No. _____

In the
SUPREME COURT of the UNITED STATES
October Term, 2023

CORDERO PASSLEY,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, for a defendant to commit a "willful, deliberate, malicious, and premeditated killing" that constitutes first degree murder (as opposed to second degree murder) under 18 U.S.C. § 1111(a), there must be some period of time, however brief, during which he in fact deliberated about his course of conduct.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of this petition.

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OPINIONS AND ORDERS BELOW

The summary order of the United States Court of Appeals for the Second Circuit, *United States v. Passley*, No. 22-1361, dated December 27, 2023, appears as Appendix A to this petition. The order of the Second Circuit on Passley's petition for rehearing and rehearing *en banc,* dated March 1, 2024, is attached as Appendix B. The Decision and Order of the district court, dated June 9, 2022, is attached as Appendix C. (These orders are not officially or unofficially reported.)

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 27, 2023. The petition for rehearing and rehearing *en banc* was denied by that Court on March 1, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 18, Section 1111(a) provides, in pertinent part, that:

> 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 . . . is murder in the first degree.
>
> Any other murder is murder in the second degree.

STATEMENT OF THE CASE

The federal murder statute [18 U.S.C. § 1111(a)] incorporates the common law distinction between first degree and second degree murder and provides that, to constitute the more serious offense, which is punishable by death or life imprisonment, a murder must be "willful, deliberate, malicious, and premeditated." It has been nearly a century since Benjamin Cardozo, then the Chief Judge of the New York Court of Appeals, complained that the distinction signified by the terms "deliberate" and "premeditated" is "so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it" and confessed that, despite diligent efforts, "I am not at all sure that I understand it myself . . . ." Benjamin N. Cardozo, *What Medicine Can Do for Law* (1929) 5 Bulletin of New York Academy of Medicine 597. Although courts and commentators have continued to lament the murder statute's lack of clarity in the ensuing years, this Court has never undertaken to explicate its meaning.

In the present case, the Court of Appeals for the Second Circuit upheld a determination, for sentencing purposes, that Passley engaged in conduct that would

establish an attempt to commit murder in the first degree even though the district court found that, in the context of a brief "road rage" incident with a driver and passenger who were unknown to him, Passley *failed* to engage in calm deliberation before shooting at the driver. Review of that decision will enable this Court, as it never has before, to analyze the meaning of the terms underlying the consequential distinction between first degree and second degree murder, and to resolve a split among the Circuits as to whether some period of actual deliberation is required to establish guilt of the more serious offense.

1. The Underlying Incident and the District Court's Decision

After his car was cut off by a van on a busy Brooklyn street, Cordero Passley, in a manner the van's driver described as "just irrational," screamed "Yo, what the f*** are you doing? Do you want me to kill you?" When Passley and the van's occupants exited their vehicles and hurled angry threats at one another, a woman in Passley's car, reminding him that their daughter was with them, implored him not to get into a fight over "road rage." Neither that plea, nor the woman's warning that Passley (who was on supervised release) was at risk of going to jail, succeeded in calming him down; he continued screaming as she pulled him back into the car. After he drove a short distance and the woman and child exited the car, Passley made a u-turn in order to pursue the van (which had executed a similar maneuver) and continued to "mouth off" from inside the car as he slowed down near the driver's side of the van. Barely more than three minutes after the commencement of the precipitating traffic incident, Passley fired a single shot

through his passenger window that entered the van near the driver's shoulder but did not strike him.

Passley was charged in the United States District Court for the Eastern District of New York with possession of a firearm by a felon [18 U.S.C. 922(g)]. Following his guilty plea, the Department of Probation issued a Presentence Investigation Report recommending that Passley's offense level under the United States Sentencing Guidelines should be based on a cross reference to the guideline for attempted murder and that the applicable level should be 33 because the object of the attempt would have constituted first degree murder.[1] The defense objected and the district court conducted an evidentiary hearing to determine whether a preponderance of the evidence supported application of the proposed Guideline.[2]

In its post-hearing decision, the district court made reference to the Fifth Circuit's holding that "[p]remeditation requires a showing that a defendant acted with a cool mind

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[1]The section of the Sentencing Guidelines for possession of a firearm (U.S.S.G. § 2K2.1) cross references § 2X1.1 (Attempt, Solicitation, or Conspiracy) if the defendant used the firearm in connection with another offense and the resulting offense level is greater than the one calculated under the firearms section. *See* § 2K2.1(c)(1)(A). Pursuant to that cross reference, the Probation Department applied section 2A2.1, the guideline for "Assault with Intent to Commit Murder; Attempted Murder." On the theory that "the object of the offense would have constituted first degree murder," the Probation Department applied the higher base offense level of 33 pursuant to § 2A2.1(a)(1). If the object of the offense would not constitute first degree murder, the base offense level would have been 27 pursuant to § 2A2.1(a)(2).

[2]Passley contended that the evidence was insufficient to establish that his conduct constituted an attempt to commit murder in any degree, and, in the alternative, that it was insufficient to establish an attempt to commit murder in the first degree; the present petition concerns only the latter contention.

that is capable of reflection, and did, in fact, reflect, at least for a short period of time before his act of killing." [Appendix C, pp. 6-7, quoting *United States v. Shaw*, 701 F.2d 367, 393 (5th Cir. 1983)].[3] It also noted that, in *United States v. Delaney*, 717 F.3d 553, 556 (7th Cir. 2013), the Seventh Circuit explained that, "[i]n contrast to malice aforethought, premeditation requires that an appreciable time elapse between formation of the design and the [attempted] fatal act within which there is, in fact, deliberation." [Appendix C, p. 7]

Although the district court, without explanation, announced a finding that incorporated the language of *Delaney* quoted above, *see* Appendix C, p. 8 ("There was an 'appreciable time' between 'formation of the design and the [attempted] fatal act within which there [was], in fact, deliberation'"), that pronouncement was immediately followed by a judicial finding that, while Passley had enough time to deliberate, he did not in fact engage in calm deliberation:

> The record demonstrates Defendant acted in a fit of rage and with a "cool mind." Defendant became angry and heated during the traffic incident. His anger was further inflamed when he yelled at the other drivers. Demonstrating his cool, calculated actions and intent, the Defendant then discharged the woman and child from his car, followed the van, drove up to the side of the van, and deliberately discharged his gun at the driver's head. The entire encounter lasted long enough for the Defendant to engage in calm reflection, to deliberate and

[3]Unless otherwise indicated, quotations in this petition omit all internal alterations, quotation marks, footnotes, and citations.

> to step back from his premeditated attempt to murder his victim. *He failed to do so.*[Appendix C, p. 8] (emphasis added)

2. The Decision of the Court of Appeals

On appeal, Passley pointed out the self-contradictory nature of the district court's findings and argued that the determination that Passley had an opportunity to reflect but "failed to do so" negated an essential element of murder in the first degree. In its decision upholding the district court's application of the Guidelines, the Court of Appeals did not cite any case law concerning the distinction between first and second degree murder and it did not recognize any requirement that there be a period in which the defendant, with a cool mind, in fact deliberates. Instead, as discussed below, the Court focused on whether the evidence established the "deliberateness" of Passley's actions.

The Court recounted the evidence that Passley yelled at the driver and threatened to kill him before blocking the van, as well as the evidence that he continued to threaten the driver and passenger after exiting his vehicle. According to the Court, Passley's conduct after the woman who accompanied him pulled him back into the car was "critical" to its determination that the evidence was sufficient to establish an attempt to commit murder in the first degree:

> Critically, Passley then dropped off the woman and a child who had been in his automobile." After that, he drove up behind the van, followed the Victims through a series of turns, and pulled up alongside the Victims' van. It was only then, about three to four minutes after the initial incident, that Passley shot a firearm at the Victims, with the bullet lodging

> just inches from [the driver's] head. On these facts, we agree with the district court that Passley's conduct was sufficiently "willful, deliberate, malicious, and premeditated" to constitute attempted murder in the first degree under 18 U.S.C. § 1111 and to warrant the enhancement under U.S.S.G. § 2A2.1(a)(1). [Appendix A, pp. 6-7]

In a footnote following the first sentence of the above passage, the Court acknowledged that the evidence left open the question whether the woman and child left the car at Passley's direction or on their own accord, but explained that "whether or not the passengers left the vehicle at Passley's direction does not alter our consideration of this evidence as relevant to the *deliberateness* of Passley's conduct in evaluating whether it constituted attempted murder in the first degree." [Appendix A, p. 7, n.2] (emphasis added)

In his petition for rehearing and rehearing *en banc*, Passley argued that the Court of Appeals overlooked the case law requiring "deliberation" with a cool mind and the district court's finding that Passley failed to deliberate. He further argued that upholding a determination that Passley engaged in conduct that would constitute an attempt to commit murder in the first degree without requiring such "deliberation" diminished the legal standard and created a conflict between the standard applied in the Second Circuit and that applied in several other federal Circuits, as well as with the view of the law endorsed by this Court in *Fisher v. United States*, 328 U.S. 463 (1946). The Court of Appeals denied that petition without explaining its rationale. [Appendix B]

REASONS FOR GRANTING THE WRIT

REVIEW OF THE SECOND CIRCUIT'S DECISION WILL ALLOW THIS COURT, FOR THE FIRST TIME, TO EXAMINE THE DISTINCTION BETWEEN MURDER IN THE FIRST DEGREE AND MURDER IN THE SECOND DEGREE UNDER 18 U.S.C § 1111, TO RESOLVE A CONFLICT AMONG THE CIRCUITS, AND TO CLARIFY THE STANDARD BY WHICH COURTS ARE TO DRAW THAT CONSEQUENTIAL DISTINCTION

A person who is found guilty in federal court of committing murder in the first degree "shall be punished by death or by imprisonment for life," while one who is convicted of murder in the second degree faces imprisonment for "any term of years or for life." 18 U.S.C. § 1111(b). When, as in the present case, a defendant's offense level under the Sentencing Guidelines turns on whether the object of his attempt to cause death would constitute murder in the first degree or murder in the second degree, holding him accountable for the more serious offense can nearly double his advisory sentencing range.[4] Despite the significant consequences that hinge on the level of the offense, the federal murder statute defines the distinction (other than where the murder occurs during perpetration of specified offenses) only by means of a phrase – "perpetrated by poison,

[4]For Passley, who was in Criminal Category IV and who received a three-level reduction for acceptance of responsibility, the determination that the object of his offense would constitute first degree murder meant that his Guidelines sentencing range was 135 to 168 months instead of 77 to 96 months. (He was sentenced to 120 months, which was the statutory maximum for his offense of conviction.)

lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing" – that, as noted earlier in this petition, includes words that so great a jurist as Cardozo found obscure and baffling.

Many others have shared Cardozo's view regarding the unclear nature of the terms that demarcate the boundary between first degree murder and second degree murder. *See*, *e.g*. *United States v. Shaw*, 701 F.2d 367, 393 (7th Cir. 1979) ("The distinction which marks the line between 'deliberation' sufficient to support a conviction of first degree murder and the lesser killing with malice which supports conviction of second degree murder is less than clear"); 2 Wayne R. Lafave, *Substantive Criminal Law* § 14.7(a) at 477 (2d. ed. 2003) ("It is not easy to give a meaningful definition of the word 'premeditate' . . . as . . . used in connection with first degree murder"); *United States v Begay*, 567 F3d 540, 545 (9th Cir 2009) ("Both courts and commentators have noted the lack of clarity in the precise legal definition of premeditation").

The closest this Court has come to offering guidance on this subject was in *Fisher v. United States,* 328 U.S. 463 (1946). The issue presented in that case was whether, in a prosecution for first degree murder under the law of the District of Columbia, the defendant was entitled to an instruction informing the jury that it could consider evidence of his mental deficiencies (which fell short of insanity) to determine whether he was capable of the premeditation and deliberation required for first degree murder. *Id*. at 470. Because the issue did not involve "Constitutional limitations or a general federal law," the

Court deemed it a matter of local concern with which it should not interfere; rather than deciding the issue, the Court deferred to the Court of Appeals for the District of Columbia. *Id*. at 476-77.

Although Fisher's appeal did not seek review of the jury instructions other than with respect to the request regarding his mental health, the Court, noting that it would correct an error in a capital case even if it was not the subject of a specific challenge, indicated that it saw "no error" [*Id*. at 470] in the district court's instructions, which included the following:

> 'Then, there is the element of premeditation. That is, giving thought, before acting, to the idea of taking a human life and reaching a definite decision to kill. In short, premeditation is the formation of a specific intent to kill.
>
> 'Deliberation, that term of which you have heard much in the arguments and one of the elements of murder in the first degree, is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.
>
> 'Although formation of a design to kill may be instantaneous, as quick as thought itself, the mental process of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact, deliberation.
>
> `The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period – hours, days, or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually gives second thought and consideration to the intended act, he has, in fact

> deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued.' [*Id*. at 467, n.3]

This passing nod of approval for the requirement that there be some time during which a defendant "in fact deliberated" – made with reference only to a local District of Columbia law, without any focused discussion or legal analysis, and made approximately 78 years ago – stands as the one and only time this Court has weighed in on the essential requirements for establishing that a defendant committed murder in the first degree. Subsequently, several Circuit Courts have similarly recognized the requirement of actual deliberation. *See Shaw,* 701 F.2d at 393 ("deliberation . . . 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"); *United States v. Catalan–Roman*, 585 F.3d 453, 474 (1st Cir.2009) ("it is the fact of deliberation, of second thought, that is important"); *United States v. Bell*, 819 F.3d 310, 319 (7th Cir. 2016) ("But more is required than the simple passage of time: the defendant must, in fact, have deliberated during that time period"); *United States v. Begay*, 567 F.3d 540, 546 (9th Cir. 2009) ("[P]remeditation, at minimum, requires that at some point after the defendant forms the intent to kill the victim, he has the time to reflect on the decision to commit murder, that he in fact does reflect on that decision, and that he commits the murder with a cool-mind after having engaged in such reflection")

Courts in other Circuits, however, have – as the Second Circuit did here – focused their inquiry on whether a defendant's actions were "deliberate" in the sense that they were not accidental or involuntary rather than whether they followed a period of actual deliberation. In *United States v Greer*, 57 F.4th 626 (8th Cir 2023), for example, the Eighth Circuit found that the defendant's "deliberate actions" before shooting (entering a store, looking at the victim twice, and shifting money to his left hand so he could reach for his pistol) "demonstrate that he acted with the requisite premeditation." *Id* at 629. Similarly, the Sixth Circuit has approached the requirements of first degree murder in a manner that essentially equates "premeditated" with "intentional." Thus, in *United States v McDaniel*, 165 F.3d 29 (6th Cir 1998)(unpublished decision), that court upheld a district court's conclusion that a shooting "had the earmarks of a premeditated assault, rather than an accidental shooting" and, without mention of any evidence suggesting that the defendant engaged in actual deliberation, concluded that "the fact that McDaniel shot the officer six times and then reloaded is certainly evidence that he was attempting to commit a willful, deliberate, malicious, and premeditated killing." *See also United States v Christian*, 404 Fed. Appx. 989, 994 (6th Cir 2010) (concluding that a determination that the defendant attempted to commit murder in the first degree was supported by evidence that he "walked to his car, retrieved a loaded weapon, walked across the parking lot, and shot an unarmed man sitting inside his car numerous times, without evidence of physical provocation").

Thus, while several Circuits have adopted the view endorsed by this Court in *Fisher* – that the "premeditation" and "deliberation" that distinguish first degree murder from second degree murder requires some lapse of time in which "there is, in fact, deliberation" – the Sixth Circuit, the Eighth Circuit, and now the Second Circuit have dispensed with that requirement. The rationale employed by those courts demonstrates how easy it is, by adopting a semantic variation of the word "deliberate," to dilute the standard that must be satisfied to hold a defendant accountable for the more serious version of the offense. Under that diminished standard, a determination that the defendant acted *deliberately* takes the place of a finding that he acted after *deliberating*. By granting certiorari in the present case, this Court will be able, for the first time, to analyze the murder statute's distinction between first degree murder and second degree murder and to enunciate a clear interpretation of its operative language that will set a nationwide standard for its application.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Second Circuit, and upon such review, the order should be vacated and the decision reversed.

Respectfully submitted,

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May 2024

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of December, two thousand twenty-three.

PRESENT:

JOSÉ A. CABRANES,
RICHARD J. SULLIVAN,
ALISON J. NATHAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. Nos. 22-1361 (L),
22-1368 (Con)

CORDERO PASSLEY,

Defendant-Appellant.

For Defendant-Appellant: JEREMY GUTMAN, New York, NY.

For Appellee: ADAM TOPOROVSKY (David G. James, *on the brief*), Assistant United States Attorneys, *for* Breon Peace, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from judgments of the United States District Court for the Eastern District of New York (William F. Kuntz, II, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the district court are **AFFIRMED**.

Cordero Passley appeals from a June 14, 2022 judgment following his guilty plea to unlawfully possessing a firearm after having been previously convicted of a felony, in violation of 18 U.S.C. § 922(g)(1), for which he received a sentence of 120 months' imprisonment. On appeal, Passley challenges the district court's application of an enhancement under the United States Sentencing Guidelines for using the firearm during a road-rage incident in which Passley attempted to murder the driver of a van who refused to let Passley's vehicle change lanes, as well as the procedural reasonableness of the district court's calculation of his criminal history category.

Passley also appeals a second judgment, issued on the same date, imposing a twenty-four-month term of imprisonment, to run consecutive to the sentence on the section 922(g) conviction, for his violation of the conditions of supervised release imposed as part of a prior sentence and based on the same underlying conduct as the section 922(g) conviction. On appeal, he argues that this sentence was procedurally and substantively unreasonable. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

I. Sentencing Enhancement for Attempted Murder

In determining the sentence for Passley's section 922(g) conviction, the district court concluded, after a sentencing hearing, that Passley was subject to the enhancement for using a firearm "in connection with the commission or attempted commission of another offense," U.S.S.G. § 2K2.1(c)(1), namely, attempted first-degree murder under U.S.S.G. § 2A2.1(a)(1). When reviewing "a district court's application of the Guidelines to the specific facts of a case," we follow an "either/or approach, adopting a *de novo* standard of review when the district court's application determination was primarily legal in nature, and adopting a clear[-]error approach when the determination was primarily factual." *United States v. Gotti*, 459 F.3d 296, 349 (2d Cir. 2006) (internal quotation marks omitted).

The government bears the burden of proving, by a preponderance of the evidence, all facts relevant to the Guidelines calculation used at sentencing. *See United States v. Concepcion*, 983 F.2d 369, 388 (2d Cir. 1992).

Passley first contends that the district court erred by finding that there was sufficient evidence that he acted with a specific intent to kill the victim. Under the federal murder statute, murder is defined as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111; *see also* U.S.S.G. § 2A2.1, cmt. n.1. First-degree murder is murder that is committed (1) by "lying in wait, or [by] any other kind of willful, deliberate, malicious, and premeditated killing," (2) during the course of particular felonies, or (3) "from a premeditated design unlawfully and maliciously to effect the death of any human being other than [the one] who is killed." 18 U.S.C. § 1111. "Any other murder is murder in the second degree." *Id.* § 1111. Attempted murder in *either* degree "requires [both] a specific intent to kill," *Braxton v. United States*, 500 U.S. 344, 351 n.* (1991) (internal quotation marks omitted), and "conduct amounting to a 'substantial step' towards the commission of the crime," *United States v. Martinez*, 775 F.2d 31, 35 (2d Cir. 1985).

Here, the evidence adequately supported the district court's finding that Passley fired his gun with a specific intent to kill. Indeed, the evidence introduced during the sentencing hearing demonstrated that (1) Passley verbally threatened the driver of the van, Lester Brown, and his passenger, Alfred Bonner (together, the "Victims"), after Brown refused to make way for Passley's car to enter the van's lane; (2) Passley pulled up next to the Victims' van, took out a handgun, and fired into the side of the van; and (3) the bullet from Passley's firearm hit a metal plate next to the top of the seatbelt holder on the driver's side of the van, which was located only inches from Brown's head.[1] We cannot say that the district court erred in concluding that this evidence – showing that Passley repeatedly shouted threats to kill Brown, fired a deadly weapon at close range, and hit a metal plate close to Brown's head – was sufficient to establish by a preponderance of the evidence that Passley discharged his firearm with the specific intent to kill Brown.

Passley's principal response is that he could not have had the specific intent to kill because he fired only one shot even though he had additional rounds in the firearm and an operational weapon. But Passley has cited no authority for the

[1] The evidence on which the district court relied included, among other things, images showing the bullet's trajectory and the site of impact, Brown's and Bonner's grand-jury testimony, and statements that Brown and Bonner gave to the police immediately following the incident.

proposition that specific intent requires the firing of multiple shots at an intended victim, and we are aware of none ourselves. *Cf. United States v. Grant*, 15 F.4th 452, 456, 458 (6th Cir. 2021) (finding no clear error in district court's determination that defendant had a specific intent to kill where defendant fired one shot at the victim); *see also United States v. Reid*, No. 22-1279, 2023 WL 8469353, at *1 (2d Cir. Dec. 7, 2023) (rejecting the same argument Passley raises on appeal). Nor are we persuaded to adopt such a theory.

Passley next argues that the district court erred by applying the Guidelines section for attempted murder *in the first degree*. But the presentence investigation report (the "PSR") and evidence from the sentencing hearing indicated that Passley "yell[ed] at [Brown] and threaten[ed] to kill him" "[w]hen [Brown] would not let [Passley] cut in." PSR ¶ 4. Passley then inserted his car into the neighboring lane – "block[ing]" the van so it "couldn't move" – and exited his vehicle while "grabbing his pocket . . . like[] he had a weapon" as he argued with the Victims outside of the vehicles. Gov't App'x at 17–18. Subsequently, a female passenger in Passley's car "pull[ed] [him] back into their automobile," PSR ¶ 4, warning him that he could go to jail. Critically, Passley then "dropped off the woman and a

child[] who had been in his automobile." *Id.* ¶ 5.[2] After that, he drove up behind the van, followed the Victims through a series of turns, and "pulled up alongside the Victims' van." *Id.* It was only then, about three to four minutes after the initial incident, that Passley shot a "firearm at the Victims," with the bullet lodging "just inches from [Brown's] head." *Id.* On these facts, we agree with the district court that Passley's conduct was sufficiently "willful, deliberate, malicious, and premeditated" to constitute attempted murder in the first degree under 18 U.S.C. § 1111 and to warrant the enhancement under U.S.S.G. § 2A2.1(a)(1).

II. Procedural and Substantive Reasonableness

Passley next challenges the procedural and substantive reasonableness of his sentences. "Criminal sentences are generally reviewed for reasonableness, which requires an examination of . . . the procedure employed in arriving at the sentence (procedural reasonableness)" and "the length of the sentence (substantive reasonableness)." *United States v. Chu*, 714 F.3d 742, 746 (2d Cir. 2013) (internal quotation marks omitted). We review a district court's sentence "under

[2] Passley disputes whether the woman and child left his vehicle at his direction or whether they left on their own accord. But whether or not the passengers left the vehicle at Passley's direction does not alter our consideration of this evidence as relevant to the deliberateness of Passley's conduct in evaluating whether it constituted attempted murder in the first degree.

a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007).

Passley first contends that the district court committed procedural error with respect to his section 922(g) sentence by (1) assigning two criminal history points under U.S.S.G. § 4A1.1(b) to a prior state-court sentence, thereby placing him in Criminal History Category IV, and (2) not granting his request for a downward departure under U.S.S.G. § 4A1.3(b) because his "criminal history category substantially over-represent[ed] the seriousness of [his] criminal history."[3] Passley Br. at 35–37. We need not reach these issues, however, given our determination that the district court was correct in applying U.S.S.G. § 2A2.1(a)(1) – the Guidelines section for attempted murder in the first degree – which resulted in a total offense level of 30. Based on this offense level, Passley's Guidelines range would have been the statutory maximum sentence of 120 months' imprisonment regardless of whether Passley was determined to be in Criminal History Category III or IV. *See* U.S.S.G. § 5G1.1(a).

[3] Passley argues that the district court erred by assigning one extra point under U.S.S.G. § 4A1.1, and that Criminal History Category III "should be recognized as the appropriate basis for determining Passley's Guidelines imprisonment range." Passley Br. at 37.

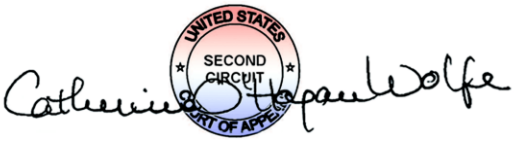
Passley next argues that his above-Guidelines sentence for his violation of supervised release was procedurally and substantively unreasonable. But the district court's imposition of a twenty-four-month sentence for Passley's violation of supervised release was not procedurally unreasonable because the district court properly applied the 18 U.S.C. § 3553(a) factors to the facts of this case; accurately calculated the applicable Guidelines range; appropriately recognized that the Guidelines are not mandatory; and articulated specific reasons for the sentence it imposed. *See Chu*, 714 F.3d at 746. Indeed, the district court specifically addressed a variety of mitigating factors – including Passley's physical ailments, seizures, mental health disorders, and substance-abuse problems – while stressing, just before issuing its sentence, the seriousness of the felon-in-possession offense.

Nor can we say that the twenty-four-month sentence for Passley's violation of supervised release, which was three months longer than the relevant Guidelines range of fifteen to twenty-one months, was substantively unreasonable. Based on "the totality of the circumstances" surrounding Passley's supervised-release violation, *id.* – including the fact that "[he] continue[d] to ignore the Probation Department's efforts" "to assist [him] to come into compliance with his conditions [of supervised release]," Passley App'x at 55, not to mention the egregious

circumstances surrounding the shooting itself – it cannot be said that the twenty-four-month sentence imposed here fell outside "the range of permissible decisions" available to the sentencing court, *Chu*, 714 F.3d at 746 (internal quotation marks omitted).[4]

We have considered Passley's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgments of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



[4] It bears noting that the district court's decision to run the twenty-four-month sentence on the violation consecutive to the ten-year sentence on the section 922(g) conviction resulted in an aggregate sentence of 144 months, which was well below the average sentence imposed for federal defendants convicted of attempted murder in the first degree in recent years. *See United States v. Green*, No. 22-800, 2023 WL 7180645, at *2 (2d Cir. Nov. 1, 2023) ("In 2021, the average sentence imposed under [section] 2A2.1 – the Guideline for attempted first-degree murder – was 155 months.").

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of March, two thousand twenty-four.

United States of America,

Appellee,

v.

Cordero Passley,

Defendant - Appellant.

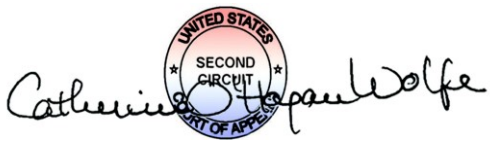
ORDER

Docket No: 22-1361(L)

Appellant Cordero Passley filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

CORDERO PASSLEY,

Defendant.

----------X

DECISION & ORDER
15-CR-287-20 (WFK)
19-CR-534 (WFK)

WILLIAM F. KUNTZ, II, United States District Judge:

On June 10, 2021, Cordero Passley ("Defendant") pleaded guilty to being a Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1) and to violating the conditions of his supervised release by committing a crime. On December 7, 2021, the Probation Department ("Probation") filed a sealed Presentence Investigation Report ("PSR") setting forth Defendant's sentencing range. PSR, ECF No. 68, Case No. 19-CR-534; ECF No. 483, Case No. 15-CR-287-20. Before the Court is Defendant's objection to the PSR. *See* Def. Objection, ECF No. 78, Case No. 19-CR-534. For the following reasons, the Court DENIES the Defendant's objections.

BACKGROUND

On May 19, 2017, Defendant pleaded guilty to Count Sixty-Four of the Superseding Indictment in *United States v. Artis et al.*, Case No. 15-CR-287-20, charging him with Assault in Aid of Racketeering in violation of 18 U.S.C. § 1959(a)(3), pursuant to a plea agreement. *See generally* ECF Nos. 435, 436, Case No. 15-CR-287-20. On July 23, 2018, this Court sentenced Defendant to forty-six (46) months in custody, followed by three (3) years of supervised release. *See* Judgment, ECF No. 587. Defendant commenced his term of supervision on November 19, 2018. Violation of Supervised Release ("VOSR") Report at 1, ECF No. 808, Case No. 15-CR-287-20

On October 11, 2019, Probation filed a sealed VOSR Report charging Defendant with seven violations of the conditions of his supervision. *See* VOSR Report. As set forth in the VOSR Report, the Defendant, while driving, engaged in a verbal altercation with an individual after a traffic incident. The Defendant discharged a firearm at the individual's vehicle and drove

away. The individual was not injured and followed the Defendant's vehicle until Defendant exited it and entered building "A" of 305 Linden Boulevard. Officers later recovered a grey Taurus 9-millimeter firearm and loaded magazine from 305 Linden Boulevard and a shell casing on the driver's side floor of Defendant's vehicle, which matched the ammunition rounds found in the firearm.

On November 13, 2019, a grand jury returned an Indictment in *United States v. Passley*, Case No. 19-CR-534, charging Defendant with being a Felon in Possession of a Firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Indictment, ECF No. 8, Case No. 19-CR-534. On December 6, 2019, Probation filed a sealed supplemental memorandum to the first VOSR report to include an eighth violation charging Defendant with violating the following condition: "[D]efendant shall not commit another federal, state, or local crime." ECF No. 830 ("VOSR Supplement").

On June 10, 2021, Defendant pleaded guilty to the sole count of the Indictment in *United States v. Passley*, Case No. 19-CR-534, and to Charge Eight of the VOSR Report in *United States v. Artis et al.*, Case No. 15-CR-287-20. On December 7, 2021, Probation filed a sealed PSR. On April 14, 2022, Defendant filed a letter objecting to portions of the PSR. *See* ECF No. 78, Case No. 19-CR-534 ("Def. Objection"). Specifically, Defendant asks the Court to hold the Government to its burden of proof by a preponderance of the evidence as to all material allegations concerning Defendant's interaction with the driver and passenger of a van on October 8, 2019, including the following allegations reflecting Defendant's intentions and mental state: (1) that Defendant attempted to cut the van off with his vehicle; (2) that Defendant threatened to kill the driver; (3) that Defendant pointed a firearm "at" the van's occupants; and (4) that the bullet discharged from the firearm was shot "at" those individuals. *Id*. Defendant objects to the

legal conclusion that the offense involved an assault with intent to commit murder, and objects to the further conclusion that the offense involved murder in the first degree. ECF No. 79, Case No. 19-CR-534 ("Def. Issues Ltr.").

On April 15, 2022, the Government filed a response to Defendant's objections to the PSR, arguing there is ample factual and legal support for the conclusion that Defendant intended to commit murder. ECF No. 80, Case No. 19-CR-534 ("Gov't Response"). On April 18, 2022, the Government filed an additional letter in further support of the conclusion and guidelines calculation in the PSR. ECF No. 81, Case No. 19-CR-534 ("Gov't Issues Ltr.").

On April 21, 2022, the Court held a *Fatico* hearing. The Court received the following exhibits at the hearing and in the parties' briefing: (1) the first 911 call of Lester Brown, Gov't Ex. 1; (2) the second 911 call of Mr. Brown, Gov't Ex. 2; (3) a photograph of the van driven by Mr. Brown, Gov't Ex. 4; (4) photographs of the van and bullet hole, Gov't Exs. 5–6; (5) a photograph of the metal plate behind the driver's seat in the van, Gov't Ex. 7; (6) body camera footage, Gov't Exs. 9, 11, 17, 18, 19; (7) the grand jury testimony of Mr. Brown, Gov't Ex. 13; (8) the grand jury testimony of Alfred Bonner, Gov't Ex. 14; (9) a property clerk invoice of the recovered firearm, Def. Ex. 1; (10) laboratory reports of examinations of the firearm, cartridge, and bullets, Def. Exs. 2–4; (11) the King's County State Court criminal charges, Def. Ex. 5; (12) photographs of the bullet recovered from the van's cabinet, Def. Exs. 7–11; (13) a map depicting the intersection of Rogers Avenue and Linden Boulevard in Brooklyn, New York, Def. Ex. 13; (14) a letter from a neurologist, Dr. Laurence Radin, who was retained to provide an opinion regarding medication Defendant was taking at the time of the incident, Def. Ex. 14; (15) notes of an interview with Mr. Bonner by prosecutors and law enforcement officers, Def. Ex. 17; (16) notes of an interview with Mr. Brown by prosecutors and other law enforcement officers, Def.

Ex. 18; (17) footage from two cameras at the intersection of Rogers Avenue and Church Avenue, Def. Ex. 20; and (18) footage from two cameras at the intersection of Clarkson Avenue and Nostrand Avenue, Def. Ex. 21.

DISCUSSION

I. Legal Standard

"Judges may exercise sentencing discretion through 'an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'" *Alleyne v. United States*, 570 U.S. 99, 116 n.6 (2013) (alteration in original) (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)). "[F]acts relevant to sentencing must be found by a preponderance of the evidence." *United States v. Salazar*, 489 F.3d 555, 557 (2d Cir. 2007). "In light of this discretion, numerous courts have considered uncharged violent conduct by a defendant at sentencing in determining, *inter alia,* his 'history and characteristics' and/or the degree to which there is a need 'to protect the public from further crimes of the defendant'" pursuant to the Sentencing Guidelines. *United States v. Valerio*, No. 14-CR-94, 2017 WL 2376602, at *2 (E.D.N.Y. June 1, 2017) (Bianco, J.) (citing cases), *aff'd*, 765 F. App'x 562 (2d Cir. 2019). Where a party has made an objection to any portion of the presentence investigation report, the Court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3)(B).

II. The Events of October 8, 2019

The evidence and exhibits admitted at the *Fatico* hearing established the following by a preponderance. On October 8, 2019, at approximately 4:30 P.M., Defendant was driving a

Toyota Camry in the Flatbush neighborhood of Brooklyn, New York. Def. Exs. 20–21. Defendant had a traffic incident with a work van driven by Mr. Brown and in which Mr. Bonner was a passenger, wherein the driver of one vehicle impeded the entrance of the other vehicle into the lane. Gov't Ex. 13 at 10; Gov't Ex. 14 at 5–6. The drivers exited their respective vehicles, and engaged in a heated verbal altercation. Gov't Ex. 13 at 10–13; Gov't Ex. 14 at 6–8; Def. Exs. 17–18. Defendant stated to Mr. Brown and Mr. Bonner, in sum and substance, that he was going to cause one or both of them serious physical harm. Def. Ex. 18 at 1, Gov't Ex. 13 at 10–11.[1] After a woman with Defendant ushered him back into his car, both drivers returned to their vehicles and drove off. Def. Exs. 17–18. Shortly thereafter, Defendant stopped the car and the woman and a child exited the vehicle. Gov't Ex. 13 at 13–14; Gov't Ex. 14 at 8–9. Defendant began to follow Mr. Brown and Mr. Bonner in his car, even when Mr. Brown made a U-turn. *Id*. Defendant then pulled his car alongside the driver's side of the van, pointed a gun at the direction of Mr. Brown, and fired one shot toward the driver's side of the van. *See* Gov't Ex. 13 at 14–15; Gov't Ex. 14 at 8. The bullet entered the side of the van and struck a metal plate behind Mr. Brown's shoulder before ricocheting and coming to rest inside the van cabinet. Gov't Exs. 4–7, 10. Defendant then drove away. Gov't Ex. 13 at 15; Gov't Ex. 14 at 9.

III. Calculation of the Applicable Guidelines Sentencing Range

The applicable Guideline for 18 U.S.C. § 922(g)(1) offenses is United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") § 2K2.1. Pursuant to § 2K2.1(c)(1)(A), if the firearm was used in connection with the commission of another offense, U.S.S.G. § 2X1.1 applies. Section 2X1.1 states "[w]hen an attempt, solicitation, or conspiracy is expressly covered by

[1] Whether Defendant actually stated he was going to "fucking kill" Mr. Brown, Gov't Ex. 13 at 10, or "I'm going to fuck you up," Gov't Ex. 9 at 16:59, 17:00, or "somebody is going to get hurt," Def. Ex. 18 at 1, it is clear from the evidence the Defendant expressed an intent to cause serious physical injury at the very least.

another offense guideline section, apply that guideline section." The central dispute of the parties is whether the instant offense involved an assault with intent to commit murder, therefore warranting application of Sentencing Guideline § 2A2.1. Furthermore, even should section 2A2.1 apply, the parties dispute whether the object of the offense would have constituted first degree murder, supporting a base offense level of thirty-three (33), or other attempted murder, resulting in a base offense level of twenty-seven (27). U.S.S.G. § 2A2.1(a).

U.S.S.G. § 2A2.1 defines "first degree murder" as conduct that would constitute first degree murder under 18 U.S.C. § 1111. Pursuant to 18 U.S.C. § 1111, "murder is the unlawful killing of a human being with malice aforethought." The statute defines first degree murder as "murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing." *Id.* "Premeditation can be proved by circumstantial evidence." *United States v. Cespedes*, No. 11-CR-1032, 2015 WL 4597539, at *3 (S.D.N.Y. July 30, 2015) (Engelmayer, J.) (quoting *United States v. Begay*, 673 F.3d 1038, 1043 (9th Cir. 2011)). "Relevant circumstantial evidence includes: '(1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, planning activity; (2) facts about the defendant's prior relationship and conduct with the victim from which motive may be inferred; and (3) facts about the nature of the killing from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.'" *Cespedes*, No. 11-CR-1032, 2015 WL 4597539, at *3 (S.D.N.Y. July 30, 2015) (quoting *United States v. Blue Thunder*, 604 F.2d 550, 553 (8th Cir. 1979)). "Premeditation requires a showing that a defendant acted with 'a cool mind that is capable of reflection,' and 'did, in fact, reflect, at least for a short period of time before his act of killing.'" *United States v. Watson*, 2021 WL 2474430, at *6

(E.D.N.Y. June 16, 2021) (Kuntz, J.) (quoting *United States v. Shaw*, 701 F.2d 367, 393 (5th Cir. 1983), *abrogated on other grounds by Greer v. Miller*, 483 U.S. 756 (1987)). "In contrast to malice aforethought, premeditation requires that 'an appreciable time elapse between formation of the design and the [attempted] fatal act within which there is, in fact, deliberation.'" *Id.* (quoting *United States v. Delaney*, 717 F.3d 553, 556 (7th Cir. 2013); *Fisher v. United States*, 328 U.S. 463, 469 n.3 (1946)). *See also id.* at *6 (finding premeditation where Defendant had driven to the scene from a distance away following a phone call and fired multiple shots at the victim as he drove away).

"Any other murder is murder in the second degree." 18 U.S.C. § 1111. The Second Circuit has explained that "second degree murder's malice aforethought element is satisfied by: (1) intent-to-kill without the added ingredients of premeditation and deliberation; (2) intent-to-do-serious-bodily-injury; [or] (3) depraved-heart." *United States v. Regnier*, 44 F. App'x 524, 528 (2d Cir. 2002) (summary order) (quoting *United States v. Pearson*, 159 F.3d 480, 486 (10th Cir. 1998)).

The Government and Probation argue application of U.S.S.G. § 2A2.1(a)(1) is warranted, resulting in a base offense level of thirty-three (33). *See* Gov't Response at 1; PSR ¶ 15. The Defense argues U.S.S.G. § 2A2.1(a)(1) is not applicable, and the Court should instead apply Guideline § 2K2.1(a)(4)(A), for a base offense level of twenty (20), along with a four-level increase pursuant to Guideline § 2K2.1(b)(6)(B) because the defendant used or possessed the firearm in connection with "another felony offense," namely, reckless endangerment in the first degree in violation of New York Penal Law § 120.20. Def. Objection at 2. The Defense alternatively argues that even if the Court were to find there was an assault with intent to commit murder warranting application of section 2A2.1, section 2A2.1(a)(2) should apply instead of

section 2A2.1(a)(1) because the circumstances of the October 8, 2019 incident do not support a finding of premeditated intent by the Defendant. Def. Issues Ltr. at 4.

The Court finds the Government has proved by a preponderance of the evidence Defendant's actions constitute an attempt to commit first degree murder. The attempt was "so particular and exacting that the defendant must have intentionally [attempted to kill] according to a preconceived design," *Blue Thunder*, 604 F.2d 550 at 553, and the facts indicate Defendant acted with a "cool mind." *See Shaw*, 701 F.2d 367 at 393. Although the Defendant attempts to blame his prescribed medication at the time, with side effects including rage, emotional outbursts, psychotic symptoms, irritability, and aggressive behavior, Def. Ex. 14, the Court is not persuaded. There was an "appreciable time" between "formation of the design and the [attempted] fatal act within which there [was], in fact, deliberation." *Delaney*, 717 F.3d 553 at 556 (quotations omitted). The record demonstrates Defendant acted in a fit of rage and with a "cool mind." Defendant became angry and heated during the traffic incident. His anger was further inflamed when he yelled at the other drivers. Demonstrating his cool, calculated actions and intent, the Defendant then discharged the woman and child from his car, followed the van, drove up to the side of the van, and deliberately discharged his gun at the driver's head. The entire encounter lasted long enough for the Defendant to engage in calm reflection, to deliberate and to step back from his premeditated attempt to murder his victim. He failed to do so.

Upon careful review of the evidence, the Court finds the Government has met its burden of proving by a preponderance: this Defendant acted with an intent to kill Mr. Brown sufficient to support an attempt to commit first degree murder. The Defense argues a single shot cannot support a finding of intent to kill. Def. Post Hr'g Brief at 6, ECF No. 1066, Case No. 15-CR-287-20. In support, the Defense postulates a single discharge could have been "a warning shot

that went astray or another unintended result comparable to those that happen even when trained officers draw weapons." *Id*. The Court disagrees. Defendant fired a dangerous and deadly weapon at the head of another person, from relatively close range, as his car was pulled alongside the driver's side of the van. The bullet struck a metal plate affixed to the van just behind Mr. Brown's head, narrowly protecting him from what could have been a deadly head shot. This occurred after Defendant had threatened to kill or to "fuck up" Mr. Brown, and his actions in shooting a deadly weapon at Mr. Brown's head immediately thereafter support a finding of an attempt to commit first degree murder. These charges, which the Government has proved by a preponderance, are serious.[2] Therefore, the Court will apply Guideline § 2A2.1(a)(1) in calculating a base offense level of thirty-three (33).

CONCLUSION

For the foregoing reasons, the Court DENIES the Defendant's objection to the PSR. Aaron Burr killed Alexander Hamilton with one deadly shot; John Wilkes Booth killed Abraham Lincoln with one deadly shot; James Earl Ray killed Rev. Dr. Martin Luther King, Jr. with one deadly shot. Counsel for Cordero Passley asks this Court to establish a new rule of attempted murder: requiring more than one attempted deadly shot. History says otherwise. The law says otherwise. This Court rules otherwise.

SO ORDERED.

s/ WFK

HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: June 9, 2022
Brooklyn, New York

[2] Indeed, an attempted murder charge has been brought in federal court *absent* the firing of a single shot in *United States of America v. Nicholas John Roske*, a case involving an individual alleged to have planned to murder Justice Brett Kavanaugh. *See* Complaint at ECF No. 1, 22-MJ-1848-TJS (D.Md. June 8, 2022).