Number ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

THOMAS J. CONNERTON,

***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 where the District Court discharged a juror, without "good cause" under rule 23(b)(3) of the Federal Rules of Criminal Procedure, and accepted an 11-juror verdict, even though it made no judicial inquiry into the nature of her illness or the timing of her return, and did not even know if the juror, who complained of mere dizziness, could return to court later the same day?

2. Should certiorari be granted where the District Court refused to discharge a juror who was pregnant, crying, and pleading to be excused, because that deprived Petitioner of his right to a properly functioning Sixth Amendment jury that deliberates calmly and rationally, based on the facts and the law?

3. Should certiorari be granted because the District Court failed to discharge a juror who was sleeping, which deprived Petitioner of his Sixth Amendment right to a properly functioning jury, that listens to the facts at trial?

4. Should Certiorari be granted because the District Court violated Petitioner's due process rights when it misdefined reasonable doubt by

instructing the jury that, if it viewed the evidence as a "toss-up," it should find him not guilty?

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OPINION BELOW

There was one summary order below, which is attached to this petition. *United States v. Erickson*, No. 19-4337-cr, 2021 U.S. App. LEXIS 10604 (2d Cir. Apr. 14, 2021)

JURISDICTION

The summary order of the Court of Appeals was decided on April 14, 2021, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 23(b)(3) of the Federal Rules of Criminal Procedure, the Sixth Amendment right to a jury trial, and the Fourteenth Amendment due process clause.

STATEMENT OF THE CASE

Petitioner, Thomas J. Connerton, was charged, in a superseding indictment, in the District of Connecticut, with twelve counts of wire fraud, in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 2 (counts one through twelve); one count of mail fraud, in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2 (count thirteen); sixteen counts of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2 (counts sixteen through thirty-one); four counts of illegal monetary Transactions, in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2 (counts thirty-three through thirty-six); and one count of tax evasion, in violation of 26 U.S.C. § 7201 (count thirty-nine).

On September 17, 2018, the jury found Connerton guilty on all thirty-four counts. The District Court thereafter sentenced him to 108 months' imprisonment. The Second Circuit Court of Appeals affirmed on April 14, 2021. *United States v. Erickson*, No. 19-4337-cr, 2021 U.S. App. LEXIS 10604 (2d Cir. Apr. 14, 2021).

STATEMENT OF FACTS

Petitioner, an engineer and inventor, started Safety Technologies, LLC ("Safety Tech"), to patent and market a revolutionary surgical glove that incorporated a unique polymer into latex which made it rip and puncture proof as well as cut-resistant. Connerton attempted to sell this unique technology to the biggest medical supply companies in the world, including Intertek, Medline, Cardinal Health, Kraton Polymers Molnlycke and Killian Latex.

Investors gave $1,833,250 to Safety Tech. Connerton did not take his full salary for his work in managing the project, to which he was permitted by the subscription agreement. His average for the time period was less than $10,000 per month he was owed. Over the total of 84 months, he only took $796,373, which was less than the $840,000 draw to which he was entitled during that time period. All together, Connerton thus took $43,627 less compensation than he was entitled to under the subscription agreement.

Instead of retaining monies owed him, Connerton invested enormous sums of money in advancing the project. Agent Elizabeth McCartney, a financial analyst with the Federal Bureau of Investigation,

found that, from June 2009 though May 2016, a period of 84 months, Connerton, through Safety Tech, received $1.833 million in investor funds and spent 30 percent, or nearly $550,000, on consultants, research, lawyers, testing, and other business expenses. This included $430,533 on glove consultants, $123,923 for research and testing, $93,294 on accountants and $70,000 for patent lawyers.

Before investing, some investors, like Margaret Carlson spoke to glove consultants, who confirmed that "this technology exists."

SUMMARY OF ARGUMENT

Certiorari should be granted for four reasons.

First, "good cause" to discharge a juror, under rule 23(b)(3) of the Federal Rules of Criminal Procedure, and the taking of an 11-juror verdict, does not include mere dizziness--especially when the District Court did not ask the juror about the nature of her illness or the timing of her return, and, indeed, did not even know if she could return to court later the same day.

Second, certiorari should be granted where the District Court refused to discharge a juror who was pregnant, crying, and pleading to be excused, because Petitioner had a Sixth Amendment right to have a juror that was not in an emotional state, which may have prevented her from deliberating or reaching a verdict.

Third, certiorari should be granted where the District Court failed to discharge a juror who was sleeping, which deprived Petitioner of his Sixth Amendment right to a properly functioning jury.

Fourth, certiorari should be granted because the District Court violated Petitioner's due process rights when it misdefined reasonable doubt by instructing the jury that, if it viewed the evidence as a "toss-

up," it could convict, even though that reduced the People's burden of proof.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED WHERE THE DISTRICT COURT DISCHARGED A JUROR, WITHOUT "GOOD CAUSE" UNDER RULE 23(b)(3) OF THE FEDERAL RULE OF CRIMINAL PROCEDURE, AND ACCEPTED AN 11-JUROR VERDICT, EVEN THOUGH IT MADE NO JUDICIAL INQUIRY INTO THE NATURE OF HER ILLNESS OR THE TIMING OF HER RETURN, AND DID NOT EVEN KNOW IF THE JUROR, WHO COMPLAINED OF MERE DIZZINESS, COULD RETURN TO COURT LATER THAT SAME DAY.

During jury deliberations, the District Court informed counsel that juror number 11 was "not feeling well" due to dizziness. Defense counsel asked the Court for a brief postponement until the juror could return. The Court conceded it did not know if the juror could return that or the next day because it had never even spoken with the juror. Even the Government agreed with Petitioner's counsel, and said its "position" was to "wait a day and to see how she's feeling .... " The Court ruled, however, that because the juror could not deliberate, in court, that day, the juror should be discharged. It then discharged the juror and ordered the jury to continue deliberating with 11 jurors. Two and one-half hours later, the eleven-member jury returned guilty verdicts.

Rule 31(a) of the Federal Rules of Criminal Procedure requires that "[t]he verdict shall be unanimous." Discharging a juror, during deliberations, jeopardizes the right to unanimity protected by Rule 31(a). This Rule was designed to protect the rights of defendants under the Sixth Amendment to the United States Constitution. *See* Fed. R. Crim. P. 23, Notes of Advisory Committee subd. (a). When a juror has been discharged, on a finding of just cause, and the defendant has consented, the dangers are minimized, and the procedure permitted by Rule 23(b) does not violate Rule 31(a). But when, as here, there is no consent, and no finding by the District Court that it is "necessary ... for just cause" to discharge a juror during deliberations, a defendant is denied the right to a unanimous jury verdict that is protected by Rule 31(a).

Here, the District Court abused its discretion when it discharged the juror without just cause during jury deliberations, and, therefore, Petitioner was denied his Sixth Amendment right to a unanimous jury verdict under Rule 31(a). The District Court said it did not know what illness the juror had, or if they could return to court the same or next day. Where all it knew was the juror felt "dizzy," it did not know if her dizziness was transitory, and could pass in minutes or hours. It thus

lacked sufficient information to make an informed decision before summarily discharging the juror.

A defendant has a Sixth Amendment constitutional right to a trial by a particular jury chosen according to law, in whose selection he had a voice, and a due process right to a unanimous jury. Where a juror is wrongfully discharged, during deliberations, in the absence of good cause, the Petitioner is deprived of a unanimous jury of 12. *Schad v. Arizona*, 501 U.S. 624, 634 n.5, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991)(plurality opinion)(a unanimous jury "is more accurately characterized as a due process right than as one under the Sixth Amendment"); *Apodaca v. Oregon*, 406 U.S. 404, 32 L. Ed. 2d 184, 92 S. Ct. 1628 (1972)(holding that a defendant has a constitutional right to a unanimous jury verdict in federal court).

While this Court has never addressed the "good cause" requirement in Rule 23(b), numerous Circuit Courts have found a violation thereof constitutes *per se* reversible error. *See United States v. Curbelo*, 343 F.3d 273, 283-85 (4th Cir. 2003)("Not surprisingly, all of our sister circuits, in considering violations of Rule 23(b), have agreed that such violations require *per se* reversal and are not subject to

harmless error review"); *United States v. Taylor*, 498 F.2d 390, 392 (6th Cir. 1974)("We note that the government's primary insistence on this appeal is that the [Rule 23(b)] error complained of was harmless. We cannot so construe it. To do so would be to open the door to emasculation of the rule"); *United States v. Araujo*, 62 F.3d 930 (7th Cir. 1995)("Because the district court lacked just cause to excuse the twelfth juror pursuant to Rule 23(b), we reverse the defendants' convictions and remand for a new trial," without regard to whether the error was actually prejudicial); *United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991)(conviction reversed " ... on the grounds that the District Court abused its discretion when it excused juror number three" without harmless error analysis); *United States v. Patterson*, 26 F.3d 1127, 1129 (D.C. Cir. 1994)("Since (1) the record is silent, and (2) the court must find just cause on the record, and (3) the case must be affirmed or reversed on the record, and (4) there is nothing in the record to support the court's action, the case must be reversed")(citation and internal quotation marks omitted); *United States v. Essex*, 734 F.2d 832, 845 (D.C. Cir. 1984)("The claim is made by the dissent that appellant has shown no prejudice. But no further prejudice need be shown than that

the court did not comply with the stipulation and Rule 23(b), and that appellant was denied her right to have her case decided by the unanimous verdict of the 12 jurors who heard the case. In cases involving secret jury deliberations it is virtually impossible for a defendant to demonstrate actual prejudice. Courts therefore have determined that the potential for serious harm and the interest of the defendant--and the public--in fair, unbiased and secret deliberations are so great that no evidentiary showing of actual prejudice, or of defense counsel's objection to the internal functioning of the jury of which he could not possibly be informed, is required.").

Even though the District Court admitted it knew nothing about the juror's condition, did not know the extent of her illness, was unsure if the dizziness would pass, even an hour, did not know if the juror could return to court shortly, and, in fact, had never even spoken with the juror, the Second Circuit still ruled, incorrectly, that it had "sufficient information to make an informed decision" and would thus review the dismissal of the juror, under Rule 23(b), for an abuse of discretion. *Erickson*, 2021 U.S. App. LEXIS 10604, at *2-4.

The Second Circuit's holding--that " ... waiting even one additional day before continuing deliberations risked the absence of more jurors, which in turn risked a mistrial because there were no more alternate jurors," *id*.--rests on a misreading of the record. There was no evidence the juror would miss even one day. A juror's dizziness can pass in minutes, or even an hour. Yet the Court never spoke to the juror, and thus could not reasonably make these determinations.

Certiorari should thus be granted because, when a juror is dizzy, and the District Court does not know if they can appear in court in an hour, or even a day, discharging them does not constitute good cause under Rule 23(b)(3) of the Federal Rule of Criminal Procedure, or otherwise justify an 11-member jury verdict.

POINT II

CERTIORARI SHOULD BE GRANTED WHERE THE DISTRICT COURT REFUSED TO DISCHARGE A JUROR WHO WAS PREGNANT, CRYING, AND PLEADING TO BE EXCUSED, BECAUSE THAT DEPRIVED PETITIONER OF HIS RIGHT TO A PROPERLY FUNCTIONING SIXTH AMENDMENT JURY THAT DELIBERATES CALMLY AND RATIONALLY, BASED ON THE FACTS AND THE LAW.

The District Court told counsel that a juror had approached him outside court and said she was pregnant and could not continue serving. The Court replied it would make "accommodations" for her, such as "more frequent breaks." The juror insisted she was too uncomfortabble to continue jury service, and that, given her condition, it "just seems like a lot." She implored the Court to understand that her feet were now very "swollen," and she did not "realize" just how difficult it would be to sit on a jury. The Court acknowledged she was "obviously pregnant" and "looked uncomfortable yesterday," but refused to discharge her, even though she complained she was under so much "pressure to be here." Even after defense counsel objected that "[s]he's not going to make it," and the Court said "she was in tears in the hallway" and "feeling stressed," it refused to discharge her.

The Second Circuit found this issue lacked merit, and never addressed it. *Erickson*, 2021 U.S. App. LEXIS 10604, at *4. It should have, though, because the District Court abused its discretion when it denied Connerton's motion to excuse the pregnant juror where she was, by her own admission, physically and mentally unable to perform the functions of a juror. *See Foster v. Chatman*, ___ U.S. ___, 136 S. Ct. 1737, 1753, 195 L. Ed. 2d 1136 (2016)("One of those prospective jurors was excused before even being questioned during *voir dire* because she was five-and-a-half months pregnant."). *See also United States v. Wilson*, 894 F.2d 1245, 1250 (11th 1990)(where juror "appeared to be ill" "was crying" and "her doctor was afraid that she might miscarry her baby," Court held " ... just cause existed to dismiss this juror."). *Cf. United States v. Shenberg*, 89 F.3d 1461, 1472 (11th Cir. 1996)("Prior to jury deliberations commencing, the district court decided not to dismiss a pregnant juror in her seventh month of pregnancy who wanted to continue her service on the jury and who had not experienced any difficulty during pregnancy."). *See, generally*, *Valderrama v. McDonald*, No. CV 10-8113 DMG (MRW), 2011 U.S. Dist. LEXIS 152365, at *7 (C.D. Cal. Nov. 22, 2011)("The court concluded that the

trial court correctly found proper cause to dismiss the juror in Petitioner's trial. The appellate court noted evidence in the record that the juror was crying, upset, unable to sleep, and that her emotional state would prevent her from deliberating or reaching a verdict."). *See also State v. Evans*, 125 Ariz. 140, 142, 608 P.2d 77, 79 (Ct. App. 1980)("the trial court acted prudently" where, during a break in the trial, the bailiff found a female juror crying in the hall. When questioned in the trial judge's chambers, with both counsel present, the juror asked to be excused because she was very upset).

Certiorari should thus be granted to find that, when a pregnant juror is in pain, and crying, she should be excused, because she cannot perform the functions of a juror in a calm and deliberative manner. This violates a Petitioner's Sixth Amendment right to a duly constituted jury.

POINT III

CERTIORARI SHOULD BE GRANTED BECAUSE THE DISTRICT COURT FAILED TO DISCHARGE A JUROR WHO WAS SLEEPING, WHICH DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO A PROPERLY FUNCTIONING JURY.

During the testimony of Lorraine Ward, the Court said juror number three was "literally nodding off," while other juror's were "looking at me" with "imploring eyes" like '[a]re we going over this again?'" The Court said the jury's reaction was in response to the prosecution of the Government's case, and asked it to focus on four to eight of the counts and "drop the rest." It beseeched the Assistant United States Attorney to go to his "office" and "figure out" if they wanted to drop counts or "lose the jury and start this again." The Government refused. The prosecutor said he was "scare[d]" of not proving his case beyond a reasonable doubt. The Court rebuffed him, insisting he was just "piling on" against Petitioner.

Later, when the Court again challenged the Government, it rhetorically asked the Assistant United States Attorney "[h]ave you been observing the jury?" After counsel claimed the jury was " ... engaged in taking notes," the Court said, in fact, "none of them were engaged,"

adding that Juror number three was "having some problems staying awake."

The Second Circuit ruled this issue had no merit, and thus did not address it in its decision. *Erickson*, 2021 U.S. App. LEXIS 10604, at *4 Instead of discharging the sleeping juror, the Court allowed him to deliver a verdict. This was improper, because a sleeping juror, who misses vital evidence, is unable to discharge his duties. *See United States v. Fajardo*, 787 F.2d 1523, 1525 (11th Cir. 1986)(" ... the court may assume that jurors who ... have slept in open court will be unable to discharge their duties.").

Significantly, this is not a case where the juror was simply being inattentive. On the contrary, the District Court itself twice raised the issue of the juror nodding off--that is, falling asleep in a sitting position--because it was concerned about the way the Government was trying its case. Yet instead of either speaking with the juror, or discharging him, the Court remained silent and undertook no investigation of any kind. *Compare United States v. Diaz*, 176 F.3d 52, 78 (2d Cir. 1999)("from the moment the sleeping juror allegation was raised, [the court] investigated the matter and carefully observed the juror in question

throughout the trial," and, therefore, there was no abuse of discretion in not removing the juror).

The sleeping juror abridged Petitioner's Sixth Amendment right to a jury trial, because he did not hear the evidence upon which he thereafter based his verdict. This deprived Petitioner of his Sixth Amendment right to 12 jurors who sat as the judge of the facts, and were charged with deciding whether the Government had proved its case beyond a reasonable doubt.

This Court has never addressed the not uncommon issue of jurors either sleeping or nodding off at trial. This, therefore, is a case of first impression. *Compare Skinner v. Louisiana*, 393 U.S. 473, 475 n.2, 89 S. Ct. 704, 705, 21 L. Ed. 2d 684 (1969)("All three petitioners allege that at least two jurors were observed to have been sleeping during the trial and assign this allegation as further support for the argument that the length of the trial session deprived them of due process. The trial court, after a hearing on the motion for a new trial, found that none of the jurors had been asleep."). Certiorari should be granted to find that, when a juror falls asleep, or repeatedly nods off, they should be

discharged to protect a defendant's Sixth Amendment right to a jury trial.

POINT IV

CERTIORARI SHOULD BE GRANTED BECAUSE THE DISTRICT COURT VIOLATED PETITIONER'S DUE PROCESS RIGHTS WHEN IT MISDEFINED REASONABLE DOUBT BY INSTRUCTING THE JURY THAT, IF IT VIEWED THE EVIDENCE AS A "TOSS-UP," IT SHOULD FIND HIM NOT GUILTY.

In its jury charge, the District Court instructed the jury:

> In order for the government to prove that a defendant is guilty of a particular offense charged, it must prove all the elements of the offense beyond a reasonable doubt. The burden of proof never shifts to a defendant, which means that it is always the government's burden to prove each element of the crimes beyond a reasonable doubt. If you view the evidence as a 'toss-up' or reasonably permitting either of two conclusions – one of 'not guilty' and the other of 'guilty'–then of course you must find Mr. Connerton not guilty.

Neither the Supreme Court nor any circuit court, has ever approved a "toss-up" analogy in the context of reasonable doubt. Nor should it. A toss-up occurs when two possibilities are equally likely, which is slightly less than a preponderance of the evidence [51 to 49 percent], and far less than proof beyond a reasonable doubt.

Because due process requires proof beyond a reasonable doubt, the toss-up standard of proof violates the Fourteenth Amendment to the United States constitution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt."). A verdict founded upon an improper reasonable doubt charge is not a legitimate jury verdict under the Sixth Amendment. *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Even when a charge includes a misstatement of the government's burden, a subsequent correct statement may obviate any constitutional error by clarifying the requisite burden of proof such that there is no reasonable likelihood of juror misunderstanding. *See Middleton v. McNeil*, 541 U.S. 433, 437-38, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004). Here, however, there were no subsequent statements.

The Court's allusions to a fifty-fifty toss-up was the final charge on the government's burden of proof. It was improper because it reduced its burden of proof. It instructed the jury that, if it viewed the evidence as a toss-up, it must find Connerton not guilty, but also raised the

opposite inference, namely, that, if it did not view the evidence as a toss-up, it could still convict even if proof did not rise to the level of proof beyond a reasonable doubt. The jury may have believed that, if the toss-up favored the defendant, it should vote not guilty, but if it favored the government, it should vote guilty. The instruction suggests, by implication, that a preponderance of the evidence standard was relevant, when it was not. The instruction itself did not go far enough. It instructed the jury how to decide the case when the evidence of guilt was relatively evenly balanced, to wit, a toss-up, but said nothing on how to decide when the toss-up is in the Government's favor, yet is not strong enough to be beyond a reasonable doubt.

A review of the District Court's entire charge in this case does not show it fairly conveyed to the jury the concept of proof beyond a reasonable doubt. The judge only instructed the jury once on the meaning of reasonable doubt. While it instructed the jury that reasonable doubt was " ... doubt based upon reason and common sense," "a doubt that a reasonable person has after carefully weighing all the evidence," and "would cause a reasonable person to hesitate to act in matter of importance in his or her personal life," it then issued the toss-up charge.

This was the last instruction on reasonable doubt the jury heard, making it the most memorable. The Court's analogy to a coin-toss made it even more memorable, because it enabled the jury to visualize and remember an abstract concept. Thus, the court's charge, taken as a whole, did not properly instruct the jury on reasonable doubt. *See Cupp v. Naughten*, 414 U.S. 141, 146-47, 38 L. Ed. 2d 368, 94 S. Ct. 396 (1973).

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: April 21, 2021
Manhasset, New York

Respectfully Submitted,

Arza Feldman
Arza Feldman

UNITED STATES
SUPREME COURT

THOMAS J. CONNERTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on April 21, 2021, we served a copy of this petition for writ of certiorari, by first class United States mail, on the United States Attorney for the District of Connecticut, 157 Church Street, 25th Floor, New Haven, CT 06510, on the Solicitor General, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001, and on Thomas J. Connerton, Donald J. Wyatt Detention Center, 950 High Street, Central Falls, RI 02863. 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