No. 13-9026

IN THE SUPREME COURT OF THE UNITED STATES

LARRY WHITFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, following petitioner's attempted bank robbery, his actions in directing an elderly woman during a home invasion to enter a room in her residence where they would not be seen by the police constituted "forc[ing] any person to accompany [petitioner] without the consent of such person" within the meaning of 18 U.S.C. 2113(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted in 548 Fed. Appx. 70. A prior opinion of the court of appeals (Pet. App. 7a-42a) is reported at 695 F.3d 288.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2013. The petition for a writ of certiorari was filed on March 7, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted of attempted bank robbery, in violation of 18 U.S.C. 2113(a) (Count One); conspiring to carry a firearm during an attempted bank robbery, in violation of 18 U.S.C. 924(o) (Count Two); carrying a firearm during an attempted bank robbery, in violation of 18 U.S.C. 924(c) (Count Three); and forceful accompaniment while attempting to avoid apprehension for an attempted bank robbery resulting in death, in violation of 18 U.S.C. 2113(e) (Count Four). He was sentenced to life imprisonment on Count Four; 240 months of imprisonment on Counts One and Two; and a consecutive term of 60 months of imprisonment on Count Three -- to be followed by five years of supervised release on Counts Three and Four and three years on Counts One and Two. The court of appeals affirmed in part, vacated in part, and remanded for resentencing on Count Four. Pet. App. 7a-42a. Petitioner sought certiorari and this Court denied the petition. 133 S. Ct. 1461 (2013) (No. 12-7374).

On remand, the district court resentenced petitioner to 264 months of imprisonment on Count Four, to be followed by five years of supervised release. Pet. App. 44a-45a. The court of appeals affirmed. Id. at 1a-5a.

1. In September 2008, petitioner and Quanterrious McCoy, armed with a handgun and an assault rifle, entered the lobby of a

credit union in Gastonia, North Carolina. A metal detector triggered an automatic locking mechanism and prevented them from proceeding further. Petitioner and McCoy then fled in their car, with police officers in pursuit, until they got stuck in the highway's median. At that point, they fled on foot into the woods, discarded their firearms, and separated from each other. Pet. App. 9a.

Petitioner headed to the home of Tina Walden and forcibly entered the house. When Walden returned home from work, she noticed that the lock was jammed and saw a footprint on the door. As she attempted to call her husband, petitioner appeared, brandishing a knife, and told her to "shut up and come in." Walden instead ran away, and petitioner escaped to the nearby home of Herman and Mary Parnell. He entered the Parnell residence through an unlocked front door. Mrs. Parnell, a 79-year-old woman, was home alone and began to cry. Petitioner directed her into the computer room where they could not be seen by the police. Petitioner eventually fled from the Parnell home and was arrested soon thereafter. When Mr. Parnell returned home, he found his wife sitting in a chair in the computer room, dead from a heart attack. Pet. App. 9a-11a.

2. A federal grand jury returned an indictment charging petitioner with attempted bank robbery, in violation of 18 U.S.C. 2113(a) (Count One); conspiring to carry a firearm during an

attempted bank robbery, in violation of 18 U.S.C. 924(o) (Count Two); and carrying a firearm during and in relation to an attempted bank robbery, in violation of 18 U.S.C. 924(c) (Count Three). Pet. App. 11a. Petitioner was also charged with "forc[ing Mrs. Parnell] to accompany him without her consent, and kill[ing her]" while attempting to avoid apprehension for the attempted bank robbery, in violation of 18 U.S.C. 2113(e) (Count Four). Pet. App. 12a (citation omitted).

After the close of the government's case, petitioner moved for a judgment of acquittal on Count Four. Petitioner argued, among other things, that the evidence was insufficient to prove that he had "forced Mrs. Parnell to accompany him anywhere." Pet. App. 20a (citation omitted). The district court denied the motion. Ibid. At the close of all the evidence, petitioner renewed his motion for a judgment of acquittal on Count Four, which the district court again denied. Id. at 21a.

The district court instructed the jury that, in order to find petitioner guilty on Count Four, it was required to find, beyond a reasonable doubt, that petitioner committed the attempted robbery of the credit union alleged in Count One and that, in avoiding apprehension for that offense, petitioner either killed Mrs. Parnell or knowingly forced her to accompany him without her consent. Pet. App. 21a. The court also instructed the jury that if it found that petitioner "forced [Mrs.] Parnell to accompany

him, [it] must also decide whether that forced accompaniment resulted in [her] death." Ibid. (emphasis omitted). The court further instructed the jury that "'the term "forced accompaniment" includes[] forcing a person to move from one part of a building to another against her will,' and 'does not require [the government to show] that the defendant crossed a property line, moved a person a particular number of feet, held a person for a particular period of time, or placed the person at a certain level of danger.'" Id. at 22a (citation omitted; first brackets in original).

The jury found petitioner guilty on all four counts. On Count Four, the jury found that petitioner was not guilty of killing Mrs. Parnell, but was guilty of forcing her to accompany him in an attempt to avoid apprehension, and that the forced accompaniment resulted in her death. Pet. App. 22a-23a. A forced-accompaniment offense is punishable by a ten-year mandatory minimum prison term, but if the forced accompaniment results in death the punishment is death or life imprisonment. 18 U.S.C. 2113(e). The district court sentenced petitioner to life imprisonment on Count Four (as required by statute); 240 months of imprisonment on Counts One and Two; and a consecutive term of 60 months of imprisonment on Count Three -- to be followed by five years of supervised release on Counts Three and Four and three years on Counts One and Two. Pet. App. 23a.

3. The court of appeals affirmed in part, vacated in part, and remanded for resentencing on Count Four. Pet. App. 7a-42a.

As relevant here, the court of appeals rejected petitioner's contention that the evidence was insufficient for the jury to find that he forced Mrs. Parnell to accompany him without her consent, in violation of 18 U.S.C. 2113(e). Pet. App. 40a-41a. Petitioner argued that "the prosecution failed to produce any evidence that he had threatened Mrs. Parnell as a means of forcing her to accompany him and, in the light most favorable to the government, established only that he had 'guided' or 'asked' her to go into the computer room." Id. at 40a. The court was "entirely unpersuaded" by this argument and "decline[d] to accept that an ostensible 'request' by a physically agile twenty-year-old male attempting to evade apprehension for an attempted bank robbery constitutes anything less than a real threat, particularly when aimed at a fragile seventy-nine-year-old woman during a terrifying invasion of her home." Id. at 40a-41a. The court explained that "there was ample evidence that [petitioner] wanted to position Mrs. Parnell in the computer room where they could not be seen by the police"; that petitioner had "admitted that he directed Mrs. Parnell to the computer room"; and that "when she attempted to defy his instructions by insisting that he leave the home, [petitioner] required Mrs. Parnell to stay in the computer room, at which point

'she sat down in the chair,' where she was found dead." Id. at 41a (citation omitted).

The court of appeals acknowledged that petitioner "required Mrs. Parnell to accompany him for only a short distance within her own home; and for a brief period," but concluded that "no more is required to prove that a forced accompaniment occurred." Pet. App. 41a (citing United States v. Turner, 389 F.3d 111, 119-120 (4th Cir. 2004), cert. denied, 544 U.S. 935 (2005)). As the court explained, its "interpretation of a forced accompaniment comports with the decisions of [its] sister circuits." Id. at 41a n.20 (citing United States v. Strobehn, 421 F.3d 1017, 1020 (9th Cir. 2005), cert. denied, 547 U.S. 1005 (2006); United States v. Reed, 26 F.3d 523, 527 (5th Cir. 1994), cert. denied, 513 U.S. 1157 (1995); United States v. Bauer, 956 F.2d 239, 241 (11th Cir.), cert. denied, 506 U.S. 976 (1992)).

The court of appeals, however, held that petitioner had been convicted and sentenced for an offense not charged in the indictment, namely a forced accompaniment resulting in death. Pet. App. 33a-40a. The court explained that, in its view, Section 2113(e) encompasses three separate offenses: a killing offense, a forced-accompaniment offense, and a forced accompaniment resulting in death offense. Id. at 11a-12a, 35a. Because the indictment alleged only the killing offense and the forced-accompaniment offense, the court vacated petitioner's conviction of the "death

results" offense, which carried with it a mandatory life sentence, and remanded for resentencing on Count Four. Id. at 39a-40a.

4. Petitioner sought certiorari, contending that Section 2113(e)'s forced-accompaniment offense requires more than de minimis movement of the victim and that the courts of appeals are divided on that question. This Court denied the petition. See 133 S. Ct. 1461 (2013) (No. 12-7374).

5. Meanwhile, on remand, the district court issued an amended judgment after resentencing petitioner to 264 months of imprisonment on Count Four, to be followed by five years of supervised release. Pet. App. 43a-49a.

6. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1a-5a. Petitioner raised four challenges to his revised sentence and the court of appeals rejected each challenge. Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 8-21) that Section 2113(e)'s forced-accompaniment offense requires more than de minimis movement of the victim and that the courts of appeals are divided on that question. The court of appeals' decision is correct and does not conflict with any decision of this Court. And no square conflict exists among the courts of appeals that would warrant this Court's review. The Court recently denied petitioner's interlocutory petition for a writ of certiorari

raising the same issue, 133 S. Ct. 1461 (2013) (No. 12-7374), and the same result is warranted here.

1. Petitioner contends (Pet. 8-14) that the courts of appeals are divided on the amount of movement necessary to constitute forced accompaniment within the meaning of 18 U.S.C. 2113(e). The asserted conflict is overstated and stale. The cases largely turn on their particular facts and, with one 40-year-old exception, they do not establish a square conflict on the substantiality of movement necessary to establish forced accompaniment under Section 2113(e).

The only court of appeals' decision petitioner cites that may conflict with the decision below is United States v. Marx, 485 F.2d 1179 (10th Cir. 1973), cert. denied, 416 U.S. 986 (1974). In that case, the president of a bank was accosted at gunpoint by the co-defendants as he returned home from a morning walk, and he was forced inside the house. Id. at 1181. Once inside, the co-defendants gathered the bank president's family into one room, gave the bank president a cashier's check, and instructed him to travel in a separate car to cash the check at the bank. Id. at 1181-1182. One defendant in Marx argued that the non-consenting victim and his family did not "accompany" him at all because the victim and his family "were never physically traveling with either" defendant. Id. at 1186. Although the Tenth Circuit did not directly resolve the degree of involuntary accompaniment necessary for a conviction

under Section 2113(e), it held that "more is required than forcing [the bank president] to enter his own house or forcing the [bank president's] family to move from the den to a bedroom." Ibid.

Whatever tension may exist with Marx, it does not warrant this Court's review. No court of appeals since Marx has held that a forced accompaniment involved a movement too insubstantial to qualify under Section 2113(e). Indeed, in the ensuing 40 years, the courts of appeals to have considered the forced-accompaniment provision of Section 2113(e) have generally adhered to the plain language of the statute and upheld convictions involving forced movements of a relatively short distance and duration. See United States v. Strobehn, 421 F.3d 1017, 1018-1020 (9th Cir. 2005) (forced bank guard to walk from parking lot to interior of bank and to lie face down inside bank), cert. denied, 547 U.S. 1005 (2006); United States v. Turner, 389 F.3d 111, 114, 119-120 (4th Cir. 2004) (forced bank manager to unlock bank vault and fill pillowcase with money; ordered tellers to get inside vault), cert. denied, 544 U.S. 935 (2005); United States v. Davis, 48 F.3d 277, 278-279 (7th Cir. 1995) (forced bank supervisor to unlock credit union and to accompany defendant inside building and vault during robbery); United States v. Reed, 26 F.3d 523, 525, 526-528 (5th Cir. 1994) (forced bank employee to unlock credit union, to accompany defendant inside building during robbery, and to lie face down on floor), cert. denied, 513 U.S. 1157 (1995); United States v. Bauer,

956 F.2d 239, 241-242 (11th Cir.) (forced bank employees to walk from back of bank to front door before defendants decided not to take them as hostages), cert. denied, 506 U.S. 976 (1992).

Petitioner's contention (Pet. 10-11) that the decision below also conflicts with the Fifth Circuit's decision in Reed is incorrect. See Pet. App. 41a n.20 (noting that its "interpretation of a forced accompaniment comports with" Reed); Strobehn, 421 F.3d at 1020 (noting that Reed "rejected a 'substantiality' argument"). In Reed, the Fifth Circuit held that a relatively short forced accompaniment during a bank robbery -- i.e., forcing a victim at gunpoint to unlock the door to a credit union and to accompany the defendant inside the building during the robbery -- was sufficient to uphold the defendant's conviction under Section 2113(e). 26 F.3d at 525, 528. The court determined that "moving the victim as a hostage into the bank is an accompaniment, just as moving her out of the bank as a hostage would have been an accompaniment." Id. at 528. The court also distinguished Marx on the factual ground that "the victim in this case physically accompanied the defendant" from the bank's door to the bank's vault, while in Marx "the Tenth Circuit did not address the trip to the bank" other than to note that the victims did not travel with the defendants. Id. at 526 n.3.

The Fifth Circuit also stated that "[w]ithin the context of a bank robbery, there will often be movement within the bank by a

bank employee -- movement orchestrated by the robber." Reed, 26 F.3d at 527. And the court expressed concern that if "such circumstances are an aggravating accompaniment," it "would likely convert numerous ordinary * * * bank robberies to aggravated bank robberies with only the faintest of distinctions between accompanied, i.e., aggravated, and non-accompanied, non-aggravated bank robber[ie]s." Id. at 528. Contrary to petitioner's contention, however, that dictum does not suggest that the Fifth Circuit would find that the facts here did not satisfy Section 2113(e). If anything, it suggests a distinction between movement within the bank and movement that crosses the threshold of the bank. The court in Reed suggested that such a distinction might be necessary to avoid converting "ordinary" bank robberies into aggravated bank robberies. Because this case does not involve movement within a bank, but rather movement within a woman's residence during a home invasion in an effort to avoid apprehension for an attempted bank robbery, that dictum and the concerns underlying it are not implicated here. Indeed, in a different context, the Fifth Circuit noted that Reed could be read "as authority to find abduction when the forced movement [is] from one location to another on a property owned by a single property owner." United States v. Hawkins, 87 F.3d 722, 727 (5th Cir.) (discussing abduction for purposes of Sentencing Guidelines § 2B3.1(b)(4)(A)), cert. denied, 519 U.S. 974 (1996).

Petitioner also relies (Pet. 11-13) on the Ninth Circuit's decision in Strobehn. As petitioner acknowledges, however, that court affirmed a conviction under Section 2113(e) and rejected the defendant's suggestion that the court "embrace a substantiality requirement measured by the duration and distance of the asportation." Strobehn, 421 F.3d at 1019. Petitioner is correct that the court did not "hold that [Section] 2113(e) 'plainly' applies to any forced accompaniment, no matter how slight." Id. at 1020 n.1 (citation omitted). But neither did the court below. Without attempting to define the precise degree of movement necessary for a forced accompaniment, the court of appeals held, in a single factbound paragraph, that the evidence in this case was sufficient to support the jury verdict. See Pet. App. 41a. The court broke no legal ground in reaching that conclusion; it simply applied settled circuit law that a forced accompaniment under Section 2113(e) "does not require that the victim be 'held . . . for a particular time period.'" Id. at 32a (quoting C.A. App. 1242 and citing Turner, 389 F.3d at 119-120). That prior circuit precedent is consistent with, and is cited favorably in, Strobehn. See 421 F.3d at 1020.

2. On the merits, petitioner contends (Pet. 17-19) that some threshold amount of movement is necessary to constitute forced accompaniment within the meaning of Section 2113(e). He concedes (Pet. 17) that the statute itself does not provide any such

threshold; it requires only that the perpetrator "force[] any person to accompany him without the consent of such person." 18 U.S.C. 2113(e). Petitioner nevertheless argues that the absence of any qualifying language renders the statute ambiguous and that, viewed in context, the ambiguity should be resolved in favor of a limiting construction. That argument is without merit.

Petitioner suggests (Pet. 15-17, 18-19) that the court of appeals' "interpretation of [Section] 2113(e)" will have a "deleterious" effect on "every case prosecuted under [Section] 2113" by turning "mine-run bank robbery cases" into Section 2113(e) cases. That prediction is unfounded. Nearly every court of appeals to consider the issue has interpreted Section 2113(e) the same as the court below. And those cases have been decided over the course of the last two decades. The Fourth Circuit first considered the degree of movement necessary to establish forced accompaniment in 2004. See Turner, 389 F.3d at 119. Despite the relatively long pedigree of the interpretation adopted by the courts of appeals, petitioner fails to identify any flood of Section 2113(e) litigation arising from it. Indeed, no court of appeals has addressed the issue since this Court denied review more than a year ago.

In addition, this is not a "mine-run" bank robbery case. Unlike most of the other Section 2113(e) cases petitioner cites, the forced accompaniment did not take place inside or at the

threshold of the bank during the robbery. In an attempt to avoid apprehension for an attempted bank robbery, petitioner directed Mrs. Parnell to move into the computer room of her own home during a home invasion, where she subsequently died. Pet. App. 41a. Petitioner does not explain how the court's fact-specific holding in this case -- where petitioner attempted an armed bank robbery, fled at a high rate of speed from pursuing police, and unlawfully entered two different homes in an effort to evade capture (brandishing a knife in one and leaving a dead victim in the other) -- poses a risk of converting a "mine-run" bank robbery into an aggravated bank robbery under Section 2113(e).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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