1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LARRY WHITFIELD, :

4 Petitioner : No. 13-9026

5 v. :

6 UNITED STATES. :

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Tuesday, December 2, 2014

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:06 a.m.

14 APPEARANCES:

15 JOSHUA B. CARPENTER, ESQ., Asheville, N.C.; on behalf of

16 Petitioner.

17 BRIAN H. FLETCHER, ESQ., Assistant to the Solicitor

18 General, Department of Justice; Washington, D.C.; on

19 behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will now hear

4 argument next this morning in Case No. 13-9026,

5 Whitfield v. United States.

6 Mr. Carpenter.

7 ORAL ARGUMENT OF JOSHUA B. CARPENTER

8 ON BEHALF OF THE PETITIONER

9 MR. CARPENTER: Mr. Chief Justice, and may

10 it please the Court:

11 The basic bank robbery offense under

12 Section 2113(a) requires the robber to use force,

13 intimidation or violence against another person.

14 Section (e)'s force accompaniment provision is designed

15 for much more extreme conduct that Congress viewed as

16 roughly on par with murder. And yet the government

17 would have that provision and its ten-year mandatory

18 minimum apply any time that a robber forces someone to

19 take a single step with him in the course of a robbery.

20 That single step rule isn't justified by the

21 text of the statute, and it isn't necessary to ensure

22 just punishment for bank robbers. In this case --

23 JUSTICE SCALIA: Why isn't it justified by

24 the text?

25 MR. CARPENTER: Your Honor, it's not

1 justified by the text, first --

2 JUSTICE SCALIA: I can -- I can accompany

3 my -- my wife to her table when we go to a dinner party,

4 and we're -- we're seated at different tables. Isn't --

5 isn't it proper to say I accompany her to the table?

6 MR. CARPENTER: Your Honor, our view is not

7 that it is technically improper, but that it is -- it

8 would not be an ordinary and natural usage of the word

9 "accompany," for example, to say --

10 JUSTICE SCALIA: I just gave you an ordinary

11 and natural use. I accompanied my wife to her table.

12 MR. CARPENTER: Our view is that it is not

13 an ordinary usage to say were you accompanied, for

14 example, from this side of the lectern to this side,

15 which is the amount of movement the government believes

16 is -- is covered. Or, for example, to say, will you

17 accompany me, Justice Scalia, from your chair down to

18 yours.

19 JUSTICE SCALIA: You -- you think there's a

20 spatial component to -- I mean, what -- I don't

21 understand why you say it's -- it's not normal usage,

22 unless you say there is a spatial requirement that

23 you -- to accompany somebody, you have to walk a longer

24 distance, and I -- the example I just gave you suggests

25 otherwise.

1 MR. CARPENTER: Your Honor, our view of
2 the -- in the ordinary usage it is used in the sense of
3 going to a destination, to the theater, to the ballpark.
4 But even if there is some question --
5 JUSTICE SCALIA: To my wife's table.
6 MR. CARPENTER: Well, even if there is some
7 question about whether the usage of just a movement of a
8 few feet is an ordinary usage, where there are multiple,
9 possible meanings of a term, we look to the statutory
10 context and the statutory structure --
11 JUSTICE SCALIA: I'm asking you whether
12 there are multiple possible -- listen, I'm very big on
13 the rule of lenity, but the condition for it is that
14 there be ambiguity. And accompany means accompany. I
15 don't see any spatial component to it.
16 MR. CARPENTER: Well, Your Honor --
17 JUSTICE SCALIA: And the rule here is, you
18 know, garbage in, garbage out. It may be a very foolish
19 statute. But -- but we apply what -- what Congress
20 thought was not foolish.
21 MR. CARPENTER: Well, Justice Scalia, first,
22 whether there's ambiguity is determined not by looking
23 at the word "accompany" in isolation. But as the Court
24 said last year in the Utility Air context -- or in the
25 Utility Air case, the words of the statute are

1 interpreted in their context and with a view towards
2 their place in the statutory scheme. Here the place
3 that the word "accompany" serves in the statutory scheme
4 is to set off a set of extreme conduct that Congress
5 viewed as roughly on par with murder. Its association
6 in Section (e) with the killing offense tells us under
7 the Noscitur principle that Congress viewed a forced
8 accompaniment as akin to murder.
9 JUSTICE SCALIA: 20 steps -- 20 steps is
10 horrible enough for Congress to have believed it's
11 enough of an accompaniment? What? Half a mile? What?
12 MR. CARPENTER: Well, Your Honor, we don't
13 believe there's going to be a bright-line rule based on
14 the number of steps or the number of feet.
15 JUSTICE SCALIA: I don't insist on a
16 bright-line rule. I insist on some rule. What --
17 what is your -- what is your rule? Does it have to be
18 outside the building? Does -- does the bank robber have
19 to take the person as a hostage outside the building?
20 MR. CARPENTER: We think the best way to
21 effectuate the structure of the scheme is to have a
22 finding of substantiality. And we would instruct a jury
23 or a factfinder in our Rule 29 motion, first and
24 foremost, to say that a substantial movement is
25 something more than a de minimus or a trivial movement.

1 If the district court or this Court wants to go further
2 than that, we believe that the court -- the jury --
3 JUSTICE SOTOMAYOR: That's a -- that's a
4 very different rule than in your brief. I could buy a
5 de minimis rule, but I don't know where you get the word
6 "substantial."
7 MR. CARPENTER: Your Honor, we believe that
8 "substantial" is -- is implied in the structure. Again,
9 looking at first the Noscitur --
10 JUSTICE SOTOMAYOR: Let's say we disagree.
11 Where would you find "de minimis"?
12 MR. CARPENTER: If you disagree with that,
13 then I think you would look -- you could just apply a de
14 minimis principle and say that movement of just a few
15 feet within a person's own home is --
16 JUSTICE SOTOMAYOR: How much is a few feet?
17 MR. CARPENTER: Well, in this case, it's
18 about 4 to 9 feet, which is approximately from where
19 you're sitting, Justice Sotomayor, to where you're
20 sitting, Justice Scalia. That is approximately --
21 JUSTICE SOTOMAYOR: I thought the record was
22 different. I thought the record was 14 to 20?
23 MR. CARPENTER: It's not. The government in
24 its brief asserts that it is 20 feet from the front door
25 of the house --

1 JUSTICE SOTOMAYOR: I'm sorry. 8 -- no. I
2 was right. Go ahead.
3 MR. CARPENTER: If you look at the -- the
4 government asserts that it was 20 feet from the front
5 door all the way back to the room. But, first, the
6 record also suggests that she was -- met Mr. --
7 Mr. Whitfield while she was coming out of the hallway.
8 So the movement wasn't the 20 feet from the front door.
9 It was from the threshold of the hallway into the
10 computer room.
11 CHIEF JUSTICE ROBERTS: Is it contextual?
12 In other words, is 20 feet in her home different from
13 20 feet in the bank?
14 MR. CARPENTER: Yes. Well, I think 20 feet
15 all within a single building is almost never going to
16 qualify because that cannot be so significantly
17 different from the conduct that is covered by an
18 ordinary (a) offense that Congress would have viewed it
19 as extreme enough to justify a ten-year mandatory
20 minimum penalty.
21 CHIEF JUSTICE ROBERTS: But it seems -- the
22 reason I ask is that it -- it strikes me that it makes a
23 difference if it's in part of the robbery itself. I
24 mean, it seems to me to tell the teller to go to the
25 vault or something. That's what happens in a bank

1 robbery. If on the other hand, the -- the defendant
2 takes the teller from the bank to the car and then, you
3 know, they -- they block the car, that strikes me as
4 something different even though the distance might be
5 the same.
6 MR. CARPENTER: Well, you're right and we
7 agree with you on the -- that it is a contextual
8 inquiry. So taking the -- the person out of the bank
9 and into the car is very likely going to qualify.
10 JUSTICE SCALIA: Except that the statute
11 says "both in the course of or in fleeing from." So it
12 obviously envisions an accompaniment in the course of
13 the bank robbery, doesn't it?
14 MR. CARPENTER: I -- I believe --
15 JUSTICE SCALIA: The answer is yes, right?
16 MR. CARPENTER: Well, that language in our
17 view would be satisfied by the hypothetical -- or by
18 the -- not a hypothetical -- by an actual case that we
19 see in Wilson, for example, which is cited in the
20 government's brief where the bank robber goes to a bank
21 employee's home, forces them to come with him from their
22 home to the bank to facilitate the robbery. That's
23 absolutely an accompaniment in the commission of the
24 offense. I don't think anything in the statute suggests
25 that there must be some category of accompaniment within

1 the walls of the bank only.

2 JUSTICE ALITO: If the test is -- if the

3 test is that there must be something that's substantial,

4 how would you instruct the jury?

5 MR. CARPENTER: We would instruct the jury

6 first to say it must be more than de minimus or trivial

7 movement. You could go further than that and ask the

8 jury to consider factors such as the amount of distance

9 that was covered, whether the person was moved into or

10 out of a bank or another building and whether they were

11 ultimately transported to a different place or location

12 than where they were found.

13 JUSTICE KAGAN: But your first -- when you

14 just said it's not de minimis, is that your primary

15 argument? You just want a non-de minimis rule?

16 MR. CARPENTER: We believe that resolves

17 this case. Yes. We think that -- as we use

18 "substantial" in the briefs, it is the flip side of de

19 minimis. So we think that de minimis is what happened

20 here. Movement with -- inside a person's own home only

21 for a few feet is de minimis. We think the way to

22 effectuate that --

23 JUSTICE SCALIA: The woman died from a heart

24 attack, didn't she? That wasn't de minimis.

25 MR. CARPENTER: No.

1 JUSTICE SCALIA: And -- and part of what
2 frightened her may have been the -- the fact that your
3 client forced her to go from one room to another.
4 MR. CARPENTER: Well, Justice Scalia, there
5 is no doubt this is a tragic and sad case, but
6 Section 2113(e) provides a mechanism for the government
7 to hold Mr. Whitfield directly responsible --
8 JUSTICE KENNEDY: But why wouldn't it be --
9 MR. CARPENTER: -- for the fact that she
10 passed away.
11 JUSTICE KENNEDY: Why wouldn't it be
12 substantial when you go from one room to another? Why
13 doesn't that satisfy the definition of substantial?
14 MR. CARPENTER: The reason for that, I
15 think, is if you look at the structure --
16 JUSTICE KENNEDY: I mean, we're -- we're
17 looking for -- for guidelines here. So if you go from
18 one room to another, that's arguably substantial.
19 MR. CARPENTER: I think the problem with
20 that interpretation, Justice Kennedy, is that it sweeps
21 in so many A offenses because the movement of just a few
22 feet inside the bank, as Justice -- as Mr. Chief Justice
23 referred to, happens frequently. Congress, in setting
24 up Section (e) as an aggravated offense that requires a
25 ten-year mandatory minimum, and that at the time it was

1 passed, required --

2 JUSTICE SOTOMAYOR: I don't think that a few

3 feet from a cash register to a vault -- I've actually

4 never seen the vault. It's usually locked away behind

5 the main area, so that's going to be another room, and

6 it's going to be not necessarily a short distance.

7 MR. CARPENTER: Well, the -- the typical

8 bank robbery happens in branch offices which are

9 probably half the size of this courtroom, so I don't

10 believe it's going to be --

11 JUSTICE SOTOMAYOR: I can see -- I think the

12 statistics that we were shown is that the vast majority

13 of bank robberies are at the counter, that people are

14 not moved at all.

15 MR. CARPENTER: Well, we don't know the

16 latter aspect of that in that no one -- including the

17 government under the current iteration of the U.S.

18 Attorneys' Manual before this case -- has been looking

19 at the question of whether a person was moved a single

20 step -- again, from this side of the lectern to that,

21 from this side of the counter to that -- in the course

22 of the bank robbery. But we know if the -- if this

23 Court --

24 JUSTICE GINSBURG: This case -- this case

25 didn't involve a single step. But you say whatever it

1 was, nine feet, it's de minimis. If you are right about
2 that, then this charge never should have gone to the
3 jury because is -- is the jury supposed to say what is
4 de minimis or is the judge supposed to say that?
5 MR. CARPENTER: Well, the judge will always
6 address that in the first instance under a Rule 29
7 motion. But, Justice Ginsburg, you are absolutely
8 correct. Our view is that this should not have went to
9 the jury on the forced accompaniment count.
10 But I would return to Justice Scalia's
11 question --
12 JUSTICE KENNEDY: Now, you -- you say there
13 is -- there is no proper instruction to a jury that
14 would allow this case to go to the jury?
15 MR. CARPENTER: That is correct. We do
16 not --
17 JUSTICE BREYER: That isn't de minimis.
18 That's -- I mean, don't you accompany a person as well
19 when you stay with them in the room, and did he?
20 MR. CARPENTER: Well, the -- the government
21 even agrees with us here that this isn't a confinement
22 statute, and that goes back to the --
23 JUSTICE BREYER: Wait. So -- so a person --
24 does it make no difference that they -- they take the
25 teller or they take the woman, you walk ten feet down to

1 a room, he says, sit there, and he stays with her to
2 make certain that she won't pop her head up so someone
3 can see? I think that's probably what happened here.
4 All right. If that's what happened here, the
5 accompaniment was not just walking, it was also staying
6 and walking back perhaps.
7 MR. CARPENTER: The problem, Justice Breyer,
8 is that that converts this into a confinement provision,
9 and Congress pointedly did not write a confinement
10 provision. We know first that accompany, by its
11 dictionary definition that the government agrees with,
12 means to go with, not to stay with.
13 JUSTICE BREYER: It's a very peculiar
14 statute. You kidnap a victim as a hostage. You walk
15 them two feet into the car. You quickly disguise the
16 car and have them lie on the floor, and -- and that
17 isn't covered by the statute. Or you have outside, I
18 don't know, there is a closet, you go, you walk them in,
19 and push them in the closet, that is not covered. It is
20 covered if you -- if you go 30 feet down the corridor
21 with somebody else. I can't -- I don't understand,
22 then, how this statute --
23 MR. CARPENTER: I will agree with you that
24 Congress could have written a much more precise statute
25 here, but we think that it -- given the penalty

1 structure and the increased ten-year mandatory minimum
2 that would apply here in so many bank robbery cases --
3 JUSTICE KENNEDY: Well, I'm not so sure
4 what -- if you were going to draft the statute to reach
5 some of this conduct where people are forced to
6 accompany the robber, how would you have done it?
7 MR. CARPENTER: I think if Congress wanted
8 to adopt the government's interpretation of this
9 statute, it should have said forces someone to accompany
10 him for any distance whatsoever. Because that modifies
11 the word accompany which, in our view, in its ordinary
12 usage implies something more than the movement of a
13 single step.
14 JUSTICE GINSBURG: In an ordinary use it
15 doesn't. Justice Scalia gave one example. Suppose I
16 were to say, the nurse accompanied a patient as she
17 walked around the Intensive Care Unit. That's an
18 ordinary use of the -- of "accompanied."
19 MR. CARPENTER: Well, again, we don't
20 disagree that it's a permissible usage. We -- for the
21 reasons set out in the brief -- don't think that it is
22 ordinary usage, and we certainly don't think it is
23 ordinary in the way that Congress used it.
24 Again, if you look at the usages of the word
25 "accompany" in the code in 1934, Congress never used it

1 to cover this type of short distance movement. It's
2 also consistent with this Court's usages in the 1930s
3 which they -- virtually all of them in the 1930s
4 referred to long distance movements. And we think that
5 is consistent with the structure of the statute --
6 JUSTICE SCALIA: Because that was evident
7 from the rest of the statute, right?
8 MR. CARPENTER: And I think it's --
9 JUSTICE SCALIA: I mean, all the statutes
10 you cite, they make it clear that -- that you are
11 talking about accompanying over a long distance,
12 kidnapping or whatever else. But here there's no such
13 indication, and presumably where -- where you have an
14 indication in some statutes, you do not have it here, it
15 presumably does not apply here.
16 MR. CARPENTER: Well, Justice Scalia, I
17 disagree with you that we don't have the other
18 indications in this statute, and I would start with the
19 noscitur principle under Section (e). Congress put
20 forced accompaniment in Section (e) because it viewed it
21 as akin in terms of the defendant's culpability to
22 murder. It made it more serious than Section (d). We
23 know from Section (d) that Congress -- endangering a
24 person's life with a gun or knife as only a minor
25 aggravating factor that didn't warrant any mandatory

1 minimum at all.

2 JUSTICE SCALIA: It -- it didn't -- it

3 didn't make it comparable to murder because the

4 provision itself says that the -- the accompaniment

5 shall be -- a person accompanied shall be in prison not

6 less than 10 years or if death results, shall be

7 punished by death or life in prison. So it's -- you are

8 talking 10 years.

9 MR. CARPENTER: Well, the death results

10 language was added in 1994 as a conforming amendment to

11 bring the statute in line with this Court's

12 jurisprudence. If you look at our brief at pages 25 and

13 26, we have the original text of the statute. Under the

14 original version passed in 1994 -- or 1934, forced

15 accompaniment and killing carried the exact same

16 statutory penalty. Both required a mandatory minimum of

17 10 years. Both required or made it ineligible for the

18 death penalty.

19 JUSTICE SCALIA: Which -- which statute was

20 your client prosecuted under, the old one or the current

21 one?

22 MR. CARPENTER: Well, certainly under the

23 current one.

24 JUSTICE SCALIA: Yeah, well --

25 MR. CARPENTER: But the -- the context is

1 still the same in -- in the relationship with the
2 killing offense.
3 And I would go back to your earlier
4 question, Justice Scalia. This statute, through the
5 killing offense, gives the government the tools it needs
6 to hold Mr. Whitfield directly responsible for the fact
7 that Mrs. Parnell died. Mr. Whitfield was indicted for
8 a killing offense. Over our objection, the District
9 Court interpreted that provision as a felony murder
10 provision that did not require any intent -- intent
11 above and beyond the intent necessary for the bank
12 robbery itself. And based on the evidence, the jury
13 rejected that count and held him not responsible for her
14 death.
15 It makes little sense to stretch the meaning
16 of a forced accompaniment so broadly that it allows the
17 government to hold him indirectly responsible for her
18 death when the jury, who we rely on to make these kinds
19 of determinations in our system --
20 JUSTICE GINSBURG: I'm sorry, I would like
21 to stop you for a minute. Because I thought that the --
22 the killing was one thing. But it -- it wasn't --
23 there -- didn't the judge say you didn't ask for -- what
24 was it --
25 MR. CARPENTER: Death results.

1 JUSTICE GINSBURG: -- death results, right.
2 MR. CARPENTER: Justice Ginsburg, you are
3 correct that the Fourth Circuit threw out the death
4 results finding because it had not been charged in the
5 initial indictment.
6 But you're also correct that killing is a
7 separate offense. As interpreted by the Fourth Circuit
8 at least, fourth -- a forced --
9 JUSTICE GINSBURG: So this -- this jury -- I
10 mean the issue of causing the death, that wasn't charged
11 and the defendant was not acquitted of that?
12 MR. CARPENTER: But that is a separate
13 offense. As interpreted by the Fourth Circuit, there
14 are three offenses under Section (e), killing, forced
15 accompaniment, and the third is forced accompaniment
16 resulting in death. The third is the one that wasn't
17 charged and was thrown out. Even under it, we still
18 have the antecedent question of whether there was a
19 forced accompaniment in the first place.
20 But he was properly indicted on the killing
21 offense. It was interpreted by the District Court as a
22 felony murder provision. And based on the evidence, the
23 jury held that Mr. Whitfield was not responsible for
24 killing Mrs. Parnell.
25 JUSTICE ALITO: If the test is more than de

1 minimis, what does the judge tell the jury if the jury
2 says we don't understand what de minimis means?
3 MR. CARPENTER: I think de minimis is often,
4 in other jury instructions, defined as trivial or
5 insignificant, and we would --
6 JUSTICE ALITO: What does that mean?
7 They -- what does that mean in relationship to the
8 distance that must be involved?
9 MR. CARPENTER: Well, in our view, this is
10 the easy case in that it's only a few feet and it's
11 entirely within a person's own home. The -- we think
12 the way to effectuate that is through a substantiality
13 finding which juries make all the time in other -- under
14 other criminal statutes.
15 JUSTICE BREYER: You want to know what, I
16 mean, that's exactly the same question. Look,
17 substantially -- you tell the jury substantial, they
18 have no idea in this context. I mean, I wouldn't. I
19 would have thought yeah, moving a person -- I don't see
20 what it has to do with her home or somebody else's home.
21 I don't see what that has to do with it. And a few feet
22 sounds, yeah, it sounds substantial to me. I know
23 nothing about it, you see.
24 So is there anything else you want to say in
25 response to what Justice Alito said? Because that --

1 think of my problem. It's not your client that is the
2 problem, but it's not the main problem. The main
3 problem is to write a standard so people can understand
4 it. And what do you want the words of that standard to
5 say?
6 MR. CARPENTER: Justice Breyer, I would go
7 back to the jury instruction that I set out earlier. We
8 believe the jury could be charged in determining whether
9 the movement is substantial or whether the movement is
10 more than de minimis. You could consider the amount of
11 distance that was traveled, whether the person was taken
12 into or out of the home or another building and whether
13 they were ultimately transported to a different place or
14 different location --
15 JUSTICE ALITO: The problem is we don't --
16 the jury would not know and the court would not know
17 what you are looking at, what ultimately you're
18 concerned about. You have a number of factors. But I
19 assume the point of this statute is to impose a severe
20 penalty in cases in which Congress thought there would
21 be great emotional distress for the person who is forced
22 to accompany that person.
23 Now, that could depend on lots of things,
24 not just the distance traveled. So to -- applying a
25 purely spatial test to that just doesn't make any sense.

1 You can't say is it substantial in relation to the thing
2 that this statute is getting at. That is what I have a
3 problem with.
4 MR. CARPENTER: I think in part you are over
5 reading what Congress was trying to do here by
6 suggesting that if the person was put in particular fear
7 or danger or trauma that that would justify any charge.
8 That is not what he was looking at. Because we know --
9 JUSTICE ALITO: What is the reason for this?
10 Why a heavier penalty for a case where there is
11 accompaniment it it's not that there is greater --
12 across the whole category, greater likelihood of trauma
13 to the person who is involved?
14 MR. CARPENTER: We know that Congress viewed
15 the forced accompaniment provision as similar to
16 kidnapping, which under the Federal law at the time
17 required transportation entirely out of State and under
18 common law required transportation out of the country.
19 Under even the common definition of kidnapping at page
20 30 of our brief required more than a confinement or a
21 false imprisonment.
22 JUSTICE SCALIA: How do I know Congress
23 considered it equivalent to kidnapping? How do I know
24 that?
25 MR. CARPENTER: Well, for those of you who

1 do consider the legislative history, there are --
2 JUSTICE SCALIA: No, I don't know it at all.
3 MR. CARPENTER: So you may not know this but
4 -- I think, Justice Scalia, you do know it from the
5 context, and particularly from the association that
6 Congress made in Section (e) between forced
7 accompaniment and killing. It made both of those crimes
8 eligible for the death penalty at the discretion of the
9 jury. And if you look at the broader code at that time,
10 there were only a handful of offenses that carried the
11 potential for the death penalty. Among them were murder
12 and kidnapping.
13 So I think that is one very good reason why
14 we know that Congress would have been thinking of
15 accompaniment as something akin to kidnapping, which it
16 had in other provisions of the code --
17 JUSTICE BREYER: To do that you had to cross
18 State lines. The kidnapping statute, you had to cross
19 State lines, and you don't even argue you have to cross
20 State lines.
21 MR. CARPENTER: No, absolutely not, Justice
22 Breyer. We're not suggesting that Congress intended to
23 incorporate the elements of Federal kidnapping here.
24 But what we are saying -- to go back to the question
25 about what we're trying to distinguish here, we believe

1 that forced accompaniment and the instruction that we've
2 suggested for the jury allows the jury to distinguish
3 cases of confinement on the one hand -- where the
4 movement is incidental to a confinement, you are keeping
5 a person in their home, you are keeping the person in
6 the bank -- it distinguishes those from cases that we
7 would in a nontechnical sense think of as a kidnapping
8 or an abduction where you are taking someone from the
9 bank with you on the getaway, which was the John
10 Dillinger scenario we discussed in the briefs, or the
11 opposite scenario that I talked from the Wilson case a
12 few minutes ago, where you take the bank employee from
13 their home to the bank. That kind of situation is, we
14 believe, the heart of what Congress was trying to get
15 to.
16 JUSTICE KAGAN: You might be right that it's
17 the heart of what Congress was trying to get at, but
18 this happens all the time when Congress writes statutes,
19 right? It thinks about a particular case, it has an
20 idea in its mind of the sort of conduct that they mean,
21 which is this John Dillinger example, but then when it
22 gets down to drafting the words it writes words that are
23 broader than that, that include things that are not in
24 the front of their minds, like this one.
25 MR. CARPENTER: Well, I think when you put

1 the words they use in the context in which they use
2 them, it limits it to that kind of scenario. And even
3 the government has never thought that these kinds of --
4 a few steps of movement inside the bank qualify as a
5 forced accompaniment. I would point to the cases cited
6 in our reply brief at pages 12 and 13, all of which were
7 charged under (a) or (d) and all of which clearly
8 involve movement that would easily satisfy the
9 government's single-step rule here. Yet in each of
10 those cases, based on the guidelines, based on the 3553A
11 factors, the district courts imposed sentences well
12 below the 10-year mandatory minimum that would apply
13 under a Section (e) charge.
14 We know that if the Court here blesses the
15 single-step rule that the government is now advocating,
16 which has never been present in the United States
17 Attorneys' Manual before, the default principle under
18 the Justice Department's charging guidelines will be to
19 include a Section (e) count in every bank robbery where
20 the prosecutor can allege and prove a single step of
21 movement that occurred in the course of the robbery.
22 That surely cannot be what Congress intended in the
23 structure of this statute where it designated Section
24 (e) as an offense that was so much more serious and so
25 much more extreme --

1 JUSTICE GINSBURG: But here it wasn't a
2 single step. And it seems from what happened that this
3 case presents a very danger that (e) wants to guard
4 against. That is, the woman is terrified and she had a
5 heart attack.
6 MR. CARPENTER: Well, Justice Ginsburg, I
7 disagree that -- and the government actually agrees with
8 us at page 40 of their brief -- with the notion that
9 dangerousness by itself can convert something into an
10 accompaniment that is not. We believe first that in
11 Section (a) Congress required as an element of a basic
12 offense force, intimidation, or violence. What that
13 tells us is that in every bank robbery, there is going
14 to be danger presented to everyone present. And under
15 Section (d), Congress used danger as the jumping off
16 point for an aggravated offense under Section (d). It
17 escalated the statutory maximum in cases where the
18 robber used a gun or a knife to put someone's life in
19 danger. So I think the dangerousness by itself doesn't
20 get us to an (e) offense.
21 And I would also say one more thing before I
22 reserve my time, which is that reversing this conviction
23 and rejecting the government's single-step rule is in no
24 way going to allow Mr. Whitfield to walk away from this
25 unpunished. Even under our view, his sentence would be

1 12 to 13 years, which is approximately four times the
2 amount that a bank robber receives -- that a first-time
3 offender like Mr. Whitfield receives for a bank robbery
4 offense. That factors in his post-robbery conduct
5 during his flight and gives him adequate punishment for
6 that. So the (e) charge is unnecessary to ensure that
7 he receives the punishment he needs.
8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Carpenter.
10 Mr. Fletcher.
11 ORAL ARGUMENT OF BRIAN H. FLETCHER
12 ON BEHALF OF THE RESPONDENT
13 MR. FLETCHER: Thank you, Mr. Chief Justice,
14 and may it please the Court:
15 Section 2113(e) prescribes greater
16 punishment meant for a bank robber who forces another
17 person to accompany him in committing the robbery or in
18 attempting to avoid arrest.
19 When Petitioner invaded the Parnell home and
20 forced Mrs. Parnell to go with him to a different room
21 where they could not be seen by the police, he violated
22 that statute because the forced movement fell squarely
23 within the ordinary meaning of the word "accompany." In
24 everyday speech it is both proper and common to say that
25 from one person accompanied someone else from one room

1 of the house to another, and Congress chose to use that
2 broad non-technical term in framing Section 2113(e). It
3 didn't include any qualifying language requiring that
4 the forced accompaniment traverse a particular number of
5 feet, cross the threshold of a building or otherwise
6 cover a substantial distance.
7 CHIEF JUSTICE ROBERTS: Yes, but all the
8 definitions begin by saying accompanying is go with
9 somebody as an associate or companion. Yes, it is
10 certainly a permissible use and a common use in context
11 to say I accompanied someone across the hall. But when
12 you are in the context that this present one is of bank
13 robbery, the point of associate or companion, I think,
14 takes on greater weight. Obviously, an unwilling one.
15 MR. FLETCHER: I think you are right,
16 Mr. Chief Justice. I think the connotation of
17 "accompany" focuses very much not only on movement but
18 also on movement together. But as you say, it doesn't
19 have to be a friendly association or a voluntary
20 association.
21 I think this Court's opinion in Oregon v.
22 Ellstat, which involved essentially the reverse of the
23 movement in this case -- the police encountered a
24 suspect in the bedroom in his house and directed him to
25 get dressed and accompany them, this Court wrote, to the

1 living room to answer questions. I assume they hadn't
2 met before. I assume that the association wasn't a sort
3 of long-standing one or a voluntary one. But it's still
4 natural in those circumstances to describe two people
5 moving from one room to another with the term
6 "accompany."
7 CHIEF JUSTICE ROBERTS: All right, you take
8 two bank robberies. One, the robber comes in, waves a
9 gun, pistol whips five people, grabs the money and
10 leaves. Okay? In another the bank robber comes in,
11 just gets the bag of money, says, you walk over here 2
12 feet with me, so he can get the bag of money and leaves.
13 The first one you could get probation. I mean, you're
14 not going to, but there's no mandatory sentence. And
15 the second one you get at least 10 years. That doesn't
16 make any sense.
17 MR. FLETCHER: Well, I think it does make
18 sense because I think Congress understood, and I think
19 in practice we would see that the first bank robber in
20 your first hypothetical is not going to get probation.
21 He is going to get a very, very substantial sentence.
22 And we know that Congress contemplated --
23 CHIEF JUSTICE ROBERTS: But they didn't care
24 exactly what the minimum was, right, even before the
25 sentencing guidelines, which would obviously have a

1 higher sentence, they didn't care if it was one year
2 because of extenuating circumstances, whatever. But,
3 they said, forcing someone to accompany you is so much
4 more serious that you get at least 10 years.
5 MR. FLETCHER: And I think that they had
6 good reason to do that, but I also just want to
7 highlight that the 10-year mandatory minimum that they
8 set for the forced accompaniment offense is right in the
9 middle of the range for a completely unaggravated,
10 unarmed bank robbery in violation of Section 2113.
11 CHIEF JUSTICE ROBERTS: Range where?
12 MR. FLETCHER: Of the statutory range of
13 zero -- probation to 20 years. The statutory maximum is
14 20 years and Congress set the limit for a nonaggravated
15 bank robbery. For an armed bank robbery under 2113(d),
16 the statutory maximum is 25 years.
17 And so when Congress established a mandatory
18 minimum penalty for Section 2113(e) at 10 years,
19 absolutely it did that because it regarded 2113(e)
20 violations as culpable conduct that merited enhanced
21 punishment a deterrence. But it also made clear that it
22 understood that there were going to be unaggravated bank
23 robberies and unarmed bank robberies that warranted
24 greater punishment than forced accompaniments and it
25 left room for sentencing judges and now, with the

1 guidelines, for sentences to be framed in a way that
2 took account of the type of aggravating circumstances
3 like pistol whipping the victim and threats and things
4 of the nature that you described that don't trigger a
5 statutory enhancement but that obviously sentencing
6 judges would consider.
7 JUSTICE KAGAN: Do you think there's --
8 JUSTICE BREYER: The problem -- the problem
9 is there is a set of cases where you can think it's
10 serious and a set of cases where you just think it
11 isn't. The bank robbery -- there are more in the bank
12 are the ones that concern me that it isn't. The bank
13 robbers are in the bank, there are a couple of other
14 customers walk in and one of them says will you please
15 walk over here with me for a second. Okay? They walk
16 two feet to get him out of the way. That doesn't sound
17 as if that is a lot worse than pistol whipping somebody.
18 And you can multiply those cases.
19 And what is worrying me about it is, since
20 it's a mandatory minimum, the prosecutors have a choice
21 about whether to -- to indict or not on that ground, and
22 a person who is coming in and who is represented and --
23 what is his choice? You know, you either plead guilty
24 or I put this in, too, because you moved one of the
25 customers 10 feet.

1 Now, that's -- that's the -- it's the --
2 that's the nature of the mandatory minimum which is
3 disturbing and calls, I think, for some kind of lenity
4 when there is openness of interpretation. But on the
5 other hand it's very hard for me to distinguish how to
6 separate the cases that seem comparatively trivial
7 taking place within the bank from the ones where you
8 really are injecting fear, special fear, into the mind
9 of the person who is told to accompany you, and that
10 could take place even if it's like one foot, because
11 he's been singled out.
12 Okay. Is there any way to do it? Is there
13 any way that you could reassure me that in these lesser
14 cases this will not be used as an instrument towards a
15 guilty plea or an instrument where these minor things
16 that he's been talking about nonstop, your brother over
17 here, that they'll certainly turn out to be charged
18 routinely?
19 MR. FLETCHER: Yes, absolutely. I think --
20 I would like to say a number of things. I think the
21 first one goes to the charging question that you asked
22 and that my friend referred to. He pointed to the
23 cases, the four cases that he cites at pages 12 and 13
24 of his reply brief as examples that would fall under our
25 definition of forced accompaniment but that weren't

1 charged as such in this case. But I think -- or in
2 those particular cases.
3 I think what is important to highlight about
4 that is that three of the four cases arose in circuits
5 that have already adopted our rule. One was in the
6 Seventh Circuit and one was in the Eleventh Circuit and
7 one was in the Ninth Circuit, and the Seventh and
8 Eleventh Circuits have specifically said that movement
9 within a bank, our rule here, you don't have to move
10 anyone a particular distance, you don't have to move
11 them out of the building. And so the fact that they
12 weren't charged in that case reflects an exercise of the
13 government's charging discretion, not the fact that the
14 rule that we're asking you to adopt today had been
15 blessed by those circuits.
16 JUSTICE KAGAN: But that's what you are
17 going to lead it to, Mr. Fletcher, it's just going to be
18 prosecutorial good judgment that's going to separate the
19 case that's, like, could you come with me a couple of
20 feet.
21 MR. FLETCHER: Well, I think that is part of
22 it and I do think it's important to highlight that
23 the -- the charging guidance that my friend points to
24 does permit the exercise of prosecutorial discretion to
25 determine individual cases.

1 JUSTICE KAGAN: Right. I guess I'm asking
2 you is there anything else. Would you -- you think that
3 there should not be a de minimis exception at all.
4 MR. FLETCHER: Well, I guess I don't
5 understand my friend to be really asking for a de
6 minimis exception, but let me --
7 JUSTICE KAGAN: I'm asking about a de
8 minimis exception.
9 MR. FLETCHER: Well, the reason why I don't
10 think de minimis, although we could talk about very
11 short movements and my friend likes to -- and we can
12 talk about, I don't think that de minimis movements
13 should be excluded. I don't think it's reasonable to --
14 JUSTICE GINSBURG: Even the one step?
15 MR. FLETCHER: Yes, Your Honor, even the one
16 step. And the -- the reason why I don't think it's
17 reasonable to exclude those is that this statute only
18 applies to forced movements, and it's that element of
19 force that I think my friend likes to ignore and focus
20 just on the step or two steps. But every time a robber
21 violates the statute, he does it because he's forced
22 someone --
23 JUSTICE SCALIA: You know, I thought that
24 was the case, which is why I didn't understand Justice
25 Breyer's question where he said the amiable bank robber

1 says, would you please step --

2 JUSTICE BREYER: He wouldn't say, would you

3 please step over here?

4 JUSTICE SCALIA: Yeah, I'm going to walk

5 into a bank robbery where they have about --

6 JUSTICE BREYER: Step over there or I'll

7 blow your head off is what he says.

8 MR. FLETCHER: Yes, and I imagine a

9 request --

10 JUSTICE BREYER: My -- my example was meant

11 to encompass a polite, but armed, bank robber.

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: But the point is the

14 idea of someone whose bank is being robbed not being

15 forcibly compelled to accompany someone is fanciful, and

16 all you have to do, again -- I guess it's repeating the

17 question -- is you got two feet and the prosecutor is

18 armed with another 10 years automatically in his pocket,

19 and then you use that to extort a plea bargain of, you

20 know, six years, somebody who might otherwise wanted to

21 go to trial.

22 MR. FLETCHER: Well, we know that Congress

23 drafted the statute as a mandatory minimum provision.

24 We know that it used broad language that encompasses

25 even very, very short movements. And I think the

1 discussion that --

2 CHIEF JUSTICE ROBERTS: Well, that begs the

3 question, I think.

4 MR. FLETCHER: But, well, I was going to try

5 to get to the answer, which is that the reason why

6 Congress did that and I think the discussion today

7 highlights is because, number one, it's very, very hard

8 to separate out the cases that drive at the heartland of

9 what Congress was concerned about, the human shield and

10 the hostages situations, with any sort of rule based on

11 distance.

12 CHIEF JUSTICE ROBERTS: Well, your U.S.

13 attorney's manual does just that. It says you prosecute

14 these when anyone forcibly abducts another during the

15 commission of any offense. That seems to me to be

16 trying to take out those walked two feet. That's not a

17 forcible abduction.

18 MR. FLETCHER: I -- I'm not sure that is

19 correct, Mr. Chief Justice. The U.S. attorney's manual

20 does refer to the Section 2113(e) offense in a

21 one-sentence description as covering forcible abduction.

22 But I don't think -- it's perfectly sensible and courts

23 have used the word abduction to describe moving someone

24 from one place in a bank to another one.

25 CHIEF JUSTICE ROBERTS: So -- so you think

1 when the manual says forcibly abducts, it means the
2 two-foot situation.
3 MR. FLETCHER: Potentially, yes. The
4 guidelines -- the sentencing guidelines use the word
5 abduction, for instance, Mr. Chief Justice --
6 JUSTICE BREYER: Well, of that -- why don't
7 we say that? Say that what this statute covers is
8 forcible abduction, and there we are. That's not
9 perfect. But it's -- at least my polite but armed bank
10 robber who asks the person to move over hasn't abducted
11 him and in many of these de minimis cases there won't be
12 an abduction. Why not just pick up those words and say
13 indeed, the government uses that when it explains it.
14 MR. FLETCHER: Well, Congress used very,
15 very different language. Congress didn't incorporate
16 the common law of kidnapping. It didn't refer to an
17 abduction. It used the word "accompanying" which has an
18 everyday meaning that encompasses short movements.
19 But also, I think -- I understand the
20 impetus that some of your questions suggest that
21 abduction carries up or connotes long movements, but
22 that's not the way that it's used in the U.S. attorney's
23 manual and it's not the way that it's used in the
24 provision of the guidelines which provides an
25 enhancement for a bank robbery or for any robbery that

1 involves the abduction of a victim.

2 CHIEF JUSTICE ROBERTS: So the manual is

3 read -- forcibly abducts, they read as for somebody to

4 move two feet. That's an abduction?

5 MR. FLETCHER: Yes. They don't view it as

6 limiting the charges under Section 2113(e) to require

7 movement of any particular distance.

8 CHIEF JUSTICE ROBERTS: And so the manual

9 which -- the other provision in the manual which is that

10 you should charge as large an offense as possible means

11 that in the case where somebody is forced to move two

12 feet, you charge the -- that as a forcible abduction.

13 MR. FLETCHER: No, that is not correct and

14 in part that is because the manual doesn't say you

15 always charge the most serious offense. It says you

16 charge the most serious offense that's consistent with

17 the nature of the conduct at issue and that that

18 permits, and in fact requires, an individualized

19 assessment of the defendant's conduct.

20 CHIEF JUSTICE ROBERTS: So is two feet

21 consistent with the conduct at issue?

22 MR. FLETCHER: Well, I think -- I think

23 there is a reason and I -- I do think there's a reason

24 why Congress covered even very short movements, and

25 that's in part because every time a robber forces

1 someone to go with him he exposes that person to a great
2 degree of trauma, to physical danger, and I think also
3 Congress reasonably decided not to try to write in a
4 limitation to use a term that includes movements as
5 short as a few feet because it's so difficult to draw a
6 line. It's difficult to draw an administrable line at
7 all. And any of the lines that have been offered to you
8 by my friend, by the amicus briefs, by the lower courts
9 that have tried to cabin this statute by departing from
10 its text, all of them would exclude cases that would
11 give rise to exactly the sorts of dangers that Congress
12 was concerned about, which are robbers using victims as
13 human shields, or robbers holding the gun to the head of
14 the victim and dragging them around the bank during the
15 offense. I think all of those are at the heartland of
16 what Congress was concerned about.
17 JUSTICE KAGAN: When Congress first drafted
18 this accompanying language, this was a capital offense,
19 yes?
20 MR. FLETCHER: Potentially, yes.
21 JUSTICE KAGAN: So, I mean, would you say
22 the same thing if it were still a capital offense?
23 MR. FLETCHER: We would. We think the --
24 the offense had the same meaning then and now. And I
25 think part of the reason why we'd say that is, first and

1 foremost, that the statutory language we think
2 "accompanying" has a plain meaning that includes those
3 sorts of movements.
4 But also I think it -- it's true, my friend
5 likes to point out that it was potentially death
6 eligible, but the sentencing range in the 1934 statute
7 was a minimum of 10 years to a death sentence if the
8 verdict of the jury shall so recommend.
9 The murderer statute at -- in 1934 in
10 contrast said that if you murder someone it's a
11 mandatory death penalty or life imprisonment. I
12 think --
13 JUSTICE SCALIA: Of course that was
14 unconstitutional, right? The -- imposing the death
15 penalty for this.
16 MR. FLETCHER: That's correct. The Court
17 later held --
18 JUSTICE SCALIA: For even -- even
19 kidnapping, you know, taking the person away when you're
20 fleeing. It was unconstitutional to apply the death
21 penalty, so we really don't -- don't have to take that
22 into account, I suppose.
23 MR. FLETCHER: That's correct. In the
24 current statute --
25 JUSTICE KAGAN: I guess I was just

1 suggesting that maybe we should take that into account
2 in thinking about what Congress could have meant for
3 this statute to mean, but it seems -- it -- it seems
4 very unlikely that Congress meant to give the death
5 penalty to somebody who forced another person to move
6 two feet.
7 MR. FLETCHER: And I think Congress probably
8 understood that a jury would be very unlikely, in fact,
9 almost certain not to recommend the death penalty in a
10 case like that.
11 JUSTICE KENNEDY: Well, no, no. But we're
12 talking about what the proper instructions to a jury,
13 not jury nullification. Don't -- don't play -- don't
14 play that card.
15 MR. FLETCHER: But, Justice Kennedy, I'm not
16 suggesting that they nullify on the guilt offense, but
17 the penalty provision in the 1934 statute said it's
18 punishable by death if the verdict of the jury shall so
19 recommend --
20 JUSTICE KENNEDY: Are the --
21 MR. FLETCHER: -- which permitted a jury to
22 decide the severity of the offense.
23 JUSTICE SOTOMAYOR: What's wrong with de
24 minimis? Meaning why don't we leave it to the jury to
25 decide when a movement is inconsequential, what is

1 trivial? We're worried about telling them what that --
2 what that is, but we use the word de minimis all the
3 time, and all we tell juries is you don't have to find
4 this if the movement was really trivial and
5 inconsequential.
6 MR. FLETCHER: Well, I -- I --
7 JUSTICE SOTOMAYOR: And they can then use
8 their judgment instead of the prosecutor about when
9 something is causing the kind of fear that Congress
10 worried about.
11 MR. FLETCHER: Well, I think that's a long
12 ways from the statutory text, first and foremost. I
13 also don't think that it's consistent --
14 JUSTICE SOTOMAYOR: Well, we -- we've
15 basically said, albeit only a civil area, that we always
16 assume that trivial and inconsequential matters will not
17 be covered by law.
18 MR. FLETCHER: You're right. De minimis --
19 JUSTICE SOTOMAYOR: I don't know why that
20 can't be true in the criminal area either.
21 MR. FLETCHER: De minimis is a general
22 principle of law. I, like you, have not found a case
23 where this Court has applied it in the criminal context.
24 I think in part that's because it's ultimately about
25 deciding what Congress intended to prescribe.

1 JUSTICE SCALIA: Well, if we were going to
2 apply it I guess what we would apply is was there
3 significant fear or trauma induced? I mean, that's --
4 that's what the statute's about. Threatening people,
5 causing them such excitement that they may have a heart
6 attack, as happened here. I don't know that the
7 distance is what is de minimis. It's how much you put
8 the person in fear, I suppose.
9 MR. FLETCHER: I do think that that's right
10 and I think that points up that crafting any sort of a
11 de minimis or substantiality requirement that tried to
12 get at the concerns that Congress had in passing the
13 statute would be extremely hard to do. And I think the
14 jury that asks, as Justice Alito suggested, what do you
15 mean by de minimis? How are we supposed to determine
16 whether or not a movement is de minimis? It would be
17 very, very difficult to give that jury --
18 JUSTICE BREYER: Well, but you could say de
19 minimis did because of the language that you point to,
20 accompaniment. That's what I criticized you earlier as
21 just being too vague. But where movements are small,
22 this is -- where movements are small -- in considering
23 de minimis you can consider that where movements are
24 small, the absence or presence of the kind of fear that
25 is connoted by the word abduction, which -- that's a

1 little tough. But I see your point there.
2 But the alternative is just this sort of
3 vast discretion in bank robbery cases where -- where
4 there has been nothing more like an inch or it really
5 had nothing to do with the abduction concern and the
6 distances were miniscule.
7 JUSTICE SCALIA: It's a very bad statute.
8 JUSTICE BREYER: Would you admit that?
9 MR. FLETCHER: I would disagree with that.
10 I would say though that even if you agree with that,
11 that's not a reason to read it other than according to
12 its terms.
13 And I think, Justice Breyer, my friend likes
14 to suggest that if you go our way on this you really are
15 going to open up this discretion for prosecutors to
16 charge the 2113(e) offense in a vast number of cases.
17 JUSTICE BREYER: Yes, that's true.
18 MR. FLETCHER: Respectfully, though, I don't
19 think he's been able to substantiate that with any kind
20 of evidence. As we pointed out --
21 JUSTICE BREYER: Well, 95 or -- over
22 90 percent of all the criminal charges in the country
23 are pleaded guilty. Isn't that the right number,
24 something like that?
25 MR. FLETCHER: I --

1 JUSTICE BREYER: And certainly you do read
2 lots of criticisms of people pleading guilty because
3 they are afraid that in the absence of the guilty plea
4 the sentence will go way up. I don't know how true that
5 is, I haven't seen the studies, but I'm certainly
6 familiar with literature that says that.
7 MR. FLETCHER: I understand the concern but
8 it arises only to the extent that forced accompaniments
9 of short distances are common in bank robberies.
10 CHIEF JUSTICE ROBERTS: No, no. That is
11 exactly where the prosecutor needs another ace in his
12 hand. In other words, if he's waving a gun, if he's
13 assaulting the people, if he's shooting them, fine, he's
14 got enough leverage. But when he hasn't done any of
15 that and all he's done is asked the teller or whoever to
16 accompany him for -- of forced, I'm sorry, the teller to
17 accompany him for a few feet, that's where the
18 prosecutor says I, you know, it's a good thing I've got
19 these 10 years or otherwise he might go to trial.
20 MR. FLETCHER: I don't think that's correct,
21 Mr. Chief Justice. I think in a number -- our rule has
22 been the law in a number of circuits, at least four of
23 them, in the Eleventh Circuit since the Bauer decision
24 in 1992, and yet you don't see and Petitioner certainly
25 hasn't pointed to you a pattern of prosecutorial abuse

1 in those circuits. Instead what you see is the case,
2 the Section 2113(e) offense being charged in unusual
3 bank --
4 CHIEF JUSTICE ROBERTS: How would you -- how
5 would you see the evidence of prosecutorial abuse? When
6 you have these cases, he says I'm going to charge you
7 with a 10-year minimum, and the guy says, my gosh, I
8 can't risk that, I'm going to plead guilty to 6 years or
9 7 years. I don't see how that pattern could show up in
10 any kind of statistics.
11 MR. FLETCHER: Well, for one thing, I mean,
12 both sides here are looking at the fact patterns in
13 reported cases. There could be --
14 CHIEF JUSTICE ROBERTS: It would not be a
15 reported case because he would have pled guilty.
16 MR. FLETCHER: But even guilty pleas can
17 give rise to reported cases that describe the facts of
18 the offense if there's an appeal relating to sentencing,
19 as there often is. And we just don't see the government
20 bringing this charge in part because most bank robberies
21 do not involve forced movement. The classic bank
22 robbery --
23 CHIEF JUSTICE ROBERTS: When they plead
24 guilty don't they have to -- I don't remember if this is
25 just limited to the State systems or not -- don't they

1 have to waive their rights to appeal?

2 MR. FLETCHER: In some cases guilty pleas do

3 include waivers of appeal rights. So I'm -- I

4 understand the point that many guilty pleas wouldn't

5 show up in reported cases, but I think we also provide

6 statistics about the number of -- guilty pleas that

7 would still be sentenced according to the sentencing

8 guidelines and we provide statistics that say that --

9 and -- and would show up in the FBI's bank crime

10 statistics.

11 We provide statistics suggesting that

12 most -- the overwhelming majority of bank robberies are

13 limited to the teller area. They don't involve moving

14 someone to the vault. The classic bank robbery -- we

15 cite to the secondary literature as well -- involves

16 someone walking up to a teller and presenting a demand

17 note or making an oral demand. And I think once a

18 robber goes beyond that and begins forcibly

19 orchestrating the movement of people around the bank,

20 that's stuff that -- conduct that's typically

21 accomplished with a weapon or with physical -- direct

22 application of physical force to compel people to move

23 around the bank. And I think Congress correctly made a

24 judgment that that's significantly aggravated conduct

25 that separates those offenses from the mine-run bank

1 robberies.

2 JUSTICE SOTOMAYOR: But the problem is that

3 there is some fortuity in this. Some bank robbers will

4 tell people, tellers, move to that corner and lay down

5 on the floor and they'll just point the gun. There is

6 no accompaniment. Some of them may say move, and move

7 with them. There is --

8 MR. FLETCHER: There's -- there's no doubt

9 that there's some fortuity. That's going to happen any

10 time Congress frames a broad rule. But I do think that

11 being forced to move around the bank with the robber is

12 materially worse and materially more dangerous to the

13 victims than being ordered to move to the other side of

14 the bank by the robber.

15 If the robber comes into the bank and pulls

16 a gun, everyone in the gun is going to be -- everyone in

17 the bank is going to be frightened. And if he directs

18 everyone to go over to one side of the room, that's

19 going to be frightening, too. But if he picks out a

20 teller and says, You're coming with me and we're going

21 to the vault, that teller is going to be the most afraid

22 in the bank, the most traumatized. That person's going

23 to be in the greatest danger, at the greatest risk of

24 further violence from the robber, and that person is

25 going to be in the worst possible place if the police

1 respond, if an armed guard responds, or if some sort of
2 confrontation breaks out.
3 CHIEF JUSTICE ROBERTS: Well, I just don't
4 see that as a common sense proposition. If you're a
5 teller, when are you more scared, when the guy has a gun
6 pointed at you and says get the money or when the guy
7 does not have a gun so far as you can see and says you
8 better come with me over to the vault?
9 MR. FLETCHER: So I think potentially in --
10 in the case with a gun, but a couple of points on that.
11 One is the vast majority, as far as I can tell, 2113(e),
12 forced accompaniment offenses, almost always involve
13 weapons. I think the parties cite, you know, 6 or 8
14 lower court cases that have involved the -- the question
15 at issue here. How far do you have to move in order to
16 be a forced accompaniment. In all of them except this
17 one, the person had either a gun or knife. And I think
18 that makes sense because if you're going to be trying to
19 direct the people -- the movement of people within the
20 bank, you're going to do that by means of a gun or a
21 knife.
22 The second thing that I'd say is that I do
23 think that the teller who is forced to move with the
24 robber, even if we hypothesize the unusual case of a
25 robber who doesn't have a weapon, that teller is still

1 sort of at risk of further physical force unarmed by the
2 robber himself; that person is still in danger in the
3 event that an armed confrontation breaks out with
4 someone else. That person is still in a very, very bad
5 position.
6 I think Congress reasonably decided that it
7 wanted to deter bank robbers from involving innocent
8 people in their offense. And I think it sensibly made
9 the decision to deter that sort of conduct at the very
10 first step by writing the statute in a way that
11 prohibits forced accompaniment, a term that as our brief
12 demonstrate, readily encompasses the type of movement at
13 issue here from one room to another. And I think also
14 readily encompasses even movements as short as a few
15 steps.
16 The example that my friend gave earlier was
17 moving from one side of the lectern to another, and he
18 suggested that movements of that order aren't -- aren't
19 sensibly described as accompaniments. I think to the
20 contrary, if Mr. Dreeben had joined me when I came to
21 the lectern to present my argument a few minutes ago, we
22 would very easily say that he accompanied me to the
23 lectern to present the argument.
24 This Court used the word "accompany" to
25 describe a movement of just a few steps in Washington v.

1 Chrisman where the issue was a police officer
2 accompanying a college student from the public corridor
3 of the student's dorm into the student's dorm room. And
4 I think by choosing to use that term, Congress made the
5 judgment that forced movements with a robber present
6 enhanced dangers, present greater trauma to the victims,
7 and that it was appropriate to deter and punish that
8 conduct with a broad rule, because in every instance
9 where it arises, it presents some dangers. But also
10 because to try to draft any line that excludes some of
11 the types of hypotheticals that the Court has proposed
12 today would be very difficult to do, would produce an
13 arbitrary and hard to administer standard and would
14 inevitably rule out some of the cases that Congress
15 meant to include when it drafted the statute.
16 If the Court has --
17 JUSTICE KENNEDY: Suppose we had substantial
18 evidence that prosecutors were using the threat of this
19 extra charge in order to obtain guilty pleas, very
20 substantial evidence, would that be a basis for us to
21 rule that the statute is either inoperable altogether or
22 that it should be interpreted in a way consistent with
23 what the Petitioner argues?
24 MR. FLETCHER: I don't think so. I don't
25 think this Court has ever suggested that the charging

1 decisions with respect to a particular statute should
2 inform the way the statute is interpreted.
3 JUSTICE KENNEDY: So you think that concern
4 is simply irrelevant to the interpretative task that we
5 face.
6 MR. FLETCHER: I think the Court has said
7 that the interpretative task in interpreting a statute
8 is to give the words of the statute their ordinary
9 meaning in the context in which they're enacted. I
10 don't think that is considered -- a charge of questions
11 is -- of charging discretion would play into that
12 inquiry.
13 I understand why such a hypothetical pattern
14 of prosecutorial abuse would give the Court pause and
15 would be of concern, and I think that's why it's
16 significant that to the extent that those concerns do
17 arise, we don't have evidence of that here in the
18 circuits that have adopted our rule or something very
19 much like it. And I don't think there's any indication
20 that prosecutors are departing from the instruction to
21 consider the circumstances of individual cases in
22 bringing charges.
23 If the Court has no further questions, we'd
24 ask that the judgment below be affirmed.
25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Carpenter, you have four minutes
2 remaining.
3 REBUTTAL ARGUMENT OF JOSHUA B. CARPENTER
4 ON BEHALF OF THE PETITIONER
5 MR. CARPENTER: Thank you. I would offer
6 the Court first a twist on the old adage from
7 Justice Holmes, which is to say that sad facts sometimes
8 make very bad law. The facts of this case are
9 undoubtedly sad, but the broad rule that the government
10 seeks to apply here would cover cases where the facts
11 aren't as sad and aren't -- aren't tragic at all.
12 I would go to your point, Justice Scalia,
13 about whether we should somehow interpret the statute to
14 cover cases where there's particularly heightened
15 trauma. On that issue, there was trauma here, but it
16 had nothing to do with the movement from one room to
17 another and it had everything to do with the fact that
18 he invaded her home. So it can't -- this case can't
19 turn -- the application of this provision can't turn on
20 the happenstance of whether she was sitting in her room
21 when he walked in or whether she happened to be standing
22 at the hallway and he asked her to move into the room.
23 Also, the government repeatedly points out
24 all the bad conduct that can happen even where there is
25 movement of only a few feet, and it's inside the bank,

1 but it can be accompanied with physical assault, et
2 cetera. I would point the Court to the government's own
3 brief at page 23 where my friend cites a series of cases
4 that he described as the most egregious examples of
5 forced movements over a short distance.
6 In each of those -- in three of those cases
7 they were decided under the guidelines, Davis, Lewis and
8 Reid. In each one, based on the guidelines and based on
9 the 3553(a) factors, the district courts imposed a
10 sentence well below the statutory maximum that was
11 available for an (a) offense. What that tells us is
12 that the enhanced statutory maximums under (e) aren't
13 necessary, even in these egregious cases where the
14 movement is accompanied by physical assault and where
15 it's of a short distance in the bank.
16 On the flip side, though, the government's
17 broad, single-step rule is going to be tremendously
18 harmful in the mine run of bank robberies where you have
19 only a few feet of movement and which present the
20 problems that many of you have touched upon about the
21 exercise of prosecutorial discretion.
22 It's important to point out that in his
23 presentation today, my friend mentioned that well, the
24 guidelines -- the guidelines charging manual doesn't
25 actually provide a limit here because abduction means

1 even movement of a single step. So we know that the
2 government isn't disavowing the single-step rule. It
3 continues to advance it before this Court.
4 And the government has also pointed to
5 problems with line drawing. There's no doubt that it is
6 not easy to draw a line in a case like this. But that
7 doesn't justify the Court or the government in throwing
8 up its hands and saying there's no line at all. I would
9 say that the rule of lenity should have special force in
10 the context of mandatory minimum provisions like this
11 one, both because of the notice that a criminal
12 defendant should receive that his conduct is so severe,
13 that he's going to face the mandatory minimum penalty as
14 severe as this one, and because of the harm to the
15 system that flows from a broadly applicable mandatory
16 minimum that gives the prosecution the ability to
17 threaten these charges in otherwise ordinary bank
18 robbery cases.
19 If there are no further questions, we'd ask
20 the Court to reverse the (e) conviction and send this
21 case back for resentencing.
22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
23 The case is submitted.
24 (Whereupon, at 12:00 p.m., the case in the
25 above-entitled matter was submitted.)

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