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IN THE SUPREME COURT OF THE UNITED STATES

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LARRY WHITFIELD, :

Petitioner : No. 13-9026

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Tuesday, December 2, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

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

BRIAN H. FLETCHER, ESQ., Assistant to the Solicitor General, Department of Justice; Washington, D.C.; on 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: Thank you Mr. Chief Justice,
10 and may 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 forced 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: There is, I just gave you an
11 ordinary and natural use. I accompanied my wife to her
12 table.

13 MR. CARPENTER: Our view is that it is not
14 an ordinary usage to say were you accompanied, for
15 example, from this side of the lectern to this side,
16 which is the amount of movement the government believes
17 is -- is covered. Or, for example, to say, will you
18 accompany me, Justice Scalia, from your chair down to
19 yours.

20 JUSTICE SCALIA: You -- you think there's a
21 spatial component to -- I mean, what -- I don't
22 understand why you say it's -- it's not normal usage,
23 unless you say there is a spatial requirement that
24 you -- to accompany somebody, you have to walk a longer
25 distance, and I -- the example I just gave you suggests

1 otherwise.

2 MR. CARPENTER: Your Honor, our view of
3 the -- in the ordinary usage it is used in the sense of
4 going to a destination, to the theater, to the ballpark.
5 But even if there is some question --

6 JUSTICE SCALIA: To my wife's table.

7 MR. CARPENTER: Well, even if there is some
8 question about whether the usage of just a movement of a
9 few feet is an ordinary usage, where there are multiple,
10 possible meanings of a term, we look to the statutory
11 context and the statutory structure --

12 JUSTICE SCALIA: I'm asking you whether
13 there are multiple possible -- listen, I'm very big on
14 the rule of lenity, but the condition for it is that
15 there be ambiguity. And accompany means accompany. I
16 don't see any spatial component to it.

17 MR. CARPENTER: Well, Your Honor --

18 JUSTICE SCALIA: And the rule here is, you
19 know, garbage in, garbage out. It may be a very foolish
20 statute. But -- but we apply what -- what Congress
21 thought was not foolish.

22 MR. CARPENTER: Well, Justice Scalia, first,
23 whether there's ambiguity is determined not by looking
24 at the word "accompany" in isolation. But as the Court
25 said last year in the Utility Air context -- or in the

1 Utility Air case, the words of the statute are
2 interpreted in their context and with a view towards
3 their place in the statutory scheme. Here the place
4 that the word "accompany" serves in the statutory scheme
5 is to set off a set of extreme conduct that Congress
6 viewed as roughly on par with murder. Its association
7 in Section (e) with the killing offense tells us under
8 the Noscitur principle that Congress viewed a forced
9 accompaniment as akin to murder.

10 JUSTICE SCALIA: 20 steps -- 20 steps is
11 horrible enough for Congress to have believed it's
12 enough of an accompaniment? What? Half a mile? What?

13 MR. CARPENTER: Well, we don't
14 believe there's going to be a bright-line rule based on
15 the number of steps or the number of feet.

16 JUSTICE SCALIA: I don't insist on a
17 bright-line rule. I insist on some rule. What --
18 what is your -- what is your rule? Does it have to be
19 outside the building? Does -- does the bank robber have
20 to take the person as a hostage outside the building?

21 MR. CARPENTER: We think the best way to
22 effectuate the structure of the scheme is to have a
23 finding of substantiality. And we would instruct a jury
24 or a fact-finder in our Rule 29 motion, first and
25 foremost, to say that a substantial movement is

1 something more than a de minimus or a trivial movement.
2 If the district court or this Court wants to go further
3 than that, we believe that the court -- the jury --

4 JUSTICE SOTOMAYOR: That's a -- that's a
5 very different rule than in your brief. I could buy a
6 de minimis rule, but I don't know where you get the word
7 "substantial."

8 MR. CARPENTER: Your Honor, we believe that
9 "substantial" is -- is implied in the structure. Again,
10 looking at first the Noscitur --

11 JUSTICE SOTOMAYOR: Let's say we disagree.
12 Where would you find "de minimis"?

13 MR. CARPENTER: If you disagree with that,
14 then I think you would look -- you could just apply a de
15 minimis principle and say that movement of just a few
16 feet within a person's own home is --

17 JUSTICE SOTOMAYOR: How much is a few feet?

18 MR. CARPENTER: Well, in this case, it's
19 about 4 to 9 feet, which is approximately from where
20 you're sitting, Justice Sotomayor, to where you're
21 sitting, Justice Scalia. That is approximately --

22 JUSTICE SOTOMAYOR: I thought the record was
23 different. I thought the record was 14 to 20?

24 MR. CARPENTER: It's not. The government in
25 its brief asserts that it is 20 feet from the front door

1 of the house --

2 JUSTICE SOTOMAYOR: I'm sorry. 8 -- no. I
3 was right. Go ahead.

4 MR. CARPENTER: If you look at the -- the
5 government asserts that it was 20 feet from the front
6 door all the way back to the room. But, first, the
7 record also suggests that she was -- met Mr. --
8 Mr. Whitfield while she was coming out of the hallway.
9 So the movement wasn't the 20 feet from the front door.
10 It was from the threshold of the hallway into the
11 computer room.

12 CHIEF JUSTICE ROBERTS: Is it contextual?
13 In other words, is 20 feet in her home different from
14 20 feet in the bank?

15 MR. CARPENTER: Yes. Well, I think 20 feet
16 all within a single building is almost never going to
17 qualify because that cannot be so significantly
18 different from the conduct that is covered by an
19 ordinary (a) offense that Congress would have viewed it
20 as extreme enough to justify a ten-year mandatory
21 minimum penalty.

22 CHIEF JUSTICE ROBERTS: But it seems -- the
23 reason I ask is that it -- it strikes me that it makes a
24 difference if it's in part of the robbery itself. I
25 mean, it seems to me to tell the teller to go to the

1 vault or something. That's what happens in a bank
2 robbery. If on the other hand, the -- the defendant
3 takes the teller from the bank to the car and then, you
4 know, they -- they block the car, that strikes me as
5 something different even though the distance might be
6 the same.

7 MR. CARPENTER: Well, you're right and we
8 agree with you on the -- that it is a contextual
9 inquiry. So taking the -- the person out of the bank
10 and into the car is very likely going to qualify.

11 JUSTICE SCALIA: Except that the statute
12 says "both in the course of or in fleeing from." So it
13 obviously envisions an accompaniment in the course of
14 the bank robbery, doesn't it?

15 MR. CARPENTER: I -- I believe --

16 JUSTICE SCALIA: The answer is yes, right?

17 MR. CARPENTER: Well, that language in our
18 view would be satisfied by the hypothetical -- or by
19 the -- not a hypothetical -- by an actual case that we
20 see in Wilson, for example, which is cited in the
21 government's brief where the bank robber goes to a bank
22 employee's home, forces them to come with him from their
23 home to the bank to facilitate the robbery. That's
24 absolutely an accompaniment in the commission of the
25 offense. I don't think anything in the statute suggests

1 that there must be some category of accompaniment within
2 the walls of the bank only.

3 JUSTICE ALITO: If the test is -- if the
4 test is that there must be something that's substantial,
5 how would you instruct the jury?

6 MR. CARPENTER: We would instruct the jury
7 first to say it must be more than de minimus or trivial
8 movement. You could go further than that and ask the
9 jury to consider factors such as the amount of distance
10 that was covered, whether the person was moved into or
11 out of a bank or another building and whether they were
12 ultimately transported to a different place or location
13 than where they were found.

14 JUSTICE KAGAN: But your first -- when you
15 just said it's not de minimis, is that your primary
16 argument? You just want a non-de minimis rule?

17 MR. CARPENTER: We believe that resolves
18 this case. Yes. We think that -- as we use
19 "substantial" in the briefs, it is the flip side of de
20 minimis. So we think that de minimis is what happened
21 here. Movement with -- inside a person's own home only
22 for a few feet is de minimis. We think the way to
23 effectuate that --

24 JUSTICE SCALIA: The woman died from a heart
25 attack, didn't she? That wasn't de minimis.

1 MR. CARPENTER: No.

2 JUSTICE SCALIA: And -- and part of what
3 frightened her may have been the -- the fact that your
4 client forced her to go from one room to another.

5 MR. CARPENTER: Well, Justice Scalia, there
6 is no doubt this is a tragic and sad case, but
7 Section 2113(e) provides a mechanism for the government
8 to hold Mr. Whitfield directly responsible --

9 JUSTICE KENNEDY: But why wouldn't it be --

10 MR. CARPENTER: -- for the fact that she
11 passed away.

12 JUSTICE KENNEDY: Why wouldn't it be
13 substantial when you go from one room to another? Why
14 doesn't that satisfy the definition of substantial?

15 MR. CARPENTER: The reason for that, I
16 think, is if you look at the structure --

17 JUSTICE KENNEDY: I mean, we're -- we're
18 looking for -- for guidelines here. So if you go from
19 one room to another, that's arguably substantial.

20 MR. CARPENTER: I think the problem with
21 that interpretation, Justice Kennedy, is that it sweeps
22 in so many (a) offenses because the movement of just a few
23 feet inside the bank, as Justice -- as Mr. Chief Justice
24 referred to, happens frequently. Congress, in setting
25 up Section (e) as an aggravated offense that requires a

1 ten-year mandatory minimum, and that at the time it was
2 passed, required --

3 JUSTICE SOTOMAYOR: I don't think that a few
4 feet from a cash register to a vault -- I've actually
5 never seen the vault. It's usually locked away behind
6 the main area, so that's going to be another room, and
7 it's going to be not necessarily a short distance.

8 MR. CARPENTER: Well, the -- the typical
9 bank robbery happens in branch offices which are
10 probably half the size of this courtroom, so I don't
11 believe it's going to be --

12 JUSTICE SOTOMAYOR: I can see -- I think the
13 statistics that we were shown is that the vast majority
14 of bank robberies are at the counter, that people are
15 not moved at all.

16 MR. CARPENTER: Well, we don't know the
17 latter aspect of that in that no one -- including the
18 government under the current iteration of the U.S.
19 Attorneys' Manual before this case -- has been looking
20 at the question of whether a person was moved a single
21 step -- again, from this side of the lectern to that,
22 from this side of the counter to that -- in the course
23 of the bank robbery. But we know if the -- if this
24 Court --

25 JUSTICE GINSBURG: This case -- this case

1 didn't involve a single step. But you say whatever it
2 was, nine feet, it's de minimis. If you are right about
3 that, then this charge never should have gone to the
4 jury because is -- is the jury supposed to say what is
5 de minimis or is the judge supposed to say that?

6 MR. CARPENTER: Well, the judge will always
7 address that in the first instance under a Rule 29
8 motion. But, Justice Ginsburg, you are absolutely
9 correct. Our view is that this should not have went to
10 the jury on the forced accompaniment count.

11 But I would return to Justice Scalia's
12 question --

13 JUSTICE KENNEDY: Now, you -- you say there
14 is -- there is no proper instruction to a jury that
15 would allow this case to go to the jury?

16 MR. CARPENTER: That is correct. We do
17 not --

18 JUSTICE BREYER: That isn't de minimis.
19 That's -- I mean, don't you accompany a person as well
20 when you stay with them in the room, and did he?

21 MR. CARPENTER: Well, the -- the government
22 even agrees with us here that this isn't a confinement
23 statute, and that goes back to the --

24 JUSTICE BREYER: Wait. So -- so a person --
25 does it make no difference that they -- they take the

1 teller or they take the woman, you walk ten feet down to
2 a room, he says, sit there, and he stays with her to
3 make certain that she won't pop her head up so someone
4 can see? I think that's probably what happened here.
5 All right. If that's what happened here, the
6 accompaniment was not just walking, it was also staying
7 and walking back perhaps.

8 MR. CARPENTER: The problem, Justice Breyer,
9 is that that converts this into a confinement provision,
10 and Congress pointedly did not write a confinement
11 provision. We know first that accompany, by its
12 dictionary definition that the government agrees with,
13 means to go with, not to stay with.

14 JUSTICE BREYER: That's a very peculiar
15 statute. You kidnap a victim as a hostage. You walk
16 them two feet into the car. You quickly disguise the
17 car and have them lie on the floor, and -- and that
18 isn't covered by the statute. Or you have outside, I
19 don't know, there is a closet, you go, you walk them in,
20 and push them in the closet, that is not covered. It is
21 covered if you -- if you go 30 feet down the corridor
22 with somebody else. I can't -- I don't understand,
23 then, how this statute --

24 MR. CARPENTER: I will agree with you that
25 Congress could have written a much more precise statute

1 here, but we think that it -- given the penalty
2 structure and the increased ten-year mandatory minimum
3 that would apply here in so many bank robbery cases --

4 JUSTICE KENNEDY: Well, I'm not so sure
5 what -- if you were going to draft the statute to reach
6 some of this conduct where people are forced to
7 accompany the robber, how would you have done it?

8 MR. CARPENTER: I think if Congress wanted
9 to adopt the government's interpretation of this
10 statute, it should have said forces someone to accompany
11 him for any distance whatsoever. Because that modifies
12 the word accompany which, in our view, in its ordinary
13 usage implies something more than the movement of a single
14 step.

15 JUSTICE GINSBURG: In an ordinary use it
16 doesn't. Justice Scalia gave one example. Suppose I
17 were to say, the nurse accompanied a patient as she
18 walked around the Intensive Care Unit. That's an
19 ordinary use of the -- of "accompanied."

20 MR. CARPENTER: Well, again, we don't
21 disagree that it's a permissible usage. We -- for the
22 reasons set out in the brief -- don't think that it is
23 ordinary usage, and we certainly don't think it is
24 ordinary in the way that Congress used it.

25 Again, if you look at the usages of the word

1 "accompany" in the code in 1934, Congress never used it
2 to cover this type of short distance movement. It's
3 also consistent with this Court's usages in the 1930s
4 which they -- virtually all of them in the 1930s
5 referred to long distance movements. And we think that
6 is consistent with the structure of the statute --

7 JUSTICE SCALIA: Because that was evident
8 from the rest of the statute, right?

9 MR. CARPENTER: And I think it's --

10 JUSTICE SCALIA: I mean, all the statutes
11 you cite, they make it clear that -- that you are
12 talking about accompanying over a long distance,
13 kidnapping or whatever else. But here there's no such
14 indication, and presumably where -- where you have an
15 indication in some statutes, you do not have it here, it
16 presumably does not apply here.

17 MR. CARPENTER: Well, Justice Scalia, I
18 disagree with you that we don't have the other
19 indications in this statute, and I would start with the
20 noscitur principle under Section (e). Congress put
21 forced accompaniment in Section (e) because it viewed it
22 as akin in terms of the defendant's culpability to
23 murder. It made it more serious than Section (d). We
24 know from Section (d) that Congress viewed -- endangering
25 a person's life with a gun or knife as only a minor

1 aggravating factor that didn't warrant any mandatory
2 minimum at all.

3 JUSTICE SCALIA: It -- it didn't -- it
4 didn't make it comparable to murder because the
5 provision itself says that the -- the accompaniment
6 shall be -- a person accompanied shall be in prison not
7 less than 10 years or if death results, shall be
8 punished by death or life in prison. So it's -- you are
9 talking 10 years.

10 MR. CARPENTER: Well, the death results
11 language was added in 1994 as a conforming amendment to
12 bring the statute in line with this Court's
13 jurisprudence. If you look at our brief at pages 25 and
14 26, we have the original text of the statute. Under the
15 original version passed in 1994 -- or 1934, forced
16 accompaniment and killing carried the exact same
17 statutory penalty. Both required a mandatory minimum of
18 10 years. Both required or made it ineligible for the
19 death penalty.

20 JUSTICE SCALIA: Which -- which statute was
21 your client prosecuted under, the old one or the current
22 one?

23 MR. CARPENTER: Well, certainly under the
24 current one.

25 JUSTICE SCALIA: Yeah, well --

1 MR. CARPENTER: But the -- the context is
2 still the same in -- in the relationship with the
3 killing offense.

4 And I would go back to your earlier
5 question, Justice Scalia. This statute, through the
6 killing offense, gives the government the tools it needs
7 to hold Mr. Whitfield directly responsible for the fact
8 that Mrs. Parnell died. Mr. Whitfield was indicted for
9 a killing offense. Over our objection, the District
10 Court interpreted that provision as a felony murder
11 provision that did not require any intent -- intent
12 above and beyond the intent necessary for the bank
13 robbery itself. And based on the evidence, the jury
14 rejected that count and held him not responsible for her
15 death.

16 It makes little sense to stretch the meaning
17 of a forced accompaniment so broadly that it allows the
18 government to hold him indirectly responsible for her
19 death when the jury, who we rely on to make these kinds
20 of determinations in our system --

21 JUSTICE GINSBURG: I'm sorry, I would like
22 to stop you for a minute. Because I thought that the --
23 the killing was one thing. But it -- it wasn't --
24 there -- didn't the judge say you didn't ask for -- what
25 was it --

1 MR. CARPENTER: Death results.

2 JUSTICE GINSBURG: -- death results, right.

3 MR. CARPENTER: Justice Ginsburg, you are
4 correct that the Fourth Circuit threw out the death
5 results finding because it had not been charged in the
6 initial indictment.

7 But you're also correct that killing is a
8 separate offense. As interpreted by the Fourth Circuit
9 at least, fourth -- a forced --

10 JUSTICE GINSBURG: So this -- this jury -- I
11 mean the issue of causing the death, that wasn't charged
12 and the defendant was not acquitted of that?

13 MR. CARPENTER: But that is a separate
14 offense. As interpreted by the Fourth Circuit, there
15 are three offenses under Section (e), killing, forced
16 accompaniment, and the third is forced accompaniment
17 resulting in death. The third is the one that wasn't
18 charged and was thrown out. Even under it, we still
19 have the antecedent question of whether there was a
20 forced accompaniment in the first place.

21 But he was properly indicted on the killing
22 offense. It was interpreted by the District Court as a
23 felony murder provision. And based on the evidence, the
24 jury held that Mr. Whitfield was not responsible for
25 killing Mrs. Parnell.

1 JUSTICE ALITO: If the test is more than de
2 minimis, what does the judge tell the jury if the jury
3 says we don't understand what de minimis means?

4 MR. CARPENTER: I think de minimis is often,
5 in other jury instructions, defined as trivial or
6 insignificant, and we would --

7 JUSTICE ALITO: What does that mean?
8 They -- what does that mean in relationship to the
9 distance that must be involved?

10 MR. CARPENTER: Well, in our view, this is
11 the easy case in that it's only a few feet and it's
12 entirely within a person's own home. The -- we think
13 the way to effectuate that is through a substantiality
14 finding which juries make all the time in other -- under
15 other criminal statutes.

16 JUSTICE BREYER: You want to know what, I
17 mean, that's exactly the same question. Look,
18 substantially -- you tell the jury substantial, they
19 have no idea in this context. I mean, I wouldn't. I
20 would have thought yeah, moving a person -- I don't see
21 what it has to do with her home or somebody else's home.
22 I don't see what that has to do with it. And a few feet
23 sounds, yeah, it sounds substantial to me. I know
24 nothing about it, you see.

25 So is there anything else you want to say in

1 response to what Justice Alito said? Because that --
2 think of my problem. It's not your client that is the
3 problem, but it's not the main problem. The main
4 problem is to write a standard so people can understand
5 it. And what do you want the words of that standard to
6 say?

7 MR. CARPENTER: Justice Breyer, I would go
8 back to the jury instruction that I set out earlier. We
9 believe the jury could be charged in determining whether
10 the movement is substantial or whether the movement is
11 more than de minimis. You could consider the amount of
12 distance that was traveled, whether the person was taken
13 into or out of the home or another building and whether
14 they were ultimately transported to a different place or
15 different location --

16 JUSTICE ALITO: The problem is we don't --
17 the jury would not know and the court would not know
18 what you are looking at, what ultimately you're
19 concerned about. You have a number of factors. But I
20 assume the point of this statute is to impose a severe
21 penalty in cases in which Congress thought there would
22 be great emotional distress for the person who is forced
23 to accompany that person.

24 Now, that could depend on lots of things,
25 not just the distance traveled. So to -- applying a

1 purely spatial test to that just doesn't make any sense.
2 You can't say is it substantial in relation to the thing
3 that this statute is getting at. That is what I have a
4 problem with.

5 MR. CARPENTER: Well I think in part you are
6 over reading what Congress was trying to do here by
7 suggesting that if the person was put in particular fear
8 or danger or trauma that that would justify any charge.
9 That's - That's not what he was looking at. Because we
10 know --

11 JUSTICE ALITO: What is the reason for this?
12 Why a heavier penalty for a case where there is
13 accompaniment it it's not that there is greater --
14 across the whole category, greater likelihood of trauma
15 to the person who is involved?

16 MR. CARPENTER: We know that Congress viewed
17 the forced accompaniment provision as similar to
18 kidnapping, which under the Federal law at the time
19 required transportation entirely out of State and under
20 common law required transportation out of the country.
21 Under even the common definition of kidnapping at page
22 30 of our brief required more than a confinement or a
23 false imprisonment.

24 JUSTICE SCALIA: How do I know - How do I
25 know - Congress considered it equivalent to kidnapping?

1 How do I know that?

2 MR. CARPENTER: Well, for those of you who
3 do consider the legislative history, there are --

4 JUSTICE SCALIA: No, I don't know it at all.

5 MR. CARPENTER: So you may not know this but
6 -- I think, Justice Scalia, you do know it from the
7 context, and particularly from the association that
8 Congress made in Section (e) between forced
9 accompaniment and killing. It made both of those crimes
10 eligible for the death penalty at the discretion of the
11 jury. And if you look at the broader code at that time,
12 there were only a handful of offenses that carried the
13 potential for the death penalty. Among them were murder
14 and kidnapping.

15 So I think that is one very good reason why
16 we know that Congress would have been thinking of
17 accompaniment as something akin to kidnapping, which it
18 had in other provisions of the code --

19 JUSTICE BREYER: To do that you had to cross
20 State lines. The kidnapping statute, you had to cross
21 State lines, and you don't even argue you have to cross
22 State lines.

23 MR. CARPENTER: No, absolutely not, Justice
24 Breyer. We're not suggesting that Congress intended to
25 incorporate the elements of Federal kidnapping here.

1 But what we are saying -- to go back to the question
2 about what we're trying to distinguish here, we believe
3 that forced accompaniment and the instruction that we've
4 suggested for the jury allows the jury to distinguish
5 cases of confinement on the one hand -- where the
6 movement is incidental to a confinement, you are keeping
7 a person in their home, you are keeping the person in
8 the bank -- it distinguishes those from cases that we
9 would in a nontechnical sense think of as a kidnapping
10 or an abduction where you are taking someone from the
11 bank with you on the getaway, which was the John
12 Dillinger scenario we discussed in the briefs, or the
13 opposite scenario that I talked about from the Wilson case
14 a few minutes ago, where you take the bank employee from
15 their home to the bank. That kind of situation is, we
16 believe, the heart of what Congress was trying to get
17 to.

18 JUSTICE KAGAN: I mean, you might be right that
19 it's the heart of what Congress was trying to get at, but
20 this happens all the time when Congress writes statutes,
21 right? It thinks about a particular case, it has an
22 idea in its mind of the sort of conduct that they mean,
23 which is this John Dillinger example, but then when it
24 gets down to drafting the words it writes words that are
25 broader than that, that include things that are not in

1 the front of their minds, like this one.

2 MR. CARPENTER: Well, I think when you put
3 the words they use in the context in which they use
4 them, it limits it to that kind of scenario. And even
5 the government has never thought that these kinds of --
6 a few steps of movement inside the bank qualify as a
7 forced accompaniment. I would point to the cases cited
8 in our reply brief at pages 12 and 13, all of which were
9 charged under (a) or (d) and all of which clearly
10 involve movement that would easily satisfy the
11 government's single-step rule here. Yet in each of
12 those cases, based on the guidelines, based on the 3553A
13 factors, the district courts imposed sentences well
14 below the 10-year mandatory minimum that would apply
15 under a Section (e) charge.

16 We know that if the Court here blesses the
17 single-step rule that the government is now advocating,
18 which has never been present in the United States
19 Attorneys' Manual before, the default principle under
20 the Justice Department's charging guidelines will be to
21 include a Section (e) count in every bank robbery where
22 the prosecutor can allege and prove a single step of
23 movement that occurred in the course of the robbery.
24 That surely cannot be what Congress intended in the
25 structure of this statute where it designated Section

1 (e) as an offense that was so much more serious and so
2 much more extreme --

3 JUSTICE GINSBURG: But here it wasn't a
4 single step. And it seems from what happened that this
5 case presents the very danger that (e) wants to guard
6 against. That is, the woman was terrified and she had a
7 heart attack.

8 MR. CARPENTER: Well, Justice Ginsburg, I
9 disagree that -- and the government actually agrees with
10 us at page 40 of their brief -- with the notion that
11 dangerousness by itself can convert something into an
12 accompaniment that's not. We believe first that in
13 Section (a) Congress required as an element of a basic
14 offense force, intimidation, or violence. What that
15 tells us is that in every bank robbery, there is going
16 to be danger presented to everyone present. And under
17 Section (d), Congress used danger as the jumping off
18 point for an aggravated offense under Section (d). It
19 escalated the statutory maximum in cases where the
20 robber used a gun or a knife to put someone's life in
21 danger. So I think the dangerousness by itself doesn't
22 get us to an (e) offense.

23 And also -- so one more thing before I
24 reserve my time, which is that reversing this conviction
25 and rejecting the government's single-step rule is in no

1 way going to allow Mr. Whitfield to walk away from this
2 unpunished. Even under our view, his sentence would be
3 12 to 13 years, which is approximately four times the
4 amount that a bank robber receives -- that a first-time
5 offender like Mr. Whitfield receives for a bank robbery
6 offense. That factors in his post-robbery conduct
7 during his flight and gives him adequate punishment for
8 that. So the (e) charge is unnecessary to ensure that
9 he receives the punishment he needs.

10 CHIEF JUSTICE ROBERTS: Thank you,

11 Mr. Carpenter.

12 Mr. Fletcher.

13 ORAL ARGUMENT OF BRIAN H. FLETCHER

14 ON BEHALF OF THE RESPONDENT

15 MR. FLETCHER: Thank you, Mr. Chief Justice,
16 and may it please the Court:

17 Section 2113(e) prescribes greater
18 punishment for a bank robber who forces another
19 person to accompany him in committing the robbery or in
20 attempting to avoid arrest.

21 When Petitioner invaded the Parnell home and
22 forced Mrs. Parnell to go with him to a different room
23 where they could not be seen by the police, he violated
24 that statute because the forced movement fell squarely
25 within the ordinary meaning of the word "accompany." In

1 everyday speech it is both proper and common to say that
2 one person accompanied someone else from one room
3 of the house to another, and Congress chose to use that
4 broad non-technical term in framing Section 2113(e). It
5 didn't include any qualifying language requiring that
6 the forced accompaniment traverse a particular number of
7 feet, cross the threshold of a building or otherwise
8 cover a substantial distance.

9 CHIEF JUSTICE ROBERTS: Yes, but all the
10 definitions begin by saying accompanying is go with
11 somebody as an associate or companion. Yes, it is
12 certainly a permissible use and a common use in context
13 to say I accompanied someone -you know - across the hall.
14 But when you are in the context that this present one is
15 of bank robbery, the point of associate or companion, I
16 think, takes on greater weight. Obviously, an unwilling
17 one.

18 MR. FLETCHER: I think you are right,
19 Mr. Chief Justice. I think the connotation of
20 "accompany" focuses very much not only on movement but
21 also on movement together. But as you say, it doesn't
22 have to be a friendly association or a voluntary
23 association.

24 I think this Court's opinion in Oregon v.
25 Elstad, which involved essentially the reverse of the

1 movement in this case -- the police encountered a
2 suspect in the bedroom in his house and directed him to
3 get dressed and accompany them, this Court wrote, to the
4 living room to answer questions. I assume they hadn't
5 met before. I assume that the association wasn't a sort
6 of long-standing one or a voluntary one. But it's still
7 natural in those circumstances to describe two people
8 moving from one room to another with the term
9 "accompany."

10 CHIEF JUSTICE ROBERTS: All right, you take
11 two bank robberies. One, the robber comes in, waves a
12 gun, pistol whips five people, grabs the money and
13 leaves. Okay? In another the bank robber comes in,
14 just gets the bag of money, says, you walk over here 2
15 feet with me, so he can get the bag of money and leaves.
16 The first one you could get probation. I mean, you're
17 not going to, but there's no minimum sentence. And
18 the second one you get at least 10 years. That doesn't
19 make any sense.

20 MR. FLETCHER: Well, I think it does make
21 sense because I think Congress understood, and I think
22 in practice we would see that the first bank robber in
23 your first hypothetical is not going to get probation.
24 He is going to get a very, very substantial sentence.
25 And we know that Congress contemplated --

1 CHIEF JUSTICE ROBERTS: But they didn't care
2 exactly what the minimum was, right, even before the
3 sentencing guidelines, which would obviously have a
4 higher sentence, they didn't care if it was one year
5 because of extenuating circumstances, whatever. But,
6 they said, forcing someone to accompany you is so much
7 more serious that you get at least 10 years.

8 MR. FLETCHER: And I think that they had
9 good reason to do that, but I also just want to
10 highlight that the 10-year mandatory minimum that they
11 set for the forced accompaniment offense is right in the
12 middle of the range for a completely unaggravated,
13 unarmed bank robbery in violation of Section 2113.

14 CHIEF JUSTICE ROBERTS: Range where?

15 MR. FLETCHER: Of the statutory range of
16 zero -- probation to 20 years. The statutory maximum is
17 20 years and Congress set the limit for a nonaggravated
18 bank robbery. For an armed bank robbery under 2113(d),
19 the statutory maximum is 25 years.

20 And so when Congress established a mandatory
21 minimum penalty for Section 2113(e) at 10 years,
22 absolutely it did that because it regarded 2113(e)
23 violations as culpable conduct that merited enhanced
24 punishment a deterrence. But it also made clear that it
25 understood that there were going to be unaggravated bank

1 robberies and armed bank robberies that warranted
2 greater punishment than forced accompaniments and it
3 left room for sentencing judges and now, with the
4 guidelines, for sentences to be framed in a way that
5 took account of the type of aggravating circumstances
6 like pistol whipping the victim and threats and things
7 of the nature that you described that don't trigger a
8 statutory enhancement but that obviously sentencing
9 judges would consider.

10 JUSTICE KAGAN: Do you think there's --

11 JUSTICE BREYER: The problem -- the problem
12 is there is a set of cases where you can think it's
13 serious and a set of cases where you just think it
14 isn't. The bank robbery -- there are more in the bank
15 are the ones that concern me that it isn't. The bank
16 robbers are in the bank, there are a couple of other
17 customers walk in and one of them says will you please
18 walk over here with me for a second. Okay? They walk
19 two feet to get him out of the way. That doesn't sound
20 as if that is a lot worse than pistol whipping somebody.
21 And you can multiply those cases.

22 And what is worrying me about it is, since
23 it's a mandatory minimum, the prosecutors have a choice
24 about whether to -- to indict or not on that ground, and
25 a person who is coming in and who is represented and --

1 what is his choice? You know, you either plead guilty
2 or I put this in, too, because you moved one of the
3 customers 10 feet.

4 Now, that's -- that's the -- it's the --
5 that's the nature of the mandatory minimum which is
6 disturbing and calls, I think, for some kind of lenity
7 when there is openness of interpretation. But on the
8 other hand it's very hard for me to distinguish how to
9 separate the cases that seem comparatively trivial
10 taking place within the bank from the ones where you
11 really are injecting fear, special fear, into the mind
12 of the person who is told to accompany you, and that
13 could take place even if it's like one foot, because
14 he's been singled out.

15 Okay. Is there any way to do it? Is there
16 any way that you could reassure me that in these lesser
17 cases this will not be used as an instrument towards a
18 guilty plea or an instrument where these minor things
19 that he's been talking about nonstop, your brother over
20 here, that they'll certainly turn out to be charged
21 routinely?

22 MR. FLETCHER: Yes, absolutely. I think --
23 I would like to say a number of things. I think the
24 first one goes to the charging question that you asked
25 and that my friend referred to. He pointed to the

1 cases, the four cases that he cites at pages 12 and 13
2 of his reply brief as examples that would fall under our
3 definition of forced accompaniment but that weren't
4 charged as such in this case. But I think -- or in
5 those particular cases.

6 I think what is important to highlight about
7 that is that three of the four cases arose in circuits
8 that have already adopted our rule. One was in the
9 Seventh Circuit and one was in the Eleventh Circuit and
10 one was in the Ninth Circuit, and the Seventh and
11 Eleventh Circuits have specifically said that movement
12 within a bank, our rule here, you don't have to move
13 anyone a particular distance, you don't have to move
14 them out of the building. And so the fact that they
15 weren't charged in that case reflects an exercise of the
16 government's charging discretion, not the fact that the
17 rule that we're asking you to adopt today had been
18 blessed by those circuits.

19 JUSTICE KAGAN: But that's what you are
20 going to lead it to, Mr. Fletcher, it's just going to be
21 prosecutorial good judgment that's going to separate the
22 case that's, like, could you come with me a couple of
23 feet.

24 MR. FLETCHER: Well, I think that is part of
25 it and I do think it's important to highlight that

1 the -- the charging guidance that my friend points to
2 does permit the exercise of prosecutorial discretion to
3 determine individual cases.

4 JUSTICE KAGAN: Right. I guess I'm asking
5 you is there anything else. Would you -- you think that
6 there should not be a de minimis exception at all.

7 MR. FLETCHER: Well, I guess I don't
8 understand my friend to be really asking for a de
9 minimis exception, but let me --

10 JUSTICE KAGAN: I'm asking about a de
11 minimis exception.

12 MR. FLETCHER: Well, the reason why I don't
13 think de minimis, although we could talk about very
14 short movements and my friend likes to -- and we can
15 talk about, I don't think that de minimis movements
16 should be excluded. I don't think it's reasonable to --

17 JUSTICE GINSBURG: Even the one step?

18 MR. FLETCHER: Yes, Your Honor, even the one
19 step. And the -- the reason why I don't think it's
20 reasonable to exclude those is that this statute only
21 applies to forced movements, and it's that element of
22 force that I think my friend likes to ignore and focus
23 just on the step or two steps. But every time a robber
24 violates the statute, he does it because he's forced
25 someone --

1 JUSTICE SCALIA: You know, I thought that
2 was the case, which is why I didn't understand Justice
3 Breyer's question where he said the amiable bank robber
4 says, would you please step - what do you say?

5 Would you
6 please step over here?

7 JUSTICE BREYER: Yeah, I'm walking
8 into a bank robbery where they have about --

9 JUSTICE SCALIA: Step over there or I'll
10 blow your head off is what he says.

11 MR. FLETCHER: Yes, and I imagine a
12 request --

13 JUSTICE BREYER: My -- my example was meant
14 to encompass a polite, but armed, bank robber.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: But the point is the
17 idea of someone whose bank is being robbed not being
18 forcibly compelled to accompany someone is fanciful, and
19 all you have to do, again -- I guess it's repeating the
20 question -- is you got two feet and the prosecutor is
21 armed with another 10 years automatically in his pocket,
22 and then you use that to extort a plea bargain of, you
23 know, six years, somebody who might otherwise wanted to
24 go to trial.

25 MR. FLETCHER: Well, we know that Congress

1 drafted the statute as a mandatory minimum provision.
2 We know that it used broad language that encompasses
3 even very, very short movements. And I think the
4 discussion that --

5 CHIEF JUSTICE ROBERTS: Well, that begs the
6 question, I think.

7 MR. FLETCHER: But, well, I was going to try
8 to get to the answer, which is that the reason why
9 Congress did that and I think the discussion today
10 highlights is because, number one, it's very, very hard
11 to separate out the cases that drive at the heartland of
12 what Congress was concerned about, the human shield and
13 the hostages situations, with any sort of rule based on
14 distance.

15 CHIEF JUSTICE ROBERTS: Well, your U.S.
16 attorney's manual does just that. It says you prosecute
17 these when anyone forcibly abducts another during the
18 commission of any offense. That seems to me to be
19 trying to take out those walked two feet. That's not a
20 forcible abduction.

21 MR. FLETCHER: I -- I'm not sure that is
22 correct, Mr. Chief Justice. The U.S. attorney's manual
23 does refer to the Section 2113(e) offense in a
24 one-sentence description as covering forcible abduction.
25 But I don't think -- it's perfectly sensible and courts

1 have used the word abduction to describe moving someone
2 from one place in a bank to another one.

3 CHIEF JUSTICE ROBERTS: So -- so you think
4 when the manual says forcibly abducts, it means the
5 two-foot situation.

6 MR. FLETCHER: Potentially, yes. The
7 guidelines -- the sentencing guidelines use the word
8 abduction, for instance, Mr. Chief Justice --

9 JUSTICE BREYER: What about that -- why don't
10 we say that? Say that what this statute covers is
11 forcible abduction, and there we are. That's not
12 perfect. But it's - it at least my polite -- armed bank
13 robber who asks the person to move over hasn't abducted
14 him and in many of these de minimis cases there won't be
15 an abduction. Why not just pick up those words and say
16 indeed, the government uses that when it explains it.

17 MR. FLETCHER: Well, Congress used very,
18 very different language. Congress didn't incorporate
19 the common law of kidnapping. It didn't refer to an
20 abduction. It used the word "accompanying" which has an
21 everyday meaning that encompasses short movements.

22 But also, I think -- I understand the
23 impetus that some of your questions suggest that
24 abduction carries up or connotes long movements, but
25 that's not the way that it's used in the U.S. attorney's

1 manual and it's not the way that it's used in the
2 provision of the guidelines which provides an
3 enhancement for a bank robbery or for any robbery that
4 involves the abduction of a victim.

5 CHIEF JUSTICE ROBERTS: So the manual is
6 read -- forcibly abducts, they read as for somebody to
7 move two feet. That's an abduction?

8 MR. FLETCHER: Yes. They don't view it as
9 limiting the charges under Section 2113(e) to require
10 movement of any particular distance.

11 CHIEF JUSTICE ROBERTS: And so the manual
12 which -- the other provision in the manual which is that
13 you should charge as large an offense as possible means
14 that in the case where somebody is forced to move two
15 feet, you charge the -- that as a forcible abduction.

16 MR. FLETCHER: No, that is not correct and
17 in part that is because the manual doesn't say you
18 always charge the most serious offense. It says you
19 charge the most serious offense that's consistent with
20 the nature of the conduct at issue and that that
21 permits, and in fact requires, an individualized
22 assessment of the defendant's conduct.

23 CHIEF JUSTICE ROBERTS: So is two feet
24 consistent with the conduct at issue?

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

1 there is a reason and I -- I do think there's a reason
2 why Congress covered even very short movements, and
3 that's in part because every time a robber forces
4 someone to go with him he exposes that person to a great
5 degree of trauma, to physical danger, and I think also
6 Congress reasonably decided not to try to write in a
7 limitation to use a term that includes movements as
8 short as a few feet because it's so difficult to draw a
9 line. It's difficult to draw an administrable line at
10 all. And any of the lines that have been offered to you
11 by my friend, by the amicus briefs, by the lower courts
12 that have tried to cabin this statute by departing from
13 its text, all of them would exclude cases that would
14 give rise to exactly the sorts of dangers that Congress
15 was concerned about, which are robbers using victims as
16 human shields, or robbers holding the gun to the head of
17 the victim and dragging them around the bank during the
18 offense. I think all of those are at the heartland of
19 what Congress was concerned about.

20 JUSTICE KAGAN: When Congress first drafted
21 this accompanying language, this was a capital offense,
22 yes?

23 MR. FLETCHER: Potentially, yes.

24 JUSTICE KAGAN: So, I mean, would you say
25 the same thing if it were still a capital offense?

1 MR. FLETCHER: We would. We think the --
2 the offense had the same meaning then and now. And I
3 think part of the reason why we'd say that is, first and
4 foremost, that the statutory language we think
5 "accompanying" has a plain meaning that includes those
6 sorts of movements.

7 But also I think it -- it's true, my friend
8 likes to point out that it was potentially death
9 eligible, but the sentencing range in the 1934 statute
10 was a minimum of 10 years to a death sentence if the
11 verdict of the jury shall so recommend.

12 The murderer statute at -- in 1934 in
13 contrast said that if you murder someone it's a
14 mandatory death penalty or life imprisonment. I
15 think --

16 JUSTICE SCALIA: Of course that was
17 unconstitutional, right? The -- imposing the death
18 penalty for this.

19 MR. FLETCHER: That's correct. The Court
20 later held --

21 JUSTICE SCALIA: For even -- even
22 kidnapping, you know, taking the person away when you're
23 fleeing. It was unconstitutional to apply the death
24 penalty, so we really don't -- don't have to take that
25 into account, I suppose.

1 MR. FLETCHER: That's correct. In the
2 current statute --

3 JUSTICE KAGAN: I guess I was just
4 suggesting that maybe we should take that into account
5 in thinking about what Congress could have meant for
6 this statute to mean, but it seems -- it -- it seems
7 very unlikely that Congress meant to give the death
8 penalty to somebody who forced another person to move
9 two feet.

10 MR. FLETCHER: And I think Congress probably
11 understood that a jury would be very unlikely, in fact,
12 almost certain not to recommend the death penalty in a
13 case like that.

14 JUSTICE KENNEDY: Well, no, no. But we're
15 talking about what the proper instructions to a jury,
16 not jury nullification. Don't -- don't play -- don't
17 play that card.

18 MR. FLETCHER: But, Justice Kennedy, I'm not
19 suggesting that they nullify on the guilt offense, but
20 the penalty provision in the 1934 statute said it's
21 punishable by death if the verdict of the jury shall so
22 recommend --

23 JUSTICE KENNEDY: Are the --

24 MR. FLETCHER: -- which permitted a jury to
25 decide the severity of the offense.

1 JUSTICE SOTOMAYOR: What's wrong with de
2 minimis? Meaning why don't we leave it to the jury to
3 decide when a movement is inconsequential, it's
4 trivial? We're worried about telling them what that --
5 what that is, but we use the word de minimis all the
6 time, and all we tell juries is you don't have to find
7 this if the movement was really trivial and
8 inconsequential.

9 MR. FLETCHER: Well, I -- I --

10 JUSTICE SOTOMAYOR: And they can then use
11 their judgment instead of the prosecutor about when
12 something is causing the kind of fear that Congress
13 worried about.

14 MR. FLETCHER: Well, I think that's a long
15 ways from the statutory text, first and foremost. I
16 also don't think that it's consistent --

17 JUSTICE SOTOMAYOR: Well, we -- we've
18 basically said, albeit only a civil area, that we always
19 assume that trivial and inconsequential matters will not
20 be covered by a law.

21 MR. FLETCHER: You're right. De minimis --

22 JUSTICE SOTOMAYOR: I don't know why that
23 can't be true in the criminal area either.

24 MR. FLETCHER: De minimis is a general
25 principle of law. I, like you, have not found a case

1 where this Court has applied it in the criminal context.
2 I think in part that's because it's ultimately about
3 deciding what Congress intended to prescribe.

4 JUSTICE SCALIA: Well, if we were going to
5 apply it I guess what we would apply is was there
6 significant fear or trauma induced? I mean, that's --
7 that's what the statute's about. Threatening people,
8 causing them such excitement that they may have a heart
9 attack, as happened here. I don't know that the
10 distance is what is de minimis. It's how much you put
11 the person in fear, I suppose.

12 MR. FLETCHER: I do think that that's right
13 and I think that points up that crafting any sort of a
14 de minimis or substantiality requirement that tried to
15 get at the concerns that Congress had in passing the
16 statute would be extremely hard to do. And I think the
17 jury that asks, as Justice Alito suggested, what do you
18 mean by de minimis? How are we supposed to determine
19 whether or not a movement is de minimis? It would be
20 very, very difficult to give that jury a reasonable --

21 JUSTICE BREYER: Well, but you could say de
22 minimis did because of the language that you point to,
23 accompaniment. That's what I criticized you earlier as
24 just being too vague. But where movements are small,
25 this is -- where movements are small -- in considering

1 de minimis you can consider that where movements are
2 small, the absence or presence of the kind of fear that
3 is connoted by the word abduction, which -- that's a
4 little tough. But I see your point there.

5 But the alternative is just this sort of
6 vast discretion in bank robbery cases where -- where
7 there has been nothing more like an inch or it really
8 had nothing to do with the abduction concern and the
9 distances were miniscule.

10 JUSTICE SCALIA: It's a very bad statute.

11 JUSTICE SCALIA: Would you admit that?

12 MR. FLETCHER: I would disagree with that.
13 I would say though that even if you agree with that,
14 that's not a reason to read it other than according to
15 its terms.

16 And I think, Justice Breyer, my friend likes
17 to suggest that if you go our way on this you really are
18 going to open up this discretion for prosecutors to
19 charge the 2113(e) offense in a vast number of cases.

20 JUSTICE BREYER: Yes, that's true.

21 MR. FLETCHER: Respectfully, though, I don't
22 think he's been able to substantiate that with any kind
23 of evidence. As we pointed out --

24 JUSTICE BREYER: Well, 95 or -- over
25 90 percent of all the criminal charges in the country

1 are pleaded guilty. Isn't that the right number,
2 something like that?

3 MR. FLETCHER: I --

4 JUSTICE BREYER: And certainly you do read
5 lots of criticisms of people pleading guilty because
6 they are afraid that in the absence of the guilty plea
7 the sentence will go way up. I don't know how true that
8 is, I haven't seen the studies, but I'm certainly
9 familiar with literature that says that.

10 MR. FLETCHER: I understand the concern but
11 it arises only to the extent that forced accompaniments
12 of short distances are common in bank robberies.

13 CHIEF JUSTICE ROBERTS: No, no. That is
14 exactly where the prosecutor needs another ace in his
15 hand. In other words, if he's waving a gun, if he's
16 assaulting the people, if he's shooting them, fine, he's
17 got enough leverage. But when he hasn't done any of
18 that and all he's done is asked the teller or whoever to
19 accompany him for -- of forced, I'm sorry, the teller to
20 accompany him for a few feet, that's where the
21 prosecutor says I, you know, it's a good thing I've got
22 these 10 years or otherwise he might go to trial.

23 MR. FLETCHER: I don't think that's correct,
24 Mr. Chief Justice. I think in a number -- our rule has
25 been the law in a number of circuits, at least four of

1 them, in the Eleventh Circuit since the Bauer decision
2 in 1992, and yet you don't see and Petitioner certainly
3 hasn't pointed to you a pattern of prosecutorial abuse
4 in those circuits. Instead what you see is the case,
5 the Section 2113(e) offense being charged in unusual
6 bank --

7 CHIEF JUSTICE ROBERTS: How would you -- how
8 would you see the evidence of prosecutorial abuse? When
9 you have these cases, he says I'm going to charge you
10 with a 10-year minimum, and the guy says, my gosh, I
11 can't risk that, I'm going to plead guilty to 6 years or
12 7 years. I don't see how that pattern could show up in
13 any kind of statistics.

14 MR. FLETCHER: Well, for one thing, I mean,
15 both sides here are looking at the fact patterns in
16 reported cases. There could be --

17 CHIEF JUSTICE ROBERTS: It would not be a
18 reported case because he would have pled guilty.

19 MR. FLETCHER: But even guilty pleas can
20 give rise to reported cases that describe the facts of
21 the offense if there's an appeal relating to sentencing,
22 as there often is. And we just don't see the government
23 bringing this charge in part because most bank robberies
24 do not involve forced movement. The classic bank
25 robbery --

1 CHIEF JUSTICE ROBERTS: When they plead
2 guilty don't they have to -- I don't remember if this is
3 just limited to the State systems or not -- don't they
4 have to waive their rights to appeal?

5 MR. FLETCHER: In some cases guilty pleas do
6 include waivers of appeal rights. So I'm -- I
7 understand the point that many guilty pleas wouldn't
8 show up in reported cases, but I think we also provide
9 statistics about the number of -- guilty pleas that
10 would still be sentenced according to the sentencing
11 guidelines and we provide statistics that say that --
12 and -- and would show up in the FBI's bank crime
13 statistics.

14 We provide statistics suggesting that
15 most -- the overwhelming majority of bank robberies are
16 limited to the teller area. They don't involve moving
17 someone to the vault. The classic bank robbery -- we
18 cite to the secondary literature as well -- involves
19 someone walking up to a teller and presenting a demand
20 note or making an oral demand. And I think once a
21 robber goes beyond that and begins forcibly
22 orchestrating the movement of people around the bank,
23 that's stuff that -- conduct that's typically
24 accomplished with a weapon or with physical -- direct
25 application of physical force to compel people to move

1 around the bank. And I think Congress correctly made a
2 judgment that that's significantly aggravated conduct
3 that separates those offenses from the mine-run bank
4 robberies.

5 JUSTICE SOTOMAYOR: But the problem is that
6 there is some fortuity in this. Some bank robbers will
7 tell people, tellers, move to that corner and lay down
8 on the floor and they'll just point the gun. There is
9 no accompaniment. Some of them may say move, and move
10 with them. There is --

11 MR. FLETCHER: There's -- there's no doubt
12 that there's some fortuity. That's going to happen any
13 time Congress frames a broad rule. But I do think that
14 being forced to move around the bank with the robber is
15 materially worse and materially more dangerous to the
16 victims than being ordered to move to the other side of
17 the bank by the robber.

18 If the robber comes into the bank and pulls
19 a gun, everyone in the gun is going to be -- everyone in
20 the bank is going to be frightened. And if he directs
21 everyone to go over to one side of the room, that's
22 going to be frightening, too. But if he picks out a
23 teller and says, You're coming with me and we're going
24 to the vault, that teller is going to be the most afraid
25 in the bank, the most traumatized. That person's going

1 to be in the greatest danger, at the greatest risk of
2 further violence from the robber, and that person is
3 going to be in the worst possible place if the police
4 respond, if an armed guard responds, or if some sort of
5 confrontation breaks out.

6 CHIEF JUSTICE ROBERTS: Well, I just don't
7 see that as a common sense proposition. If you're a
8 teller, when are you more scared, when the guy has a gun
9 pointed at you and says get the money or when the guy
10 does not have a gun so far as you can see and says you
11 better come with me over to the vault?

12 MR. FLETCHER: So I think potentially in --
13 in the case with a gun, but a couple of points on that.
14 One is the vast majority, as far as I can tell, 2113(e),
15 forced accompaniment offenses, almost always involve
16 weapons. I think the parties cite, you know, 6 or 8
17 lower court cases that have involved the -- the question
18 at issue here. How far do you have to move in order to
19 be a forced accompaniment. In all of them except this
20 one, the person had either a gun or knife. And I think
21 that makes sense because if you're going to be trying to
22 direct the people -- the movement of people within the
23 bank, you're going to do that by means of a gun or a
24 knife.

25 The second thing that I'd say is that I do

1 think that the teller who is forced to move with the
2 robber, even if we hypothesize the unusual case of a
3 robber who doesn't have a weapon, that teller is still
4 sort of at risk of further physical force unarmed by the
5 robber himself; that person is still in danger in the
6 event that an armed confrontation breaks out with
7 someone else. That person is still in a very, very bad
8 position.

9 I think Congress reasonably decided that it
10 wanted to deter bank robbers from involving innocent
11 people in their offense. And I think it sensibly made
12 the decision to deter that sort of conduct at the very
13 first step by writing the statute in a way that
14 prohibits forced accompaniment, a term that as our briefs
15 demonstrate, readily encompasses the type of movement at
16 issue here from one room to another. And I think also
17 readily encompasses even movements as short as a few
18 steps.

19 The example that my friend gave earlier was
20 moving from one side of the lectern to another, and he
21 suggested that movements of that order aren't -- aren't
22 sensibly described as accompaniments. I think to the
23 contrary, if Mr. Dreeben had joined me when I came to
24 the lectern to present my argument a few minutes ago, we
25 would very easily say that he accompanied me to the

1 lectern to present the argument.

2 This Court used the word "accompany" to
3 describe a movement of just a few steps in *Washington v.*
4 *Chrisman* where the issue was a police officer
5 accompanying a college student from the public corridor
6 of the student's dorm into the student's dorm room. And
7 I think by choosing to use that term, Congress made the
8 judgment that forced movements with a robber present
9 enhanced dangers, present greater trauma to the victims,
10 and that it was appropriate to deter and punish that
11 conduct with a broad rule, because in every instance
12 where it arises, it presents some dangers. But also
13 because to try to draft any line that excludes some of
14 the types of hypotheticals that the Court has proposed
15 today would be very difficult to do, would produce an
16 arbitrary and hard to administer standard and would
17 inevitably rule out some of the cases that Congress
18 meant to include when it drafted the statute.

19 If the Court has --

20 JUSTICE KENNEDY: Suppose we had substantial
21 evidence that prosecutors were using the threat of this
22 extra charge in order to obtain guilty pleas, very
23 substantial evidence, would that be a basis for us to
24 rule that the statute is either inoperable altogether or
25 that it should be interpreted in a way consistent with

1 what the Petitioner argues?

2 MR. FLETCHER: I don't think so. I don't
3 think this Court has ever suggested that the charging
4 decisions with respect to a particular statute should
5 inform the way the statute is interpreted.

6 JUSTICE KENNEDY: So you think that concern
7 is simply irrelevant to the interpretative task that we
8 face.

9 MR. FLETCHER: I think the Court has said
10 that the interpretative task in interpreting a statute
11 is to give the words of the statute their ordinary
12 meaning in the context in which they're enacted. I
13 don't think that is considered -- a charge of questions
14 is -- of charging discretion would play into that
15 inquiry.

16 I understand why such a hypothetical pattern
17 of prosecutorial abuse would give the Court pause and
18 would be of concern, and I think that's why it's
19 significant that to the extent that those concerns do
20 arise, we don't have evidence of that here in the
21 circuits that have adopted our rule or something very
22 much like it. And I don't think there's any indication
23 that prosecutors are departing from the instruction to
24 consider the circumstances of individual cases in
25 bringing charges.

1 If the Court has no further questions, we'd
2 ask that the judgment below be affirmed.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Carpenter, you have four minutes
5 remaining.

6 REBUTTAL ARGUMENT OF JOSHUA B. CARPENTER

7 ON BEHALF OF THE PETITIONER

8 MR. CARPENTER: Thank you. I would offer
9 the Court first a twist on the old adage from
10 Justice Holmes, which is to say that sad facts sometimes
11 make very bad law. The facts of this case are
12 undoubtedly sad, but the broad rule that the government
13 seeks to apply here would cover cases where the facts
14 aren't as sad and aren't -- aren't tragic at all.

15 I would go to your point, Justice Scalia,
16 about whether we should somehow interpret the statute to
17 cover cases where there's particularly heightened
18 trauma. On that issue, there was trauma here, but it
19 had nothing to do with the movement from one room to
20 another and it had everything to do with the fact that
21 he invaded her home. So it can't -- this case can't
22 turn -- the application of this provision can't turn on
23 the happenstance of whether she was sitting in her room
24 when he walked in or whether she happened to be standing
25 at the hallway and he asked her to move into the room.

1 Also, the government repeatedly points out
2 all the bad conduct that can happen even where there is
3 movement of only a few feet, and it's inside the bank,
4 but it can be accompanied with physical assault, et
5 cetera. I would point the Court to the government's own
6 brief at page 23 where my friend cites a series of cases
7 that he described as the most egregious examples of
8 forced movements over a short distance.

9 In each of those -- in three of those cases
10 they were decided under the guidelines, Davis, Lewis and
11 Reid. In each one, based on the guidelines and based on
12 the 3553(a) factors, the district courts imposed a
13 sentence well below the statutory maximum that was
14 available for an (a) offense. What that tells us is
15 that the enhanced statutory maximums under (e) aren't
16 necessary, even in these egregious cases where the
17 movement is accompanied by physical assault and where
18 it's of a short distance in the bank.

19 On the flip side, though, the government's
20 broad, single-step rule is going to be tremendously
21 harmful in the mine run of bank robberies where you have
22 only a few feet of movement and which present the
23 problems that many of you have touched upon about the
24 exercise of prosecutorial discretion.

25 It's important to point out that in his

1 presentation today, my friend mentioned that well, the
2 guidelines -- the guidelines charging manual doesn't
3 actually provide a limit here because abduction means
4 even movement of a single step. So we know that the
5 government isn't disavowing the single-step rule. It
6 continues to advance it before this Court.

7 And the government has also pointed to
8 problems with line drawing. There's no doubt that it is
9 not easy to draw a line in a case like this. But that
10 doesn't justify the Court or the government in throwing
11 up its hands and saying there's no line at all. I would
12 say that the rule of lenity should have special force in
13 the context of mandatory minimum provisions like this
14 one, both because of the notice that a criminal
15 defendant should receive that his conduct is so severe,
16 that he's going to face the mandatory minimum penalty as
17 severe as this one, and because of the harm to the
18 system that flows from a broadly applicable mandatory
19 minimum that gives the prosecution the ability to
20 threaten these charges in otherwise ordinary bank
21 robbery cases.

22 If there are no further questions, we'd ask
23 the Court to reverse the (e) conviction and send this
24 case back for resentencing.

25 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

1 The case is submitted.

2 (Whereupon, at 12:00 p.m., the case in the
3 above-entitled matter was submitted.)

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