NO. 22-_____

IN THE

Supreme Court of the United States

MICKEY ROY ANDERSON, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

I. Whether this Court should resolve the split in the courts of appeal as to whether a mere matter of seconds suffice as premeditation for first degree murder or whether an appreciable amount of time must elapse so that reflection and consideration amounting to deliberation may occur.

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Mickey Roy Anderson, Sr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit affirming the conviction is unreported. (Pet. Appendix ["App."] A).

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 2, 2021 (App. A, 1); a timely petition for rehearing *en banc* was denied on January 22, 2022. (App. A, 6). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions, Statutes, and Rules Involved

18 U.S.C. § 1111(a)

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

Introduction

This case presents an important issue. Every day, throughout the United States of America, defendants are charged and convicted of premeditated, first degree murder. The standard for what constitutes "premeditation," however, is subject to enduring conflict among the courts of appeal. Here, the prosecutor argued that "mere seconds suffice" to prove premeditation for first degree murder. Caselaw shows that both the D.C. Circuit as well as this Court have found that an "appreciable amount of time" must have passed for deliberation to occur. This Court should grant certiorari to resolve the split in the courts of appeal as to whether an appreciable amount of time beyond seconds is required to prove premeditation for first degree murder.

Statement

On the evening of January 23, 2014, Alice Renee Murdock ("Ms. Murdock") was shot and killed in her home in Parker, Arizona. Four individuals were present at the time of the shooting, but only the defendant, Mr. Anderson, was charged. In February 2017, the Government filed a two-count Indictment against Mr. Anderson for Second Degree Murder and Use of a Firearm During a Crime of Violence.

In November 2017, the Government filed a six-count Superseding Indictment: Count 1 – First Degree Murder in violation of 18 U.S.C. §§ 1153 and 1111; Count 2 – Use of a Firearm During a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii); Count 3 – Burglary of a Residential Structure in violation of

18 U.S.C. §§ 1153, 13 and Arizona Revised Statutes §§ 13-507, 13-508 and 13-704; Count 4 – Use of a Firearm During a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii); Count 5 – First Degree Murder/Felony Murder in violation of 18 U.S.C. §§ 1153 and 1111; and Count 6 – Use of a Firearm During a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii).

Count 1 charged that on or about January 23, 2014, in the District of Arizona, within the confines of the Colorado River Indian Tribes Indian Reservation, Indian Country, the defendant, an Indian, did with premeditation and malice aforethought, unlawfully kill Alice Renee Murdock.

The primary question for the jury as to Count 1 – First Degree Murder in violation of 18 U.S.C. §§ 1153 and 1111, was whether or not Mr. Anderson committed a murder with "premeditation and malice aforethought", *i.e.*, first-degree murder. At trial, the prosecutor argued to the jury that a defendant must have only "thought" about killing and that "mere seconds sufficed" for a finding of premeditation for first-degree murder.

The jury convicted Mr. Anderson on all counts, including Count 1.

At sentencing, Mr. Anderson's base offense level under the United States Sentencing Guidelines was set at a level 43 pursuant to U.S.S.G. § 2A1.1(a) for first-degree murder. Pursuant to U.S.S.G. § 2A1.1, Note 1, "[t]his guideline applies in cases of premeditated killing." U.S.S.G. § 2A1.1, Note 2 is titled "Imposition of Life

Sentence" and section A is titled "Offenses Involving Premeditated Killing." This Note states that "[i]n the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed." *Id.*

Had Mr. Anderson been found guilty of second-degree murder, a lesser included offense where there was no premeditation, his base offense level would have been 38 and he would not have been subject to mandatory life imprisonment. *See* U.S.S.G. § 2A1.2.

On appeal, the Ninth Circuit affirmed Mr. Anderson's conviction and sentence. (App. A, 1). The Ninth Circuit subsequently denied a petition for rehearing *en banc*. (App. A, 6).

Reason for Granting the Petition

I. This Court Should Grant Certiorari To Resolve The Circuit Split As To Whether A Mere Matter Of Seconds Suffice As Premeditation For First Degree Murder Or Whether An Appreciable Amount Of Time Must Elapse So That Reflection And Consideration Amounting To Deliberation May Occur.

In *Austin v. U.S.*, 382 F.2d 129, 134 (D.C. Cir. 1967), overruled on other grounds by *U.S. v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986) (en banc), the court divided first degree and second degree murder into two different categories: 1. "deliberated murders such as those committed with coolness of mind" (first degree) and; 2. "murders committed on impulse, in frenzy or the heat of passion" (second degree). The question as to the difference between the two then is not whether the murder is "intentional" but whether there is sufficient evidence of meditation and deliberation

to justify first degree murder. *See Austin* at 131.

The distinction between first- and second-degree murder is based on the judgment that "one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse." *Id.* The requirements of "deliberation" and "premeditation" are accordingly intended to set apart murders that are not the result of "sudden impulse."

"Deliberation" refers to a thought process that "requires a cool mind that is capable of reflection," and "premeditation" "requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing." 2 Wayne R. LaFave, *Substantive Criminal Law* § § 14.7(a) & nn.8, 9 (2003) (citing cases) ("*LaFave*"); *accord U.S. v. Shaw*, 701 F.2d 367, 393 (5th Cir. 1983). Premeditation has been described as the defendant asking himself: "Shall I kill him?", and deliberation as the defendant saying to himself: "Wait, what about the consequences? Well, I'll do it anyway." *LaFave* § 14.7(a) n.7.

The D.C. Court of Appeals has held that "some appreciable time must elapse in order that reflection and consideration amounting to deliberation may occur." *Austin* at 135 *citing Bostic v. United States,* 68 App.D.C. 167, 171, 94 F.2d 636, 640 (1937). Further in *Bullock v. United States,* 74 App.D.C. 220, 221 (1941), the court stated that "[t]here is nothing deliberate and premeditated about a killing which is done within a second or two after the accused first thinks of doing it…" Importantly, in *Austin*, the court looked at a jury instruction that the amount of time for

premeditation may be "in the nature of hours, minutes *or seconds*." The court found that the jury instruction that mere seconds was enough to constitute premeditation was an error:

> As *Bostic* and *Bullock, Fisher* and *Frady,* all make clear, no particular length of time is necessary for deliberation, and the time required need not be longer than a span of minutes. But none of our post-*Bostic* opinions sanctions the reference to "or seconds" injected by the trial judge. The obvious problem with such a reference is that it tends to blur, rather than clarify, the critical difference between impulsive and deliberate killings.

Austin at 136-137 (internal cites omitted).

In *Fisher v. United States*, 328 U.S. 463, 469-470 n. 3 (1946), this Court quoted with approval the trial court's general instructions wherein premeditation and deliberation were defined carefully, so as to include an instruction that deliberation requires "that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact, deliberation." *Id.*

Here, the prosecutor argued that it was sufficient for first-degree murder for Mr. Anderson to have merely "thought about the killing" and that "merely seconds could suffice" for premeditation. In that case, every murder would be premeditated as soon as the killer decides to take the action that leads to death, *i.e.* pulling a trigger, swinging a bat, etc. Instead, premeditation requires evidence that cool reflection on the killing and deliberation about its consequences actually occurred.

The prosecutor's arguments, which were accepted by the court of appeals panel, effectively erase the distinction between first- and second-degree murder. Further,

the Ninth Circuit's acceptance that mere seconds could suffice for premeditation is contrary to holdings of the D.C. Circuit as well as this Court requiring an "appreciable amount of time." If the distinction between first- and second-degree murder is to retain any substance, as it must given the sentencing consequences that flow from it, whether or not an appreciable amount of time is required to allow for premeditation is a vital legal question.

This Court should grant certiorari to resolve this persisting split in the courts of appeal as to whether the mere thought of killing someone within a matter of seconds is a sufficient amount of time to "premeditate" murder in the first degree.

Conclusion

For the foregoing reasons, petitioner respectfully requests that this Court grant his petition for writ of certiorari to review the decision of the Ninth Circuit in this case.

Respectfully submitted,

DATED: April 10, 2022

/s Dori L. Zavala
Dori L. Zavala
Attorney for the Petitioner

APPENDIX A

NOT FOR PUBLICATION

FILED

DEC 2 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICKEY ROY ANDERSON, Sr., Defendant-Appellant.	No. 19-10213 D.C. No. 2:17-cr-00297-DLR-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted November 18, 2021
Phoenix, Arizona

Before: GILMAN,** CALLAHAN, and BRESS, Circuit Judges.

A jury convicted Mickey Roy Anderson, Sr. of, *inter alia*, first-degree murder under 18 U.S.C. § 1111(a) and burglary of a residential structure under 18 U.S.C. § 13 and Arizona Revised Statutes §§ 13-1507, 13-1508, and 13-704. Anderson timely appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

1. We reject Anderson's argument that the government presented insufficient evidence of premeditation, such that he could not have been convicted of first-degree murder. We "are obliged to construe the evidence 'in the light most favorable to the prosecution,' and only then determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir. 2010) (en banc) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Whether a defendant acted with premeditation is a factual question for the jury to decide. And a jury's verdict is not to be disturbed lightly." *United States v. Begay*, 673 F.3d 1038, 1043 (9th Cir. 2011) (en banc).

Based on the evidence presented at trial, a reasonable jury could have found that the murder was premeditated. "The amount of time needed for premeditation of a killing depends on the person and the circumstances." *United States v. Reza-Ramos*, 816 F.3d 1110, 1123 (9th Cir. 2016). But there must be enough time, "after forming the intent to kill, for the killer to have been fully conscious of the intent and to have considered the killing." *Id.* "Relevant circumstantial evidence includes but is not limited to 'the defendant's prior relationship to the victim, the defendant's carrying of the murder weapon to the scene, and the manner of the killing.'" *Begay*, 673 F.3d at 1043 (quoting *United States v. Free*, 841 F.2d 321, 325 (9th Cir. 1988)).

Here, Anderson stole the murder weapon a few days before the murder and

then carried it around town, often brandishing it and playing with it. The government also presented evidence that Anderson hated Chino, a rival drug dealer, and that when Chino came with Anderson's sister to the victim's home the day before the murder, Anderson told a witness that he wanted to "get rid of" three people, including Chino. Before the murder, one of the victim's friends told Anderson that she thought the victim was buying drugs from Chino. This made Anderson angry and impatient to get to the victim's home. Shortly after entering the victim's home, Anderson called out to her, and when she looked up at him, he shot her once in the face at point-blank range. That Anderson "fired from close range" supports an inference of premeditation. *Begay*, 673 F.3d at 1044. Anderson then engaged in behavior after the murder that further supported an inference of premeditated murder. *See Reza-Ramos*, 816 F.3d at 1124. All these circumstances allowed a rational jury to find premeditation.

2. Anderson argues that the prosecutor committed misconduct by stating during closing argument that "[s]econds suffices" for premeditation. Because Anderson did not object to the statement at trial, our review is for plain error. *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001). "Under a plain error standard, relief is not warranted unless there is: (1) an error; (2) that was plain; and (3) that affected the defendant's substantial rights. Even if these conditions are met, reversal is discretionary and will be granted only if the error seriously affects the fairness,

integrity, or public reputation of judicial proceedings." *United States v. Hayat*, 710 F.3d 875, 895 (9th Cir. 2013) (citation omitted) (quoting *United States v. Tran*, 568 F.3d 1156, 1163 (9th Cir. 2009)).

Even assuming that the prosecutor's statement was error and the error was plain, Anderson has not shown that it is "more probable than not that the misconduct materially affected the verdict." *United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011) (quoting *Tam*, 240 F.3d at 802). The government introduced extensive evidence from which the jury could conclude that Anderson premeditated the victim's murder minutes, hours, or even days in advance. The district court also properly instructed the jury on the definition of premeditation and the lesser-included offense of second-degree murder. "The jury is regularly presumed to accept the law as stated by the court, not as stated by counsel." *United States v. Rodrigues*, 159 F.3d 439, 451 (9th Cir. 1998). The unchallenged jury instructions mitigated any potential undue prejudice. *See, e.g.*, *Tucker*, 641 F.3d at 1122; *Tam*, 240 F.3d at 802. We thus reject Anderson's challenge to the prosecutor's statement at closing argument.

3. We also reject Anderson's challenge to his burglary conviction. Because Anderson's crime took place on the Colorado River Indian Tribe reservation, and because there is no federal burglary statute, we look to Arizona's burglary statute per the Major Crimes Act and the Assimilative Crimes Act. *See*

Ariz. Rev. Stat. §§ 13-1507, 1508; *see also United States v. Smith*, 925 F.3d 410, 421–22 (9th Cir. 2019); *Reza-Ramos*, 816 F.3d at 1125. Under Arizona law, as relevant here, a person commits burglary "by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." Ariz. Rev. Stat. § 13-1507(A).

Anderson argues that the government did not present sufficient evidence that he entered the victim's house, or remained in the victim's house, with the intent to commit a felony. But Arizona courts have held that Arizona's burglary statute supports a conviction "even if the intent to commit the crime was formed after entering the structure." *United States v. Bonat*, 106 F.3d 1472, 1475 (9th Cir. 1997) (citing Arizona cases). Regardless, the government presented evidence that would have allowed a rational jury to conclude that Anderson both entered and remained in the victim's house with the intent to commit a felony.[1]

AFFIRMED.

[1] Anderson also argued in his opening brief that he should not have been sentenced to life imprisonment. But he then withdrew this point at oral argument. Regardless, Anderson's argument is foreclosed by *United States v. LaFleur*, 971 F.2d 200, 207–10 (9th Cir. 1992) (holding that § 1111(b) imposes a mandatory life sentence for first-degree murder).

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICKEY ROY ANDERSON, Sr., Defendant-Appellant.	No. 19-10213 D.C. No. 2:17-cr-00297-DLR-1 District of Arizona, Phoenix ORDER

Before: GILMAN,* CALLAHAN, and BRESS, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Callahan and Bress voted to deny the petition for rehearing en banc, and Judge Gilman so recommended. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc (Dkt. No. 65) is **DENIED**.

* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.