apply the felony murder cross reference because that standard was not satisfied. This was so, he argued, because after escaping from the chase on I-10 following the carjacking, he had reached a point of temporary safety, terminating the scope of the carjacking/robbery. It is well established that continuing offenses like robbery end once the defendant has come

to a place of "temporary safety." *See, e.g.*, *United States v. Patton*, 927 F.3d 1087, 1102 (10th Cir. 2019) (citations omitted) (discussing widespread use of concept of "temporary safety to limit the temporal scope of a robbery"). The problem, however, as the Tenth Circuit recognized in passing, is that this is a "highly-fact intensive inquiry," and one without clear guideposts. *Lowell*, 2 F.4th at 1300 n.5. For three reasons, this Court should grant review to give shape and meaning to this concept of "temporary safety."

First, this Court does not appear to have ruled previously on what is, and what is not, "temporary safety." It also has been over two decades since this Court has substantively considered the scope and impact of the crime of federal carjacking. *See Holloway v. United States*, 526 U.S. 1, 3 (1999); *Jones v. United States*, 526 U.S. 227, 252 (1999). As the First Circuit has recognized, however, there is necessarily an outer limit to the ongoingness of a robbery/carjacking; that is, there is a level of sufficient separation by which "it cannot be the case that any subsequent traffic accident, after any interval of time whatsoever, is part of the carjacking." *United States v. Martinez-Bermudez*, 387 F.3d 98,02 & n.6 (1st Cir. 2004). This case presents these outer limits, and the way for this Court to give force and meaning to such fact-intensive legal standards is to periodically accept review of such cases.

Second, the lack of clear guideposts for evaluating when a defendant has reached a point of "temporary safety" risks inconsistent outcomes in the lower courts. Indeed, the Tenth Circuit's decision below constrasts starkly with that of the very First Circuit case that it looked to, *Martinez-Bermudez*. Specifically, in *Martinez-Bermudez* the defendant and others carjacked a vehicle at gunpoint. 387 F.3d at 99. The victim was unharmed, but approximately 45 minutes later, police spotted the vehicle and a car chase ensued, during which a police officer was struck and killed. *Id.* For purposes of applying the felony murder rule, the court found that the death occurred in the perpetration of the robbery/carjacking. *Id.* at 102. But importantly, there "[t]he record contain[ed] no evidence of an intervening action or event indicating that the carjacking had ended prior to [defendant's] striking the officer." *Id.* at 102-03.

In contrast, here there *were* significant facts indicating that the carjacking had ended and Mr. Lowell had reached a point of temporary escape. After carjacking the vehicle on I-10 and escaping into Las Cruces, Mr. Lowell and his girlfriend traveled around the city unhindered, doing drugs, scoping out parking lots, and even stopping at a Wal-Mart to go shoplifting. The nearly two and a half hours they moved about represent a clear break in the causal chain between the flight from carjacking on I-10, and, hours later, Mr. Lowell's attempt to yet again evade law

enforcement in Las Cruces. Put another way, once he was driving around Las Cruces, the robbery/carjacking was complete; what happened next was not flight "in the perpetration of" a robbery/carjacking; it was just flight.

Third, the question is important. The concept of "temporary safety" is implicated in a number of continuing offenses like robbery and carjacking, and the stakes of making that showing in any particular case can be extremely high. For instance, felony murders under § 1111(a) can be capital offenses, and in non-capital cases application of the murder guideline, § 2A1.1, leads to a recommended sentence of life imprisonment as a starting point, regardless of the defendant's criminal history. Aditionally, although this case ultimately arises in the context of the sentencing guidelines, it turns on the scope of the *statutory* provision in § 1111(a). And while the Sentencing Commission itself theoretically could further define the circumstances under which a defendant has or has not reached a place of "temporary safety" for purposes of applying the guidelines, this does not counsel against granting certiorari under the particular circumstances of this case, as the cross reference in question has been left unchanged for nearly thirty years, significantly undermining any presumption of deferring to the Commission to resolve such definitional questions. *See* U.S.S.G. Amendment 483 (adding felony murder cross reference to § 2B3.1 effective Nov. 1, 1993); *Braxton v. United States*,

500 U.S. 344, 348 (1991) (suggesting a more restrained posture for reviewing questions of a guideline's meaning).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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