

No. 17A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER BARRELLA,

Applicant,

v.

VILLAGE OF FREEPORT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Second Circuit

APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI

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**APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR
A WRIT OF CERTIORARI**

To: Associate Justice Ruth Bader Ginsburg, Circuit Justice for the United States Court of Appeals for the Second Circuit:

Under this Court's Rules 13.5 and 22, Applicant Christopher Barrella respectfully requests an extension of sixty (60) days to file a petition for a writ of certiorari in this case. His petition will challenge the decision of the Second Circuit in *Barrella v. Village of Freeport*, 714 F. App'x 78 (Mem.) (2d Cir. 2018), a copy of which is attached. In support of this application, Applicant states:

1. The Second Circuit issued its opinion on March 13, 2018, and on May 2, 2018 it issued a denial of a timely petition for rehearing, a copy of which is attached. Without an extension, the petition for a writ of certiorari would be due on July 31, 2018. With the requested extension, the petition would be due on October 1, 2018 (as September 29, 2018 falls on a Saturday). This Court's jurisdiction will be based on 28 U.S.C. § 1254(1).

2. This case is a serious candidate for review. It squarely presents a deep and acknowledged circuit split—apparently never before presented for this Court's review—on a basic matter of federal trial procedure, one that results in the disparate application across the circuits of a foundational legal standard woven throughout much of federal law, as discussed below.

3. All circuits have long prohibited so-called “golden rule” argument to a jury, in which a trial lawyer exhorts the jury to imagine themselves in the

shoes of a party in rendering its verdict, as long as the argument is made in the context of the jury's determining *damages*. The courts uniformly agree that golden rule arguments as to damages are improper invitations to the jury to depart from its mandate of neutrality and render a decision based on emotion and partiality. And all circuits hold that golden rule arguments made in the context of damages may warrant a new trial. But there is a deep circuit split on the propriety of golden arguments made regarding *liability*, with circuits disagreeing whether such arguments are appropriate and may ever warrant a new trial.

4. The question that will be presented in Applicant's petition is: whether a federal court may ever order a new trial under Federal Rule of Civil Procedure 59(a) to remedy golden rule argument made as to liability. In other words, even though the practice is permissible grounds for a new trial in every circuit when deployed as to damages, may a trial lawyer nonetheless invite the jury to identify with a party in deciding liability? As the D.C. Circuit has explained:

While all circuits that have considered the issue have held a golden rule argument improper if made with respect to damages, there appears to be, as the district court noted, a circuit split regarding whether such argument is improper if made with respect to liability. At least four circuits have found such a golden rule argument permissible. On the other hand, the Third Circuit has rejected the liability-damages distinction.

We join our sister circuits and hold that a golden rule argument is improper and may thus serve as the basis for a new trial. Further, we do not recognize a *per se* distinction between a golden rule argument relating to damages and the same argument regarding liability. Courts forbid golden rule arguments to prevent the jury from deciding a case based on inappropriate considerations such as emotion. It is no more appropriate for a jury to decide a defendant's liability *vel non* based on an improper consideration than to use the same consideration to

determine damages. Accordingly, we agree with the Third Circuit that a golden rule argument made with respect to liability as well as damages is impermissible.

Caudle v. District of Columbia, 707 F.3d 354, 359-60 (D.C. Cir. 2013) (citations and footnote omitted) (citing Third Circuit as expressly rejecting the liability-damages distinction; Fourth and Seventh Circuits as implying that golden rule argument is always improper; and Second, Fifth, Tenth, and Eleventh Circuits as adopting the liability-damages distinction). Despite the acknowledged existence of a deep circuit split, a good-faith Westlaw search has revealed no previous petitions presenting this issue for the Court's consideration.

5. In holding that golden rule argument is proper and thus can never warrant a new trial when made in the context of liability, the Second Circuit's decision below is incorrect. As the Third Circuit explained, it is always improper for a trial lawyer to exhort a jury to render a decision (whether as to damages or liability) that the jurors would want if they were in the shoes of a particular party; this conclusion flows logically and inexorably from the foundational requirement that lawyers may never encourage the jury to make a decision based on "undue sympathy and emotion." *Edwards v. City of Philadelphia*, 860 F.2d 568, 574 n.6 (3d Cir. 1988).

6. The question whether golden rule arguments regarding liability are improper and may ever warrant a new trial is an important and recurring issue. In arriving at varying conclusions on this question, the circuits have also thereby diverged on the meaning and application of the reasonable-person standard, which is woven throughout federal law. For example, the *Caudle* case

dealt with the application of “the *Burlington Northern* standard—which forbids employer actions that would have been materially adverse to a *reasonable* employee.” 707 F.3d at 360-61 (quotation marks omitted). The D.C. Circuit held that a golden rule argument was improper precisely because it “asked the jurors to decide how each of them—not a reasonable person—would feel if he were in the appellees’ situation.” *Id.* at 361. By contrast, in a Tenth Circuit case turning on the application of an objective reasonableness standard, albeit in a different area of law (a challenge to an officer’s use of deadly force)—the Tenth Circuit blessed the use of golden rule arguments as to liability “*especially* where the issue is the objective reasonableness of the use of deadly force.” *Cordova v. City of Albuquerque*, 816 F.3d 645, 660 (10th Cir. 2016) (emphasis added). In the Tenth Circuit’s view, an objective reasonableness standard *requires* the jury to “stand in [the] shoes” of the defendant. *Id.*

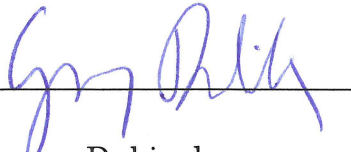
7. This case presents an excellent opportunity to resolve this important conflict and provide needed guidance to the circuits. In this case, counsel for respondent plainly engaged in golden rule argument during closing arguments at trial. After the jury found for respondents, Applicant challenged on appeal the prejudice caused by opposing counsel’s golden rule argument and presented the split to the Second Circuit, which “decline[d]” to “extend [its] prohibition on golden rule arguments beyond the context of damages (the only context in which they are forbidden) to any kind of liability. . . . Regardless of whether [respondent]’s counsel in fact made a ‘golden rule’ argument during closing, his argument was not made in the context of damages, and a new trial is not

warranted.” 714 F. App’x at 80. This case, therefore, squarely presents the circuit conflict at issue, with no vehicle problems.

8. This application for a 60-day extension seeks to accommodate Applicant’s legitimate needs. Applicant has recently affiliated with undersigned counsel. The extension is needed for undersigned counsel and his colleagues to fully familiarize themselves with the record, the decisions below, and the relevant case law. In addition, undersigned counsel was recently appointed by the First Circuit as *amicus curiae* to brief an issue in a case by August, and is currently engaged in writing a brief in a Ninth Circuit case that will be due in July.

4. For the foregoing reasons, Applicant respectfully requests that the due date for his petition for a writ of certiorari be extended to October 1, 2018.

Respectfully submitted,

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Dated: June 20, 2018

CERTIFICATE OF SERVICE

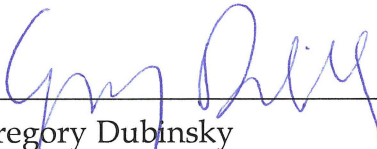
Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On June 20, 2018, I caused a copy of the within Application for an Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, to be served upon Respondents by delivery to a third-party commercial carrier (Fedex) for Priority Overnight Delivery to the addresses listed below:

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