

No. \_\_\_\_\_

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**MIKE DUFFY, III**

*Petitioner,*

v.

**UNITED STATES OF AMERICA**

*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI**

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DATE SENT VIA United States Postal Service: February 17, 2026

## QUESTIONS PRESENTED

1. Did the district court's misapplication of *Rosemond v. United States*, 572 U.S. 65 (2014) in denying Petitioner's Rule 29 Motion For Judgment of Acquittal – endorsed by the Ninth Circuit Court of Appeals – represent such a departure from the usual course of judicial proceedings as to call for the Supreme Court's supervisory power?
2. Were the district court's actions during the run up to, and during, jury deliberations – endorsed by the Ninth Circuit Court of Appeals through its denial of Petitioner's Rule 33 Motion For New Trial – so coercive in their effect on the jury's deliberations as to deprive Petitioner of his constitutional rights to due process and a fair trial, and, moreover, represent such a departure from the usual course of judicial proceedings as to call for the Supreme Court's supervisory power?

## PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

The Petitioner, Mike Duffy, III (“Duffy”), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with petitioner’s positions asserted herein.

OPINIONS BELOW

The Court of Appeals denied relief in its Memorandum Decision dated November 20, 2025 (Appendix B). The district court’s Order denying Duffy’s Motion For New Trial can be found at *United States v. Duffy*, CR 22-08057-PCT-DGC, 2023 WL8076301 (D. Ariz. Nov. 23, 2023).

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit denying relief was entered on November 20, 2025. That Court had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

**STATUTORY PROVISIONS**

**Principals (18 U.S.C. § 2)**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

**Assaults Within Maritime and Territorial Jurisdiction  
(18 U.S.C. § 113 (a)(3))**

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

. . .

(3) Assault with a dangerous weapon, with intent to do bodily harm, by a fine under this title or imprisonment for not more than ten years, or both.

**Unlawful Acts (18 U.S.C. § 922 (g)(1))**

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

. . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

**Penalties (18 U.S.C. § 924 (a)(2))**

. . .

(2) Whoever knowingly violates subsection (a)(6), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

**Penalties (18 U.S.C. § 924 (c)(1)(A)(iii))**

. . .

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

. . .

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

**Offenses Committed Within Indian Country ((18 U.S.C. § 1153)**

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other

persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

## COURT RULES

### **Rule 29. Motion for a Judgment of Acquittal**

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter

an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

### CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the

land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

### **STATEMENT OF THE CASE**

On June 21, 2022, an Indictment was filed in the United States District Court, District of Arizona, charging Duffy with two counts of Assault with a Dangerous Weapon and Aid and Abet, (Counts One and Two), in violation of 18 U.S.C. §§1153, 113(a)(3) and 2, one count of Discharge of a Firearm During a Crime of Violence and Aid and Abet (Count 3), in violation of 18 U.S.C. § 924(c)(1)(A)(iii) and 2, and one count of Felon in Possession of a Firearm (Count 4), in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), together with a forfeiture allegation. (8-ER-1507-1510)<sup>1</sup>

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<sup>1</sup> The abbreviation “ER” refers to the Excerpts of the District Court Record filed by Duffy with the Ninth Circuit Court of Appeals, and will be preceded

As to Counts 1 and 2, Assault With A Dangerous Weapon, the government alleged that on or about February 3, 2021, the defendants, Mike Duffy, III and Ryan Adelbert Johnson (“Johnson”), intentionally and knowingly assaulted T.P. and F.D., respectively, and/or aided and abetted each other in assaulting T.P. and F.D., respectively, with a dangerous weapon, that is, an Anderson Manufacturing Rifle, Model AM-15, with the intent to do bodily harm.

As to Count 3, Discharging A Firearm During And In Relation To A Crime Of Violence, And In Furtherance Of A Crime of Violence, the government alleged on or about February 3, 2021, the defendants, Mike Duffy, III and Johnson, knowingly used, carried, brandished, and discharged a firearm during and in relation to a “crime of violence”<sup>2</sup>, and knowingly possessed, brandished, and discharged a firearm in furtherance of a “crime of violence”, that is Assault With A Dangerous Weapon, and/or aided and abetted each other in doing so, as alleged in Counts 1 and 2 of the Indictment.

As to Count 4, Felon In Possession Of A Firearm, the government alleged that on or about February 3, 2021, Duffy possessed, in and affecting interstate commerce, a firearm, that is, an Anderson Manufacturing rifle, Model AM-15. He knowingly possessed the firearm and ammunition, knowing that he had been convicted of a crime punishable by a term of imprisonment exceeding one year.

The government alleged that the aforementioned crimes happened in the

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by the volume number, and followed by the relevant page number referenced in Duffy’s Excerpts of the Record.

<sup>2</sup> As defined in 18 U.S.C. § 924(c)(3)(A)

District of Arizona, within the confines of the Hopi Indian Reservation, Indian Country, and that the defendants were both Indians at the time of the crimes.

### **CASE HISTORY**

This case went to trial on September 25, 2023. After the parties selected a jury, the district court gave the jury preliminary instructions, and the parties made their opening statements.

The government then called T.P. as a witness. T.P. was one of the alleged victims, and an officer with Hopi Law Enforcement Services (“HLES”), serving the Hopi Indian Reservation in northern Arizona. (7-ER-1304)

T.P. testified that on February 3, 2021, he was on patrol with F.D. (the other alleged victim). F.D. was in police training as a “ride along”, and did not have a duty weapon. The officers were patrolling the reservation in a Ford Expedition patrol vehicle near Polacca, Arizona. T.P. was driving, and F.D. was sitting in the front passenger seat of the patrol vehicle. (7-ER-1392-1397)

At about 4:00 p.m., while the officers were traveling westbound on State Highway 264, a dark GMC pick-up truck suddenly drove through a stop sign and onto Highway 264 from a side road, causing T.P. to make a hard left turn to avoid colliding with the truck. T.P. turned his patrol vehicle around, turned on the patrol car’s emergency lights and siren, and took chase of the truck eastbound on Highway 264. (7-ER-1397-1398) T.P. could not see into the cab of the truck because its rear window was tinted. (7-ER-1399) Instead of yielding

to the patrol vehicle, the truck exited Highway 264 onto a side road and drove around to the rear of a nearby residence. T.P. drove the patrol vehicle around the other side of the residence hoping to cut off the truck. The two vehicles abruptly stopped, facing each other. T.P. exited his patrol car, removed his service weapon, approached the truck on foot, and issued commands to the driver. (7-ER-1401-1404)

As he got closer to the truck, T.P. could make out three people inside the cab of the truck. The truck then accelerated backward, with T.P. briefly chasing the truck on foot, turned around and departed the residence, heading back toward the highway. (7-ER-1401-1404-1405) T.P. returned to the highway, spotted the truck traveling westbound on Highway 264, and, again, took chase. (7-ER-1405) Shortly thereafter, T.P. noticed the truck had exited Highway 264 southbound onto a dirt road. T.P. followed the truck onto the dirt road which eventually looped back to Highway 264, where the chase resumed eastbound on Highway 264. (6-ER-1000-1002) The truck then slowed (*but did not stop*) to turn southbound off of Highway 264 onto another dirt road (BIA Route 16). (6-ER-1003) As T.P. slowed his patrol vehicle and began his exit off Highway 264 behind the truck, he heard several shots ring out from the truck. (6-ER-1003-1004) The second shot from the truck shattered the back window of the truck cab. At that point, *T.P. could see the barrel of a firearm extending out through the rear window of the truck cab.* (7-ER-1411-1412) T.P. also saw a red beam of light coming from the gun. (7-ER-1411-1412) T.P. heard five or six gunshots. A

bullet went through the windshield of the police vehicle above the steering wheel, past T.P.'s head, and penetrated the front seat belt and the plastic cage in the back seat, and possibly exited through the rear driver's side panel window of the patrol vehicle. (7-ER-1411-1413) T.P. brought his vehicle to a stop, took cover within his vehicle, and reported shots fired to dispatch. (7-ER-1413) T.P. then exited his vehicle to take cover behind the patrol vehicle, as it continued to slowly roll forward, southbound off of Highway 264, onto the dirt road, and toward the retreating truck, as he had not put it in park. (6-ER-1004) With his sidearm, he fired four shots at the truck. (7-ER-1413) T.P. then grabbed his rifle, reentered his vehicle, handed his sidearm to F.D. and pursued the truck with the rifle between his legs. (7-ER-1414-1415) T.P. then noticed his hand and left arm had been hit by debris from the round that went through the windshield, and that he was bleeding. (7-ER-1415)

T.P. continued his pursuit of the truck briefly as it traveled southbound past a nearby church. He then broke off the chase, and returned to the highway to direct traffic away from the area. He was then dispatched to the nearby church where he received medical attention. (7-ER-1416)

T.P. did not know who was shooting the gun from within the suspect truck, *but did see the barrel of a rifle protruding through the shattered back window, and believed the shooter was in the back passenger seat of the cab.* (6-ER-992) He did not see the magazine of the rifle, but did see the rifle pointing out the back of the cab. (6-ER-1014) (7-ER-1412, 1428)

T.P. testified that the driver of the truck appeared to be fleeing from the patrol vehicle *during the entire episode*. (7-ER-1427-1429)

The government next called F.D., another officer with the HLES. F.D. was the second of the two alleged victims.

F.D. testified that he started working for the HLES about two weeks before the February 3, 2021 shootings. F.D.'s testimony regarding the vehicle chase was similar to that of T.P. (6-ER-265-266, 271-280) However, during the pursuit of the suspect truck on Highway 264, he was able to make out three people in the cab of the truck – two in the front, and one in the back of the cab. The silhouette of the person in the back of the cab was that of a smaller person. (6-ER-1034, 1055)

While fleeing the patrol vehicle eastbound on Highway 264, the suspect truck slowed down near the junction of Highway 264 and BIA Route 16 to turn southward onto BIA Route 16. (6-ER-1035-1036) As the truck turned onto BIA Route 16, gunshots rang out from the truck, striking the trailing patrol vehicle. While the truck was still moving forward on BIA Route 16, more shots were fired from the truck. (6-ER-1036, 1041, 1044) The patrol vehicle stopped, and T.P. exited the vehicle to take cover behind it. F.D. attempted to exit the patrol vehicle, but his seatbelt would not release. (6-ER-1041) T.P. reentered the patrol vehicle and maneuvered it to the right to provide cover for F.D. and handed F.D. his service weapon. (6-ER-1044) F.D. then freed himself from his seatbelt. (6-ER-1048) T.P. grabbed a rifle from his patrol vehicle, and both

officers exited the vehicle briefly to take cover. The truck continued driving away from the officers on the dirt road. The officers reentered their patrol vehicle intending to resume pursuit of the truck. (6-ER-1048-1049) However, F.D. noticed that T.P. was bleeding, and called dispatch for an ambulance. The two officers then drove to a nearby church where medical personnel were waiting. (6-ER-1049)

When the shooting started, F.D. noticed a small hole in the back window of the truck cab which continued to get bigger as more shots were fired until the whole rear window was blown out. (6-ER-1041-1042, 1044) At that point, F.D. could only see two people in the cab of the truck. F.D. could also see the barrel of a rifle along with a red beam of light emanating from the rifle. (6-ER-1045-1047)

When the shooting stopped, F.D. *saw the rifle go inside the vehicle*, and as the shooter turned the rifle toward the front of the truck, he could see the magazine because the window of the truck was fully blown out.<sup>3</sup> (6-ER-1045-1046) F.D.'s view of the shooter was blocked by the front passenger seat.<sup>4</sup> (6-ER-1046) F.D. later admitted that he omitted from his official incident report any mention of the shooter being blocked by the front passenger seat. (6-ER-1064-1065) F.D. stated the person who was behind the rifle had "little bumps"

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<sup>3</sup> All of this being consistent with a back-seat shooter repositioning the rifle in the back seat while the front passenger turned his head to the rear of the cab to see what was happening.

<sup>4</sup> It should be noted that there were headrests on both sides of the rear bench seat of the truck cab behind which the rear passenger could have ducked. (3-ER-413, 419, 424, 426)

on the side of his/her head. F.D. stated the other occupants did not have bumps on the sides of their heads. (6-ER-1047-1048, 1069-1070)

F.D. confirmed there were three people in the vehicle, and the person in the back seat was in the back middle. F.D. testified he did not know if the shooter was male or female. *F.D. was not certain about where the shooter was seated in the vehicle. F.D. did not notice whether the shooter wore a hat or bandana.* (6-ER-1072)

This, and other evidence presented at trial conclusively established that during the entire chase, Duffy was the driver of the suspect vehicle, codefendant, Johnson, was in the front passenger seat, and a third person, Nanabah Hoyungowa (“Hoyungowa”), was seated in the rear section of the truck cab. One witness observed Hoyungowa smiling at him as the suspect vehicle passed his location, suggesting she was not under any duress in the vehicle.

It was also conclusively established that someone in the suspect vehicle, other than Duffy, fired a gun at the victim-officers. None of the three occupants of the suspect vehicle confessed to shooting at the officers.

It was also conclusively established that the suspect vehicle came to rest in a wash not long after the police broke off their chase, and that Duffy and Hoyungowa fled on foot in one direction with the rifle, and Johnson fled in the opposite direction. The rifle was found partially hidden under some dirt 150 yards, or so, from the suspect vehicle, and was likely the gun used in the assault. Duffy and Hoyungowa were arrested after returning on foot to the suspect

vehicle. Johnson was arrested at a nearby residence.

The government also conclusively established the jurisdictional elements of the charges.

Elizabeth Talley (“Talley”), forensic examiner in the DNA Casework Unit at the FBI laboratory in Quantico, Virginia testified for the government as a witness. (5-ER-754, 876)

Talley did DNA testing on the aforementioned rifle. The swab of the textured areas of the rifle captured DNA. The DNA profiles contained male DNA, and originated from four people. Both Johnson and Duffy were included as possible contributors. Hoyungowa was excluded as a possible contributor of the DNA found on the rifle. (5-ER-881-883)

Talley was unable to say how the DNA got on any of the tested items (e.g., whether it was the product of direct/primary or indirect/secondary transfer). Talley explained there can be “contamination” of recovered evidence through the inadvertent addition of DNA to an item caused by the mishandling of the item, or the handling of items without gloves. (5-ER-897) Talley had no knowledge of what happened with the tested items before they got to the laboratory (for example, if a seized bandana worn by one of the suspects was placed with a rifle). (5-ER-898) *The DNA tests did not allow Talley to conclusively state who handled or fired the weapon.* (5-ER-902) *Talley acknowledged that some of the DNA deposited on the rifle might have rubbed off of it when it was buried.* (5-ER-906-907)

The government called Benjamin Excell, a Special Agent with the Federal Bureau of Alcohol, Tobacco and Firearms as a witness. (5-ER-944) He testified that the suspect rifle collected in the instant case was a “firearm” with a barrel length of 17.8 inches, an overall length of 32.68 inches with the rifle stock fully collapsed, and an overall length of 35.8 inches with the rifle stock fully extended. The rifle was manufactured in Hebron, Kentucky. (5-ER-948-954)

Amber Lytton, Special Agent with the FBI, testified. (5-ER-956) She described her use of a Faro Scanner to measure the interior of the suspect truck in this case. She then sent the data to Erin Casey, at the FBI laboratory for further analysis. (5-ER-958-962)

Erin Casey (“Casey”), a visual information specialist with the FBI, testified. (4-ER-487) She diagramed various measurements of the suspect truck from the data obtained from the Faro Scanner, creating two and three-dimensional images of the interior cab of the truck, with readable measurements. (4-ER-491-503) *Casey had no knowledge of whether the front seats of the truck were moved between the time of the shootings and the time of the measurements by the Faro Scanner.* (4-ER-508)

From this evidence the government argued that Hoyungowa could not have been the shooter, as there was not enough room in the back area of the truck cab to hold and aim the recovered rifle.

Jennifer Mulhollen (“Mulhollen”), Special Agent with the FBI, testified for the government. (4-ER-509) Mulhollen collected fingerprint and DNA evidence, but not the clothing, of the suspects. (4-ER-539-545) She confirmed that no gunshot residue testing was done on any of the three suspects. (4-ER-565-566) No fingerprints were lifted from the steering wheel, door handles, or the smooth surfaces of the truck. Mulhollen was unable to lift a fingerprint from the trigger of the gun, and did not attempt to lift any fingerprints from the gun magazine. (4-ER-567-569)

The prosecutor then had Mulhollen present to the jury the partial transcripts of two jail calls Duffy made while in custody awaiting trial. Mulhollen read Duffy’s statements while the prosecutor read the other caller’s statements. That presentation unfolded, in pertinent part, as follows:

BY MS. KENNEDY:

. . .

Q. All right. Now I would like to direct your attention to page 11 and I would like you to read starting at line five and we'll continue through line 23 and end at the end of that sentence on line 23.

A. "They did. They asked me who did it, but I -- I told them that I -- I didn't know. I said, 'I don't remember. I was driving. *I just heard gunshots. I thought they were firing at me.* So that's why I took off.'

Q. "Oh.

A. "*That's why I drove -- I mean, that's why I went off the road and drove into the bushes and tried to get away from them. But, I mean, I just did*

*that because I knew that there was a rifle in the vehicle but --*

Q. "Uh-huh.

A. "Yeah, but I -- but I guess right after that happened, I ran off me. Me and Nanabah ran off. And then we -- we like hid out for like maybe an like an hour. And then I told her and I said we -- we should just go back. Let's just go back, you know. So we turned around. And I started walking back towards where the truck was. And that's when the officers seen me --"

Q. I would like to now direct your attention to Exhibit 208, page 15, and I would like us to start reading at line two and go through line nine. "They said there was some shootings from that truck.

A. "Yeah, yeah.

Q. "That's what they said.

A. "The firing came out of the truck, yeah. That's what they were -- that's what they were asking me about. And I told them, I said, *I don't know -- I don't know.*"

. . .

Q. Okay. And stop right there. Directing your attention, you're still on page eight, starting at line 24 and 25, and then we'll continue on to page nine, lines one through six. And I would like you to stop when we get to page nine at the end of that sentence. So let me move down. Okay. So starting on page eight, this is still Exhibit 209, if you could start reading on line 24.

A. "So I went to another spot -- another house. And then I was coming down the hill and my brakes on my truck are not real good. So I was

trying to brake. And I kind of drove out a little bit past the stop sign. And there was -- just then there was a police officer pulling in. So he slowed down and went around me. And then he lit me up. And we all -- *and we had all the stuff in the car, so I -- you know, I dipped out, you know.*"

Q. All right. Thank you. Stop right there. All right. And we're going to move down. We're on page nine and I would like you to read lines eight through ten but stop as soon as that sentence finishes on line 10.

A. Page nine, starting at line eight?

Q. That's correct.

A. "*And then I'm driving, driving. And then I just hear gunshots, man.* And, anyway, that's kind of like how it went down."

. . .

Q. All right. Finally, did you learn of a call on March 16, 2021, between Mike Duffy and a woman named Anna?

A. Yes, I did.

Q. All right. I'm going to show you Exhibit 210. Is Exhibit 210 a phone call of March 16, 2021, between Mike Duffy an woman named Anna?

A. It is.

Q. I'm going to direct your attention to page six and I would like you to read for Mr. Duffy and I will read for Anna. And this is going to continue a little bit onto the next page so I'm going to scroll down just a little bit and if I could have you read the sentence that begins with "but" on line 21 and read through line 25.

A. "But when I was coming down the hill and I went over the stop sign like two feet and, here, there was a police turning in. And he turned his

lights on and got behind me. *And, like an idiot, I took off. And he chased me.*"

Q. And then continuing on to page seven and Ms. Anna starts speaking, "You're a jerk. How come you didn't just stop?"

And if you can read line three through line six.

A. Could you scroll down just a bit?

Q. Oh, yes.

A. *"I don't know. I was stupid. I panicked, you know. And I took off and, yeah, so stuff happened. I can't really talk about it over the phone but I mean --"*

Q. Okay. Thank you.

(4-ER-552-559) (emphasis added)

The government next called Timothy Hornbeck ("Hornbeck"), Special Agent with the FBI as a witness. (4-ER-577) The prosecutor had Hornbeck read to the jury partial transcripts of a phone call Johnson made while in custody awaiting trial. Hornbeck's testimony in that regard included the following:

BY MS. REID-MOORE:

Q. And I'm going to direct you to page six of this Exhibit 213 and if you can go to line two through seven on that exhibit. Can you read from that exhibit, which is Ryan Johnson, on the phone call. Can you read those lines?

A. Yes. "You know, like -- like I ain't down with that shit, man. *You know, I wasn't the one fucking firing the weapon. I wasn't the one driving. I wasn't --* fuck that, dude. I tried getting out of the car. I couldn't even open up the fucking door. The

door was fucking -- you can't even open up that passenger side door."

. . .

Hornbeck was asked to read more of Johnson's statements, while the prosecutor read the other caller's statements:

BY MS. REID-MOORE:

Q. So, again, you'll start at line 24, Special Agent Hornbeck. I will be the unidentified speaker and we'll end at line 11 on the next page.

A. Okay. "*Even -- even more so, dude, they'll find my prints in the front of the truck. They're saying it was coming from the back of the truck. Of course, it was. You know what I mean? And I keep telling them, man, like, I wasn't sitting in the back, man. Like, I wasn't the motherfucker holding that weapon, you know. And, plus, it was found fucking way the fuck from where the hell I was. You know what I mean? Like my -- my prints are running east. The gun was found in the north. You know what I mean?*"

Q. "Yeah.

A. "Yeah. So, you know, I'm going in an entirely different direction from where they fucking found that weapon at."

. . .

(4-ER-596-597) (emphasis added)

The government then paused its case, pending the arrival of its final witness. To save time, the court allowed Duffy to call his first witness out of turn. Duffy called Weaver Barkman ("Barkman"), a crime scene expert, as a witness. (4-ER-617)

Duffy elicited testimony from Barkman regarding his credentials, and the scope of his review of the evidence gathered in the case. The district court, having learned that the government would not be calling its last witness, and would be resting, paused Barkman's testimony, and allowed the Defendants to move for an acquittal under Rule 29, Fed.R.Crim.Proc. The Defendants so moved. (4-ER-630-633) The judge deferred argument so as not to keep the jury waiting, and took the matter under advisement. (4-ER-633) Barkman then resumed testifying.

Barkman testified he personally examined the suspect truck and took measurements of the interior of the truck cab. He also reviewed the voluminous crime scene evidence gathered by the government. He opined that it would have been *impossible* for the person in the driver's seat of the truck to have fired the suspect rifle. (4-ER-627, 634-636) He further opined it would have been extremely difficult, but not impossible, for the individual in the passenger front seat of the truck to have fired the weapon out of the back window with the barrel extended outside the cab. (4-ER-637-642) Moreover, the gun would have been hard to hold with one hand. (4-ER-642) *He opined, to a near certainty, that based on the totality of the evidence, the person in the back seat fired the weapon out of the back window.* (4-ER-637) Barkman challenged the government's theory that the shooter had to have been in the front seat given the dimensions of the truck cab. He noted that because it is not known whether the rear cab window was defective, the window could have

been shot out or broken physically with the gun barrel from the back seat. (4-ER-643, 646-648) Barkman found the testimony that gunshots were heard before the window was shattered dubious. (4-ER-669)

The defense rested after this testimony. (4-ER-675, 684)

The judge then invited argument on the Defendants' earlier motions for acquittal. (4-ER-677)

Duffy argued that there was insufficient evidence for the jury to determine who the shooter was, or who may have aided and abetted the shooter. Merely fleeing from the police would not constitute aiding and abetting the shooter, and there was no evidence that anyone in the truck encouraged or aided the shooter. (4-ER-678-679)

The government opposed Duffy's Rule 29 motion, arguing, among other things, that Duffy slowed the truck to allow Johnson to shoot at the police, and continued to drive thereafter. The government further argued that once the predicate crime had commenced, a confederate had to do more than simply remain neutral. Rather, he immediately had to extricate himself entirely from the scene or situation, and any action thereafter that might assist the perpetrator would necessarily make the confederate an aider and abettor, citing *Rosemond v. United States*, 572 U.S. 65 (2014); *Steiner v. United States*, 940 F.3d 1282 (11th Cir. 2019); *United States v. Lawson*, 810 F.3d 1032 (7th Cir. 2016); and *United States v. Cervantes*, 2016 WL 6599515 (N.D. of Cal.) Duffy, according to the government, knew he had a gun in the truck, led the police on a

chase, and slowed the truck so Johnson could more easily shoot at the officers with the gun. (2-ER-279-285)

At 6:56 p.m. on the last scheduled day of the trial, the jury returned a unanimous guilty verdict against Duffy on Counts 1, 2 and 3. (2-ER-317-318) As to Count 3, the jury made a specific finding that Duffy carried a firearm during and in relation to the crime of violence, and that he possessed a firearm in furtherance of a crime of violence. They declined to find that he used, brandished or discharged a firearm in furtherance of the crime of violence. The jury found that co-defendant Johnson used, carried, brandished and discharged a firearm in furtherance of the crime of violence. (2-ER-206-208) The judge then dismissed the jury without ruling on Duffy's Rule 29 motion, and scheduled sentencing for January 3, 2024. (2-ER-320)

On September 30, 2023, by text-only minute entry, the district court declared a mistrial as to Counts 4 and 5, citing manifest necessity and the ends of public justice as grounds. (8-ER-1531-1532) (Doc. 127)

On September 30, 2023, the district court, by text-only minute entry (Doc. 128), granted the parties' leave to present additional arguments on the defendants' respective Rule 29 motions. (8-ER-1532) (Doc. 128)

On October 6, 2023, the government filed a memorandum opposing Duffy's Rule 29 motion. (2-ER-196-205) On October 13, 2023, Duffy and Johnson filed a joint motion for a new trial pursuant to Rule 33, Fed.R.Crim.Proc., arguing that the jury was unduly pressured to reach a verdict

by the end of day five of the trial. (2-ER-191-195)

On November 9, 2023, the government filed a memorandum opposing the Defendants' Rule 33 motion. (2-ER-179-190)

On October 10, 2023, the district court, by text only minute entry (Doc. 146), denied Duffy's Rule 29 motion, stating "for all the reasons stated in the government's memorandum, the Court concludes that a rational trier of fact could have found Defendants guilty beyond a reasonable doubt of the crimes charged in Counts 1 - 3. Defendant's Rule 29 motion is therefore denied." (8-ER-1534) (Doc. 146)

On October 17, 2023, the district court scheduled the trial on Counts 4 and 5 to start on February 12, 2024.

On November 14, 2023, the defendants filed a joint reply to the government's response to their Rule 33 motion. (2-ER-175-178)

On November 21, 2023, the district court, in a written order, denied the Defendants' Rule 33 motion. (2-ER-86-92)

On December 7, 2023, Duffy pled guilty to Count 4 of the Indictment pursuant to a written plea agreement, and a new (global) sentencing date was set to address Counts 1 – 4. The trial date for Count 4 was vacated. (8-ER-1537)

On January 29, 2024, the district court issued an order alerting the parties to a call received by the trial judge's Judicial Assistant by one of the jurors in the case. The juror suggested that one or more of the jurors had been influenced to make a quick decision during deliberations because he/she/they

wished to go home for the weekend. The caller asked whether such a fact could be taken into account at sentencing. In the order, the judge posited that, pursuant to Rule 606(b)(1), Fed.R.Evid., he could not consider such evidence of possible juror misconduct, and invited comments from the parties. (1-ER-82-85) The government filed a memorandum arguing the caller's communication should not be considered by the Court. (2-ER-172-174) Defendant Johnson filed a memorandum, joined by Duffy, arguing that the juror's comments supported their joint Rule 33 motion by reinforcing the notion that the pretrial jury screening process, statements by the trial judge to the jurors during the trial, and the jurors' travel, employment and other concerns, worked to impose a *de facto* time limit on their deliberations. Duffy requested a hearing to determine whether external factors contributed to an unduly rushed verdict. (2-ER-164-171)

On February 16, 2024, the district court issued an order affirming its January 29, 2024 position that it could not consider the caller's allegations of juror misconduct, and again denied defendants' request for a new trial. (1-ER-75-81)

On June 12, 2024, Duffy pled guilty (again) to Count 4 of the Indictment pursuant to a *revised* plea agreement. In the agreement, the parties stipulated that the prison sentence for Count 4 would be capped at the greater of the prison sentences for Counts 1 and 2, and would run concurrently with Counts 1 and 2. Moreover, another case against Duffy that was pending in the district court

would be dismissed, and the government would recommend that Duffy receive credit for time served in Hopi Tribal custody for charges arising out of the same conduct as in the instant case. There would also be a reduction in Duffy's Guidelines Offense Level for acceptance of responsibility. The plea agreement contained an appeal waiver, but only as to Count 4. (2-ER-150-160) The district court accepted Duffy's guilty plea and plea agreement, and sentenced him that same day. (1-ER-7-71)

On June 12, 2024, the district court imposed a 101-month prison sentence on Counts 1, 2 and 4, all to run concurrently, and the mandatory five-year prison sentence on Count 3 to run consecutively with the sentences on Counts 1, 2 and 4. The court also imposed a consecutive three-year term of supervised release on each count of conviction, and a \$400.00 special assessment. (1-ER-50, 66-68) (Appendix A, hereto)

Duffy appealed the convictions and sentences on Counts 1, 2 and 3 of the indictment to the Ninth Circuit Court of Appeals, presenting the following claims:

- 1) The district court erred in denying Defendant-Appellant's Rule 29 motion, thereby violating his Fifth Amendment right to due process;
  - 2) The district court erred in signaling to the jury that he believed an assault by one or both of the defendants had, in fact, occurred, thereby violating Defendant-Appellant's Fifth Amendment right to due process;
- and

3) The district court erred in denying Defendant-Appellant's Rule 33 motion for a new trial, thereby violating his rights under the Fifth and Sixth Amendments to due process and a fair trial by jury, respectively.

In a Memorandum Decision dated November 20, 2025, the Court of Appeals denied relief. (Appendix B, hereto)

### REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals' decisions in this case have so far departed from the accepted and usual course of judicial proceedings, or have permitted such a departure by a lower court, as to call for the Supreme Court's supervisory power. Specifically, the district court's misapplication of *Rosemond v. United States*, 572 U.S. 65 (2014), in denying Duffy's Rule 29 Motion For Judgement of Acquittal, endorsed by the Ninth Circuit Court of Appeals through its denial of relief from that claimed error constituted a clear violation of Duffy's procedural right to an acquittal, and his Fifth Amendment right to due process. Moreover, the district court's actions on the run up to, and during, jury deliberations, endorsed by the Ninth Circuit Court of Appeals through its denial of Duffy's Rule 33 Motion For New Trial, worked to impose a *de facto* deadline for the jury to reach a verdict, and, thus, constituted clear violations of Duffy's Fifth and Sixth Amendment rights to due process and a fair trial by jury, respectively.

## ARGUMENT

### **Rule 29 Motion**

In denying relief on the Rule 29 issue, the Panel, citing *Rosemond v. United States*, 572 U.S. 65, 78 n.9 (2014) (“[If] a defendant continues to participate in a crime after a gun was displayed, or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that he had [advance] knowledge.”), suggested that even though Duffy was not the shooter, and no clear evidence was presented at trial that Duffy intended to assist in the assault of the two officers<sup>5</sup>, he had a legal obligation to somehow withdraw from the sudden and brief assault on the officers – the same position taken by the district court when it adopted, wholesale, the government’s response to Duffy’s Rule 29 motion. (Doc. 145)

In its appeal brief, the government conceded that Duffy was the driver of the suspect vehicle, and someone other than Duffy was the shooter. (Gov.

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<sup>5</sup> In its Memorandum Decision, the Panel alluded to evidence that Duffy slowed his vehicle moments before the shooting started, and took off from the scene only after more shots were fired to support its determination that a rational juror could have concluded beyond a reasonable doubt Duffy’s intent to aid and abet the assailant, and that Duffy had a duty under *Rosemond*, to withdraw from the situation once the assailant demonstrated his/her intent to use a gun to assault the officers. However, Duffy had to slow his vehicle to exit Highway 264, the shooting did not begin until *after* Duffy had turned onto BIA Route 16 (6-ER-1003, 104, 1041), and neither eyewitness testified that the suspect truck stopped during the shooting (6-ER-1003) or “took off” after the shooting started. Rather, they both said, in so many words, that the suspect truck slowed as it approached and turned onto BIA Route 16, and continued moving away from them as shots were fired from the suspect vehicle. (6-ER-1041) (7-ER-1413)

Br. pp. 16-18.)<sup>6</sup> The government further conceded that for Duffy to be guilty of aiding and abetting the shooter, Duffy had to have had the *mens rea* of *knowingly* and *intentionally* aiding and abetting the shooter, citing *United States v. Dinkane*, 17 F.3d 1192, 1197 (9th Cir. 1994). (Gov. Br. p. 17) The government conceded that the mere presence of Duffy at the scene of the crime would be insufficient to support a conviction for aiding and abetting, citing *United States v. Andrews*, 75 F.3d 552, 555 (9th Cir. 1996). (Gov. Br. p. 17-18, 22) Yet, the *only* evidence produced at trial that the government could point to, to support its aiding and abetting theory was the slowing of the truck Duffy was driving just before the shooting started. There was no evidence produced at trial that the pre-shooting flight from the police by Duffy aided in the assault itself. Moreover, the district court correctly advised the jury that any actions by Duffy after the shooting stopped could not be considered as evidence of aiding and abetting the assault.<sup>7</sup> Even if Duffy's flight from the police somehow made it easier for the shooter to shoot at the police vehicle, that fact, alone, would not have constituted aiding and abetting, absent Duffy's specific intent to aid and abet the shooter through his (Duffy's) act in fleeing.<sup>8</sup>

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<sup>6</sup> Moreover, the jury made specific findings that Duffy did not use, brandish or discharge a firearm in the furtherance of the assault, and that Johnson did. (2-ER-320)

<sup>7</sup> See Judge's instruction to the jury in that regard at 2-ER-204, 303, 307.

<sup>8</sup> Aiding and abetting is a specific intent offense. *United States v. Lopez*, 484 F.3d 1186, 1199 (9th Cir. 2007).

Thus, the government's *entire* case against Duffy on Counts 1, 2 and 3 was based on Duffy slowing the truck as he approached and turned off of Highway 264 onto a small dirt side road (BIA Route 16) that sloped downward away from the highway – a maneuver absolutely necessary for a controlled exit from the highway.

However, *Rosemond* does not stand for the proposition advanced by the government in its memorandum, and adopted by both the district court and the appellate Panel.

The Supreme Court, in *Rosemond*, considered what the government must show when it accuses a defendant of aiding and abetting an offense under 18 U.S.C. § 924(c) (using or carrying a firearm during and in relation to any crime of violence or drug trafficking crime). In *Rosemond*, the defendant conceded his involvement in the underlying drug trafficking crime, but denied that he, himself, used a gun in its commission, or that he had anything to do with the gun that his accomplice used in the underlying crime. There, the Court held that the government could make its case by proving that the defendant actively participated in the underlying drug trafficking crime with advance knowledge that a confederate would use or carry a gun during the crime's commission. *Id.* at 67.

In the instant case, Duffy did not argue that he should have been acquitted on the § 924(c) charge (Count 3) because he didn't know a gun would be used in an assault he intentionally participated in against another

person. Rather, he argued that he did not aid and abet the shooter in the predicate assault, and, hence, could not be convicted on Counts 1, 2 *or* 3. The fact that Duffy knew that a gun was in the truck prior to the shooting, or even that he himself placed the gun there, was irrelevant to the question of Duffy's guilt, absent evidence of Duffy's intent to aid in the assault.

*Rosemond* did discuss how the defendant might have avoided culpability under the aiding and abetting statute, i.e., by withdrawing or extricating himself from the *jointly planned* illicit drug sale, but it was in the context of the 18 U.S.C. § 924(c) charge, rather than its predicate. *The predicate offense was conceded there.* In that specific context, the *Rosemond* Court held that a person's duty to withdraw from a *predicate* (to 18 U.S.C. § 924(c)) crime arises only where knowledge of the firearm was obtained early enough to allow the person to withdraw his participation in that *predicate* crime. Because Duffy did not intend to take part, or assist, in the assault on the officers, no duty to withdraw from the assault ever arose. Duffy's only duty during the entire episode, up to the conclusion of the assault, was to avoid *purposefully* and *intentionally* assisting the shooter to carry out the assault.

Because the trial judge adopted, wholesale, the government's arguments in its Rule 29 memorandum (Doc. 145), it must be assumed that the judge improperly based his decision to deny Duffy's Rule 29 motion on the government's improper *Rosemond* argument, including some perceived duty

by Duffy to somehow extricate himself from the situation the moment he realized there was a gun in the truck, and/or the shooter intended to use it to assault the officers, particularly since the government's *Rosemond* argument was tethered to the government's sufficiency-of-the-evidence argument.<sup>9</sup>

Given the evidence produced at trial, a rational juror would have had to engage in rank speculation to conclude that Duffy slowed his vehicle to aid in the assault. Indeed, the only evidence of what transpired between the occupants of the suspect vehicle before and during the shooting (jail calls) supported Duffy's claim of innocence.

While circumstantial evidence can be used to prove any fact, mere suspicion or speculation does not rise to the level of sufficient evidence. *United States v. Stauffer*, 922 F.2d 508, 514 (9th Cir. 1990); *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010) (en banc).

The government's case should never have gone to the jury. The district court's failure to grant Duffy's Rule 29 motion on Counts 1, 2 and 3, constituted a violation of Duffy's procedural right to an acquittal, and his Fifth Amendment right to due process. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970).

The Court of Appeals' reliance on *Rosemond* to affirm the district

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<sup>9</sup> The government's argument that Duffy must have known there was a rifle and ammunition in the suspect truck and, therefore, had a duty to somehow extricate himself from the shooting, was central to its opposition to Duffy's Rule 29 motion. (Gov. Br. p. 20)

court's Rule 29 denial so far departed from the accepted and usual course of judicial proceedings, or permitted such a departure from the district court, as to call for the Supreme Court's supervisory power.

### **Rule 33 Motion**

The trial in this case occurred in central Phoenix. The jury pool was purposefully drawn from northern Arizona so as to be "peers" of the Defendants, who hailed from the Winslow, Arizona area. The people who served on the petit jury lived anywhere from three to five hours from the courthouse by car. (7-ER-1308-1324) Most of the jurors had jobs (7-ER-1308-1324), and, presumably, made arrangements with their respective employers to be absent from work for five days. The court, no doubt, arranged lodging near the courthouse for the petit jurors, given the impossibility of the jurors driving home to northern Arizona and back to Phoenix between court sessions.

During the *voir dire* process, the trial judge advised the jury as follows:

As the jury notice indicated to you, this trial is expected to last five days. It will go today through Friday. *We are confident it will be done by Friday.* The daily schedule will be to start at 9 a.m. even though we didn't this morning. We will on the other trial days. And to be finished at 4:30 every day. We'll take an hour break for lunch and a 15-minute break in the morning and in the afternoon.

Would this schedule of the trial create an undue hardship for any of you?

(7-ER-1304) (emphasis added)

Several members of the jury panel informed the judge that the projected trial schedule would create an undue hardship for them, and they were struck for cause. (7-ER-1344-1345)

At the conclusion of testimony on Wednesday, September 27, 2023, the trial judge advised the jury, as follows:

THE COURT: We're going to break for the day. Ladies and gentlemen, we will plan to resume tomorrow at 9:30. I think we're making good progress in getting through the evidence. *We'll have no difficulty I don't believe ending the trial within the days we told you.* Please remember not to discuss the case or do any research. And we'll see you in the morning.

(5-ER-963) (emphasis added)

Friday, September 29, 2023, was to be the final day of trial. Presumably, the jurors checked out of their hotel rooms before arriving at the courthouse, thinking they would be returning home that afternoon, having completed their work as jurors. The trial ran most of the morning on Friday, and the jury was given the case at 11:00 a.m. The two alternate jurors were released with the following admonition:

*I think the jury will complete today and be finished* but if by chance one of them were to get ill and we had to continue on Monday or we had to continue on Monday and one or two of them couldn't do that, we would call you back for the deliberations. So you need to preserve your ability to deliberate, please, through the weekend. Feel free to call my office on Monday if you want to know what the verdict was or that there was a verdict.

(2-ER-275) (emphasis added)

While these statements were made in front of the entire petit jury, this was the first time the trial judge informed the jury that the trial could extend beyond Friday, while, in the same breath, continuing to assure the jurors that the trial would conclude by the end of the day. The jurors continued deliberating through lunch. (2-ER-289)

At approximately 5:50 p.m., the jury sent a question to the judge about changing out a recalcitrant juror who was concerned about the punishment that might follow a conviction, suggesting that the jury was deadlocked. Rather than taking that opportunity to address the jury as a group regarding their options at that late hour, the implications of not reaching a verdict that evening, and their availability to return from their homes and jobs in northern Arizona on the following Monday, if necessary, the trial judge simply sent a response to the jurors that they should not consider punishment when deliberating their verdict, and should continue deliberating. At that point, the jurors had been deliberating for approximately seven hours without a break, having committed to serving only through the remainder of that day, and facing between three and five hours of travel after reaching a verdict. It was also likely too late for some of the jurors to make arrangements to be absent from work on the following Monday.

At 6:49 p.m., the previously deadlocked jury reached a verdict of guilty on Counts 1, 2 and 3. (2-ER-316-318) The verdict was announced, and the jury was then excused.<sup>10</sup>

On appeal, Duffy posited that the trial judge was remiss in not pausing the jury deliberations when he learned about the deadlock to discuss with the jurors any hardships staying later into the evening, or returning on Monday, would cause them, given the fact the jurors were screened for only five days, the court's repeated assurances that the trial would conclude that day, the likely need for some of the jurors to contact their employers about an extended absence from work, and the distance the jurors all had to travel after reaching a verdict.

Duffy argued that given the unique confluence of circumstances heretofore described, the trial judge's instruction to the jury at (nearly) 6:00 p.m. to simply keep deliberating indefinitely into the evening was inherently coercive, and arguably caused one or more of the jurors to rush their decision. This is further borne out by the juror who contacted the court after the trial

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<sup>10</sup> The jury's quick verdict after the initial seven hours of deliberating arguably supports the notion that the judge's instruction to continue to deliberate, given the circumstances created by the trial judge, was coercive. See, e.g., *United States v. Freeman*, 498 F.3d 893, 908 (9th Cir. 1992) (quick verdict after *Allen* charge following long deliberation is evidence of possible coercion); see, also, *Lowenfeld v. Phelps*, 484 U.S. 231, 240 (1988) ("we are mindful that the jury returned with its verdict soon after receiving the supplemental instruction, and that this suggests the possibility of coercion"); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 462 (1978) (noting that "this swift resolution of the issues in the face of positive prior indications of hopeless deadlock, at the very least, gives rise to serious questions").

suggesting that one or more jurors had, in fact, rushed their decision because they wanted to go home.<sup>11</sup> Thus, while the trial judge did not explicitly tell the jury they must return a verdict by the end of the fifth day of trial, his repeated assurances (from the screening letters sent to the original jury panel to the repeated statements made by the judge to the jury during the jury voir dire and the trial) that the trial would be concluded by the end of the fifth day, and his instruction to simply keep on deliberating, knowing the jurors likely had three to five hours to drive home that evening, and likely had jobs and other obligations the following Monday, were coercive, and created a *de facto* deadline for reaching a verdict, and/or constituted a coercive *Allen*<sup>12</sup>-like charge.

A court may not place a deadline on jury deliberations. *See, United States v. Reyes-Perez*, 956 F.2d 1169 (9th Cir. 1992); *United States v. Foster*, 711 F.2d 871, 884 (9th Cir. 1983). Moreover, coercive *Allen* charges are prohibited. *United States v. Banks*, 514 F.3d 959, 974 (9th Cir. 2008).

It stands to reason that *circumstances created by a trial judge* could have the same coercive effect as that of a clearly spoken deadline to reach a hasty verdict. To argue otherwise would be to elevate form over substance. See, e.g., *United States v. Chaney*, 559 F.2d 1094, 1097-98 (7th Cir. 1977)

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<sup>11</sup> Duffy posited that the district court could have, and should have, considered the juror's statements, not to support a freestanding claim of juror misconduct, but, rather, to buttress Duffy's claim that the conditions created by the trial judge were coercive.

<sup>12</sup> *Allen v. United States*, 164 U.S. 492 (1896).

(where the coercive circumstances created by the court, rather than by an expressly-worded deadline, was found to be a violation of the defendant's rights to due process and to an impartial jury).

Placing a deadline on jury deliberations, whether it be *de facto* or *de jure*, is improper, and violates a defendant's Fifth and Sixth Amendment rights to due process and a fair trial by jury, respectively. The district court thus abused its discretion in failing to grant Duffy's Rule 33 motion.

In its memorandum decision, the appellate Panel held, in pertinent part, as follows:

A trial judge may not coerce the jury to reach a verdict. *See United States v. Evanston*, 651 F.3d 1080, 1084 (9th Cir. 2011). “[V]iewed in light of the context” in which the statements were made, *Locks v. Sumner*, 703 F.2d 403, 407 (9th Cir. 1983), the district judge's initial estimates that the trial would last one week and his subsequent failure to remind jurors on Friday at 5:54 p.m. of their option to return the following Monday were not coercive. The judge set no deadline on deliberations and expressly instructed jurors not to “change an honest belief about the weight and effect of the evidence simply to reach a verdict.” The judge also told the alternate jurors—in the presence of all jurors—that they may need to return the following Monday.

The district court did not err in declining to consider a phone call by a juror to the judge's chambers after the trial ended because the call concerned statements made during jury deliberations, not extraneous information improperly brought to the jury's attention, any outside influence, or a mistake in entering the verdict. *See Fed. R. Evid. 606(b)(2)*; *see also United States v. Leung*, 796 F.3d 1032, 1038 (9th Cir. 2015) (holding that the court could not consider

testimony that jurors prematurely reached a verdict); *United States v. Marques*, 600 F.2d 742, 747 (9th Cir. 1979) (finding it improper to consider testimony that a compromise verdict was reached because jurors believed “the judge would probably keep us late again until some verdict was reached”).

The Panel’s denial of relief worked effectively to endorse the trial judge’s acts and omissions on the run up to, and during, jury deliberations, that arguably worked to create a *de facto* deadline for the jury to reach a unanimous verdict, thereby violating Duffy’s Fifth and Sixth Amendment rights to due process and a fair trial, respectively.

The decisions of the district court in this regard, as endorsed by the Panel, so far departed from the accepted and usual course of judicial proceedings as to call for the Supreme Court’s supervisory power.

### CONCLUSION

The district court erred in denying Duffy’s Rule 29 Motion For Judgment of Acquittal. The trial evidence clearly established Duffy was not the shooter. Rather, he was the driver of the suspect truck, and someone else in the truck assaulted the two victims with a gun. Moreover, there was no evidence presented at trial from which a rational juror could conclude beyond a reasonable doubt that Duffy acted with the intent to aid and abet the shooter, even viewing the evidence in a light most favorable to the prosecution. Instead, all of the trial evidence supported Duffy’s claim that he was merely fleeing from the police to avoid being caught with a gun,

ammunition and a gun magazine in the truck, and the shooting was the spontaneous act of one of the other occupants of the truck. This error violated Duffy's procedural right to an acquittal, and his Fifth Amendment right to due process.

Finally, the district court erred in denying Duffy's Rule 33 Motion For New Trial. The trial judge created circumstances that worked to impose a *de facto* deadline for the jury to reach a unanimous verdict, thereby violating Duffy's Fifth and Sixth Amendment rights to due process and a fair trial, respectively.

The Ninth Circuit Court of Appeals' denial of relief so far departed from the accepted and usual course of judicial proceedings, or permitted such a departure by the district court, as to call for the Supreme Court's supervisory power.

For the foregoing reasons, this Court should grant this petition for a writ of certiorari, reverse the decision of the Ninth Circuit Court of Appeals, and remand the case with instructions.

RESPECTFULLY SUBMITTED this 17th day of February, 2026, by

***MICHAEL J. BRESNEHAN, P.C.***

s/ Michael J. Bresnehan  
Attorney for Petitioner/Appellant