Number ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

RAZHDEN SHULAYA,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

1. Should certiorari be granted to find that, when a jury bullies a holdout juror, the District Court should issue an *Allen* charge, in which it instructs it that no juror should yield a conscientious conviction he may have?

2. Should certiorari be granted to find that a District Court may not abridge a Petitioner's Sixth Amendment right to retain the counsel of his own choosing at sentence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

No.

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OPINION BELOW

There was one summary order below, which is attached to this petition.

JURISDICTION

The summary order of the Court of Appeals was decided on April 13, 2021, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment right to an uncoerced jury and the Sixth Amendment right to the counsel of one's own choosing.

STATEMENT OF THE CASE

On June 6, 2017, a grand jury in the Southern District of New York returned an indictment against Razhden Shulaya, charging him with participation in a racketeering conspiracy (the "Shulaya Enterprise"), under 18 U.S.C. § 1962, wire fraud conspiracy, under 18 U.S.C. § 1349, conspiracy to transport and sell stolen goods, in violation of 18 U.S.C. § 371, conspiracy to transport and sell contraband, cigarettes, in violation of 18 U.S.C. § 371, and identity fraud conspiracy, in violation of 18 U.S.C. § 1028A.

Shulaya was convicted of a racketeering conspiracy, conspiracy to violate the federal law, stolen property, conspiracy to violate federal law, contraband cigarettes, conspiracy to commit fraud relating to identity documents, and wire fraud conspiracy. He was thereafter sentenced to 45 years' imprisonment.

STATEMENT OF FACTS

The indictment alleged Shulaya directed an organized crime group that it called the "Shulaya Enterprise." It described Shulaya as a "vor v zakone," or "vor," a Russian phrase that meant "Thief-in-Law." Vors, the government alleged, refer to an order of elite criminals from the former Soviet Union who receive tribute from other criminals, offer protection, and use their recognized status as 'vor' to adjudicate disputes among lower-level criminals. The Shulaya Enterprise was alleged to be based in New York City and engaged in criminal activity that, the government claimed, included acts of violence and extortion, operating illegal gambling businesses, defrauding casinos, engaging in identity theft and fraud, and trafficking in stolen goods.

SUMMARY OF ARGUMENT

Certiorari should be granted to find that, when a jury bullies a holdout juror, the district court should issue an *Allen* charge, in which it instructs the jury that no juror should yield a conscientious conviction he may have. It should also grant certiorari to find that a District Court may not abridge a Petitioner's Sixth Amendment right to retain the counsel of his own choosing at sentence.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED TO FIND THAT WHEN A JURY BULLIES A HOLDOUT JUROR, THE DISTRICT COURT SHOULD ISSUE AN *ALLEN* CHARGE, IN WHICH IT INSTRUCTS THE JURY THAT NO JUROR SHOULD YIELD A CONSCIENTIOUS CONVICTION HE MAY HAVE.

During jury deliberations, Judge Katherine B. Forrest said:

> We have a note from the jury. Let me read it to you and then after we're done talking about it, we'll make it available for inspection by people. It says, "Your Honor, the jury is deliberating and one of the jurors is using non-law principles to come to a conclusion in this case. Is this something we have to sort through or is this a case an alternate needs to be called?" The foreperson then has signed this.

Judge Forrest then instructed the jury on, *inter alia*, its "role," but never added that no juror should surrender their own conscientiously held beliefs. The Court never addressed the foreperson's attempt to remove a juror with whom he disagreed, or the bullying associated with his conduct.

Instead, the Court effectively misled the jury in general and the holdout in particular. The Court's charge had the effect of improperly coercing the minority juror to capitulate to the majority, thereby

permitting a conviction by what is, in effect, a majority vote. The Court's failure to address the minority view--the juror who did not agree with the other jurors, and was then accused, by the foreperson, of allegedly "using non-law principles"--coerced him, by failing to state that he should only reach a unanimous verdict if he did not have to yield a conscientious conviction.

While it is for the trial judge to determine whether the jury was genuinely deadlocked, the judge never considered a number of factors that clearly indicated the jury was both bullying and hung. The trial issues were not complex. The crimes turned not on complicated real estate frauds, securities transactions banking schemes, but, rather, simply on stolen property, untaxed cigarettes and poker games. The duration of the trial was not long, beginning on June 4, 2018 and ending 15 days later, on June 19, 2018. The representation of the foreperson was paramount, because his note evinced not only the deadlocked state of the jury's deliberations, but his determination to replace the holdout with an alternative.

It is irrelevant that the foreperson did not formally state that the jury was hung, which would have automatically warranted a dynamite

charge under *Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528, 17 S. Ct. 154 (1896). His note was the functional equivalent of a genuinely hung jury because he could not convince the holdout juror to convict. Had the juror not been a holdout, it is obvious the frustrated foreperson never would have sent to the note to the judge--regardless of how he applied the law.

Because the jury was, for all practical matters, deadlocked, the Court was required to reassure the holdout juror that he need not change his vote and reach a unanimous verdict if that meant he would have to sacrifice his conscientious judgment.

The juror deadlock was underscored by the tenor of the foreperson's jury note. It was unclear, and did not explain how or why the holdout was relying on alleged "non-law principles." Co-defense counsel noted as much, when she said:

> My concern with the instruction that the Court fashioned was that the note says "non-law principles." I don't know what that means. I don't know if that's religious or philosophical. It may be that some jurors believe that they are not allowed to use their own common sense or experience or perspective from which to draw the inferences that are solely within their province.

Given the lack of clarity in the note and the lack of agreement amongst the jurors, it was incumbent on the Court to instruct the jury that no juror should yield his judgment simply for the sake of unanimity.

The foreperson's note also reflected a deeper division in the jury room. He asked if the Court could replace a sitting juror with an alternate juror to overcome the lack of unanimity. While such an action would have been legally improper, it reflected the level of frustration by the foreperson, and the degree of resistance by the holdout. In the face of this apparent acrimony, the Court should have emphasized that a verdict were only just and true if it reflected the judgment of each juror, and no juror should yield his conscientious judgment, under any circumstances. *Spears v. Greiner*, 459 F.3d 200 (2d Cir. 2006), *cert. denied*, 549 U.S. 1124, 127 S. Ct. 951, 166 L. Ed. 2d 725 (2007)(approving an instruction where court "include[d] cautionary language telling jurors that they had a right to stick to their arguments and stand up for their own strong opinions.").

The Second Circuit ruled that "[i]t is far from clear from the record before us that the jury was deadlocked" (Decision: 9). The Court is incorrect. This case turned on juror bullying, not a deadlocked jury.

The foreperson was seeking the assistance of the Court in removing a juror with whom he disagreed, because he refused to vote guilty. Under such circumstances, it was incumbent on the District Court to instruct the holdout juror that he had the right to adhere to his position, stand up for his opinion, and, under no circumstance, yield his conscientious judgment.

The United States Supreme Court has never addressed the necessity and scope of an *Allen* charge when a jurors' dispute results in a jury verdict tainted by such an inherently coercive environment that it rises to the level of an affront to any notion of civilized justice, thereby preventing a verdict from standing, as a matter of law.

Certiorari should thus be granted to find that, when a trial court finds juror bullying, it must instruct the jury, under *Allen*, that, under no circumstances, should any juror yield his conscientious judgment.

POINT II

CERTIORARI SHOULD BE GRANTED TO FIND THAT A DISTRICT COURT MAY NOT ABRIDGE A PETITIONER'S A SIXTH AMENDMENT RIGHT TO RETAIN THE COUNSEL OF HIS OWN CHOOSING AT SENTENCE.

Before sentence, incoming retained counsel moved for a sentencing adjournment before Judge Loretta Preska. He explained: "As I stated in my letter, I just came from a funeral, and I physically got to read the PSR report just this morning. I had altogether maybe three to four hours to look at all of the papers. So I don't feel prepared to go forward. I am retained counsel. Mr. Shulaya is not going anywhere. I am fully prepared to take this case forward, but I need time to prepare and file motions, your Honor." He also said "I believe we need to file the motions with respect to sentencing submissions, which I think there is definitely a need for a *Fatico* hearing .... " He added that "I am just looking at the PSR report, and I understand that ... there are certain issues in the PSR report which are not proven and my client denies those. So we would ask your Honor for a month adjournment. I don't think it's anything material. Mr. Shulaya is not going anywhere, on one end, and on the other end, I would be able to speak better on his behalf

so as not to commit malpractice on my own end and to represent him properly. I believe he is entitled to that, your Honor."

Judge Preska denied the request for an adjournment, claiming:

> [f]irst of all, with respect to the request for an adjournment, as both Judge Forrest and I have pointed out, Mr. Shulaya has used his counsel issues in this case repeatedly to seek adjournment after adjournment after adjournment. The fact that Mr. Niman appeared only yesterday is one more example of using counsel issues to secure a delay. I will note also Judge Forrest's wisdom in appointing Mr. Cecutti so that Mr. Shulaya would have continuity of counsel no matter what happened with respect to retained counsel. Because I find that Mr. Shulaya continues to use counsel issues as an excuse to delay proceedings in this case further, the request for an adjournment is denied. In any event, with respect to the specific issues mentioned by Mr. Niman, as Mr. Adams points out, there were specific references in the PSR, and to the extent the government dealt with it in its sentencing submission, there were specific references to evidence at trial supporting the allegations. Also, it appears that the loss amounts are on the conservative side, as the PSR seems to point out. Accordingly, the request for an adjournment is denied. I will just point out that yesterday's order did move the sentencing from noon until 2:00 so that Mr. Niman was able to be present.

Because "trial courts enjoy very broad discretion in granting or denying trial continuances," challenged errors are reviewed for an abuse of discretion. *United States v. Stringer*, 730 F.3d 120, 127 (2d Cir. 2013).

"A defendant must show both arbitrariness and prejudice in order to obtain reversal of the denial of a continuance." *Id*. at 128

Here, Shulaya's right to the effective assistance of counsel was abridged when the District Court arbitrarily denied a one-month adjournment to incoming retained sentencing counsel to review the record and prepare for sentence. The Court forced retained counsel to defend Shulaya, at sentence, after preparing for the case for only a number of hours. Niman, who appeared in court in good faith, was not afforded any time to review the trial transcript, which totaled 2,084 pages, nearly 500 pages of documents on Pacer and countless trial exhibits. He thus lacked the opportunity to prepare arguments and motions for sentence, based on citations to the record. This gravely prejudiced Shulaya, who, at age 43, was sentenced to 45 years' imprisonment--an effective life sentence.

Given that Shulaya received over four decades in prison, a one-month sentencing adjournment would not have prejudiced the Government or interfered with the administration of justice.

Significantly, defense counsel requested a delay that was of short or fixed duration ["one month"], the sought-after legal material was

specified with particularity [the trial record], the proposed material was critical to the sentence and the defendant has not been dilatory at the sentence itself. *Cf. United States v. Fawwaz*, 116 F. Supp. 3d 194, 210 (S.D.N.Y. 2015)("[*United States v. White*, 324 F.2d 814 (2d Cir. 1963) ... illustrates circumstances in which continuances are appropriate or perhaps even required. They include instances in which (i) the requested delay is of a short (or at least fixed) duration, (ii) the sought-after evidence is specified with particularity, (iii) the proposed evidence is critical to the defense, and (iv) the defendant has not been dilatory.").

The Second Circuit ruled, however, that "[t]he district court's decision was neither arbitrary nor prejudicial. Pointing to Shulaya's history of counsel substitutions--he had already retained and relieved at least three lawyers, resulting in multiple adjournments--the district court reasonably concluded that Shulaya's last-minute retention of Niman constituted yet another effort to delay proceedings, and, on that basis, denied the adjournment request. But, even if the decision were arbitrary, Shulaya fails to identify any prejudice to him resulting from the district court's decision. In denying the requested adjournment, the district court specifically discussed the substantial record support for the loss amounts

specified in the PSR, and Shulaya makes no argument on appeal that the loss amount calculations were ultimately incorrect or unsupported. We perceive no basis for disturbing the district court's judgment" (Decision: 10-11).

The Court is wrong on both counts. Its finding that Shulaya had retained and discharged prior attorneys does not save the District Court's ruling from being arbitrary. Shulaya's Sixth Amendment right to the counsel of his own choosing at sentence, and a one month extension, in a case where he faced an effective life sentence, far outweighs any inconvenience to the District Court or his initial indecision with regard to which counsel to proceed to trial.

More important, Shulaya did, in fact, clearly identify prejudice to him resulting from the district court's decision. When defense counsel argued " ... we don't believe that anything more than 15 years would be appropriate," incoming retained counsel agreed, " ... join[ing] [appointed counsel's] application [because] I believe 15 years is appropriate in this particular case" (Sentence: 30).

The District Court, in effect, imposed an unreasonable sentence of 45 years' imprisonment--30 years more than the requested term--

without affording Petitioner either his Sixth Amendment right to the counsel of his choosing or his Fourteenth Amendment due process right to be heard.

This Court has never ruled on the substitution of retained for appointed counsel at trial or sentence, making this a case of first impression. Certiorari should thus be granted to address this vital Sixth Amendment issue.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: April 15, 2021
Manhasset, New York

Respectfully Submitted,

Arza Feldman
Arza Feldman

UNITED STATES
SUPREME COURT

RAZHDEN SHULAYA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on April 15, 2021, we served a copy of this petition for writ of certiorari, by first class United States mail, on the United States Attorney, Southern District of New York, 1 St. Andrews Plaza, New York, NY 10007, on the Solicitor General, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001, and on Razhden Shulaya, 54114-048, 1640 Sky View Drive, Bruceton Mills, WV 26525. Contemporaneous with this filing, we have also transmitted a digital copy to the United States Supreme Court and are filing one copy of the petition, instead of 10, with this Court, pursuant to its April 15, 2020 order regarding the Covid-19 pandemic.

Arza Feldman
Arza Feldman