No.

IN THE

Supreme Court of the United States

JOHNNIE C. IVY, III, SUCCESSOR TO JOHNNIE C. IVY, DECEASED; NENA ELLISON, ERNEST STORMS; JACQUELYN STORMS; JANE C. IVY-STEVENS; ROBERT G. BURGESS, PETITIONERS

v.

H. THOMAS MORAN, II

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

PETITION FOR WRIT OF CERTIORARI

Stephen J. Johnson
Attorney At Law

9901 I.H. 10, West,
Suite 800
San Antonio, TX 78230
(210)558-2883

Marina Tramontozzi
Counsel of Record

40 Country Club Rd
N. Reading, MA 01864
mtramontozzi@tramontlaw.com
978-664-1671

CURRY & TAYLOR ♦ 202-393-4141

QUESTION(S) PRESENTED

Petitioners are investors, or survivors of investors, who purchased shares in the death benefits of an individual, Mr. Jordan's, life insurance policies. Mr. Jordan died on February 4, 2004, vesting the death benefits with Petitioners and other similarly situated investors. After Mr. Jordan died, LifeTime Capital, Inc., the viatical company which sold the shares to Petitioners, was placed in receivership under the supervision of the United States District Court for the Southern District of Ohio. The Court has refused to rule on Petitioners' ownership claims, but also denies Petitioners any rights to the proceeds of the policies.

1. Whether the District Court's refusal to provide Petitioners with a predeprivation hearing on their ownership claims deprived Petitioners of necessary due process.

2. Whether the District Court's refusal to recognize that Petitioners ownership of the policy proceeds vested with them on Mr. Jordan's death deprived Petitioners of property without necessary due process of law.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Johnnie C. Ivy III, Nena Ellison, Ernest Storms, Jacquelyn Storms, Jane Ivy-Stevens and Robert Burgess, respectfully petitions for a writ of certiorari to review the mandate of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit (Sixth Circuit) is reported at 740 Fed. Appx.820, and reproduced in the appendix hereto ("App.") at a1. The opinions of the District Court for the Southern District of Ohio are reported at 2016 WL 9404926 and 2016 WL 1222409 and reproduced at a26 and a36, respectively.

JURISDICTION

The decision of the court of appeals was entered on June 27, 2018. a1. A petition for rehearing and rehearing en banc was denied on September 6, 2018. 86a. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1)

This Petition is timely under the Supreme Court Rule 13.1 because it is being filed within 90-days after the denial of the petition for rehearing and rehearing en banc.

RELEVANT PROVISIONS INVOLVED

Amendment V

> "No person shall be. . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

> "No State shall. . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

This case comes to the Court on Petitioners' quest, lasting nearly fifteen years now, to obtain a proper judicial determination of their rights to the proceeds/death benefits of two life insurance policies. The United States District Court for the Southern District of Ohio has been the primary culprit, using a series of distractions and inattention to avoid addressing the issue. The United States Court of Appeals for the Sixth Circuit has sanctioned this practice. As a result, the courts have denied Petitioners the due process of law that entitles them to a judicial determination of their ownership claims and deprived Petitioners of the outright ownership of the property in question, also a denial of Petitioners' due process rights.

Petitioners assert claims to ownership of the proceeds of two matured life insurance policies issued to Mr. Jordan (hereinafter "Jordan policies"). Since 2004, the proceeds of the Jordan Policies have been possessed by a Receivership administering the assets of LifeTime Capital, Inc. (hereinafter "LifeTime"), established by the District Court. LifeTime was a viatical company that purchased the policies at a discount from an insured, then sold the rights to the death benefits to numerous investors. Appellants contend that the proceeds of the Jordan policies were not assets of LifeTime and that LifeTime is not entitled to possess them. Appellants contend that they are the owners.

Mr. Jordan died before there was any court case filed or receivership established in the district court. At his death, the death benefits became the property of the beneficiaries, including Petitioners. Even though the ownership question was well known at the time while the fund was still intact, the district court, the receiver and the court-appointed examiner representing receivership creditors, refused to resolve it. It remained at large and remains so today. The district court directed mediation, denied Petitioners standing to raise objections and simply suspended action. At virtually every turn, the presiding courts have expressly refused to decide the issue and have expressly acknowledged that the issue remained open.

In 2016 the district court dismissed Petitioner's claim to ownership. By this time, the Jordan policies proceeds have been used by the receiver, subject to the receiver's contingency plans to restore them. The district court still offered no coherent analysis of the

ownership issues. Now, after over 10 years, the district court stated that the ownership question had been "effectively decided" at an earlier point. The Sixth Circuit then left this determination undisturbed. The Court, however, (i) justified the possession and use of the Jordan policy proceeds.by the receiver by adopting Petitioners' ownership analysis; then (ii) never even mentioned that the same analysis supports Petitioners' ownership; and (iii) refused to apply its own precedent on due process requirements.

This Court's review clearly is warranted, not only to correct the erroneous ruling on Petitioner's claims but also to repair the departures from the accepted and usual course of judicial proceedings that created the conditions for this aberrant outcome.

STATEMENT

A. 1999-2004 Petitioners Own Jordan Policy Proceeds

This case involves the ownership rights to two $3 million death benefits payable on the death of the insured, Mr. Jordan, on February 4, 2004. 6a, 67a. LifeTime Capital, Inc., one of the Respondents herein, had purchased the rights to the death benefits from Mr. Jordan and then sold those rights to third parties, including the Petitioners. These transactions completely removed LifeTime from any claim to ownership of the death benefits, and took place in 1999 and 2000 before any controversy surrounding LifeTime 92a, 128a.

When Mr. Jordan died, Petitioners and other similarly situated purchasers had all right, title and interest in the proceeds of the insurance policies. 92a, 128a. Mr. Jordan's death and the vesting of the rights in the death benefits took place before the lawsuit seeking the appointment of a receiver.

B. 2004 Receiver Later Appointed

The principal action by H. Thayne Davis seeking *inter alia*, the appointment of a receivership over the assets of LifeTime, commenced on February 19, 2004. 4a, 66a; The District Court appointed the Receiver, giving the Receivership the possession of LifeTime's assets on February 20, 2004. 5a. The death benefits from the Jordan Policies, having already vested with Jordan Investors, were not assets of LifeTime or in the possession of LifeTime when the District Court appointed the Receiver.

In May 2004, Mr. Jordan's life insurance company paid the death benefits from the Jordan policies jointly to the life insurance trust holding the Jordan life insurance policies and the Receiver. 6a-7a. In September, 2004 the Receiver sought to have the District Court clarify whether the Jordan Policies proceeds were part of the receivership estate. 7a. The Receiver specifically sought a decision by the District Court that the Jordan Policies proceeds belonged to the Receivership.

On October 4, 2004, Mr. Andrew Storar, Court-appointed Examiner for the Receivership, sent a letter to the Jordan Investors (as well as others) about the Jordan Policies proceeds. Mr. Storar represented that

the District Court would determine whether the Jordan Policies proceeds would be distributed directly to the Jordan Investors. The letter also stated that the Jordan Investors could submit written objections to the Receiver's position or alternatively direct them to Mr. Storar. 88-91, 103a-124a, 125a-127a, 130-141. Numerous investors submitted written objections to the Receiver's position on the Jordan Policies proceeds. Mr. Storar submitted them to the Court as proper objections to the Receiver's Motion. 88a-92a.

C. 2006: Court Overrules Receiver Ownership Claim; Receiver Retains $4 Million of Jordan Policy Proceeds

While the proceeds ownership issue remained undecided the District Court ordered voluntary mediation. 84a-85a; 70a. The mediation was not compelled. Participation was voluntary. 84a-85a; 70a

The mediation took place and those Jordan Investors who elected to participate reached a settlement with the Receiver. The settlement was agreed to only by those who participated in the mediation. It was not binding on every Jordan Investor. 70a;

It was not mandatory that any investor in the Jordan Policies accept the settlement. 70a.

The Receiver informed the District Court of the settlement agreement reached in April 2006. 142a-152a. The Receiver noted that after even complete participation by all Jordan Investors, there remained $3,980,786.00 of the Jordan Policies undistributed. The

Receiver represented that he had contingency plans in place to repay these proceeds. 148a.

In response to the mediated settlement with those Jordan Investors participating, the District Court entered an Order Overruling the Motion to Clarify Status of Matured Policy Proceeds. 82a-83a.

On March 26, 2006. As its title implies, the Order overruled the Receiver's Motion to Clarify, RE 82, Page ID # 965-1004, thereby denying the Receiver's claim that the Jordan Policies proceeds were LifeTime or Receivership assets. Nevertheless, the proceeds remained under the control of the District Court and the Receivership.

D. 2011: Petitioners' Ownership Claim Excluded Yet Legal Interest "Unimpaired"

Thereafter, the Receiver filed Motions to Disallow the claims of the Jordan Investors, Motion to Disallow Claims, RE 1111, Page ID # 12208-12218; Motion to Disallow Jordan Investors Claims, RE 1112, Page ID # 12229-12241, seeking to require all Jordan Investors to participate in the settlement or forfeit all ability to claim proceeds of the Jordan Policies. Petitioners opposed the Receiver's Motions. 88a-91a, 130a-141a. The oppositions pointed out that (i) Petitioners had a still unresolved claim to ownership of the Jordan Policies proceeds; (ii) the Receiver had not previously sought to make any participation in the settlement mandatory or risk forfeiting all ownership rights to the proceeds; (iii) the court had expressly represented that any acceptance of the proposed settlement amounts was voluntary. Petitioners

submitted their oppositions to the Motion in the form of letters to the District Court, a practice consistent with oppositions to the Receiver's Motion to Clarify, 103a-124a. that originally raised the ownership issue, See also Order Approving Claims Procedure, RE 167, Page ID # 2224-2229.

The District Court granted the Receiver's Motion. 69a. The District Court refused to address the Petitioners' assertions that their claims to ownership of the Jordan policies needed to be resolved before the proceeds were disbursed. The District Court concluded that Petitioners had not formally intervened in the Receivership.

Petitioners timely appealed to the Sixth Circuit, which rejected the appeals on September 12, 2012. 58a-64a. The Court noted, however, that the District Court's decision on the Motion to Disallow, "did not disallow *any* legal interest . . . in the proceeds from the Jordan policies. . . .The district court disallowed only [Petitioners'] claim to the settlement agreement. . . its decision would not limit [Petitioners'] right to pursue any independent legal action available. . . ." 64a. The Sixth Circuit's decision confirms that the Jordan policies proceeds were not assets of the Receivership. Based on the Receiver's previous representation to the District Court, there still was upwards of $4 million of undistributed Jordan Policies proceeds still available. 148a.

E. 2016: Petitioners' Ownership Claims Rejected As "Effectively Decided" Earlier

Following a District Court-imposed stay of the receivership, Petitioners filed statements of claims, REs 1400-1405, Page ID # 14718-14761 in July 2015, followed by their Complaints, REs 1439-1443, Page ID # 15035-15069, seeking to recover the Jordan Policies proceeds and their damages. The Receiver's Motion for Summary Judgment followed. The District Court ruled that Petitioners had no ownership claim to the Jordan policies proceeds. No ownership claims vested when Mr. Jordan died. Ownership had been "effectively decided" at some point earlier in the receivership. As set forth earlier, there has been no such decision.

F. Sixth Circuit Decision: LifeTime but Not Petitioners Have a Beneficial Interest Vesting Upon Jordan's Death

Petitioners timely appealed the District Court rejection of a vested ownership interest to the Sixth Circuit. The Court of Appeals affirmed the District Court's decision, but also recognized that beneficial interests in the Jordan policies proceeds could vest upon the death of the insured. 16a. The vesting, in the Court of Appeals' perspective, however, applied to LifeTime's beneficial interest. When addressing Petitioners' interest, the Court overlooked LifeTime"s irrevocable transfer of these interests to Petitioners before Mr. Jordan's death. The Sixth Circuit refused to address the inconsistency of its position when Petitioners sought en banc review.

REASONS FOR GRANTING THE PETITION

I. The Court Should Exercise its Supervisory Powers to Review

This case has lasted fourteen years. During that time, the District Court (i) deferred deciding on the ownership of the Jordan policies death benefits; (ii) directed a voluntary mediation to avoid deciding the ownership claims; (iii) overruled the receiver's Motion to Clarify, leaving millions of dollars of Jordan policies proceeds at large; (iv) disallowed Petitioners' attempts to obtain a ruling on the ownership issue; (v) represented that Petitioners' rights to pursue claims to the Jordan policies proceeds remained intact; finally (vi) dismissed Petitioner's ownership claim because the previous steps somehow "effectively decided" the issue earlier. The Sixth Circuit then determined that beneficiary rights both could vest upon death but could not grant vested rights upon Petitioners.

As set forth above, the Jordan policies' total death benefits started at $6,048,786 when the receiver took possession. After the payments pursuant to the consented settlement agreements, the receiver retained possession of $3,980,786.00. Although the receiver represented that he had a contingency plan to restore this amount RE 414, Page ID # 4702, it now appears that the full amount of the policies proceeds have been distributed. 49a – 50a.

II. The Courts' Refusal to Accord Petitioners a Pre Deprivation Assessment of their Property Interests Claims Denied Petitioners Due Process of Law

In addition, the collective indifference by both the District Court and the Sixth Circuit to the established standards to accord a claimant the due process of law provide a compelling reason to review this case. Although the Rules of this Court identify conflicts between the various circuits as a recognized basis to grant a Petition for review, this case is instead a glaring example of the courts' refusal to follow its own precedent. This case was before the District Court for decision on the receiver's Motion to Clarify in 2005 when the Sixth Circuit ruled in *Liberte Capital Group, LLC v. Capwill*, 421 F. 3d 377 (6th Cir. 2005).

Liberte established the law in the Sixth Circuit that once a party has an ownership/property interest, a predeprivation hearing, "of some sort" is required to satisfy the dictates of due process. The record here demonstrates that Appellants never received any hearing on the issue of their ownership of the Jordan Policies proceeds.

That Petitioners never received a due process hearing on their ownership interest is brilliantly illuminated by Petitioners' entreaties submitted to the District Court, the District Court's refusal to consider those submissions or the ownership position they embodied, Petitioners' Appeal to the Sixth Circuit and the assurances given (even while the Appeal itself was rejected) that the District Court had not disallowed any legal interests in the Jordan Policies proceeds, but had

only addressed the others' consensual, voluntary settlement 64a.

In its latest attempts to dispose of Petitioners 36a – 52a; 26a – 35a, the District Court presented alternative facts to cast a different light on the past proceedings. First, the District Court pretends that the proceedings on the settlement agreement "effectively recognized the ownership interests. . . ." 48a. The District Court then tries to use this Court's 2012 decision as a determination that Appellants received proper notice and opportunity to be heard on the ownership issue 32a – 33a.

Both statements are blatantly false. None of the proceedings on the settlement can objectively be viewed as effectively recognizing any investors' ownership claims. When Petitioners sought to have the ownership issue resolved expressly, the District Court rejected the effort, never said anything about any recognition of ownership of the Jordan Policies proceeds, and then disassociated participation in the settlement from any relation to the ownership claims 65a – 81a.

The Sixth Circuit's September 12, 2012 decision 58a – 64a, likewise only addressed the District Court's preclusion of Petitioners from participating in the settlement and expressly separated the previous proceedings from any relation to the ownership claims.

Thus, the proceedings actually provided in this case gave Appellants no notice and opportunity to be heard, ". . . **concerning their ownership claims. . . .**"

as required by *Liberte, supra,* as the District Court represents 32a.

The District Court's explanations are brazenly misstated comparisons of this Court's decision in *Liberte, supra,* at 384-385. The District Court correctly notes that the court's failure in *Liberte* was that it "did not provide the claimant with a hearing on the seizure of proceeds issue" 33a.: the district court in *Liberte* denied the hearing relative to ownership and instead held a "fairness hearing" limited to the issue of determining proper disbursement of assets. The District Court just won't admit it did the same here: it also did not actually provide Petitioners with a hearing on the ownership issue and instead held "fairness hearings" on the settlement disbursements. Since the District Court now says it previously made the Jordan Policies proceeds assets of the Receivership at some earlier stage 32a, the fairness hearings are functionally identical to the deficient hearings in *Liberte.* The District Court then falsely states that the Sixth Circuit Petitioners' 2012 Appeal ruled that it **did** afford Petitioners a hearing on their ownership issue, when clearly it did not. The facts also show that there was no hearing. The proceedings held on the settlement issue did not give Petitioners any hearing on the ownership issue. It was just as inadequate as the limited fairness hearing found wanting by the Sixth Circuit in *Liberte.*

Certainly, the District Court did not follow the guidance of this Court in *Liberte,* supra, at 384: "If the matter of ownership is in doubt, then the party claiming the property should ask to be allowed to intervene in the receivership case and present his claim to the property. The court should accord such claim a proper

hearing and all parties should be heard. . . ." and further, "**At a minimum, once [claimant] challenged the ownership of the proceeds, the court should have deferred until a proper hearing had enabled the court to determine ownership. . . ."** Id at 385 [emphasis added].

The record is clear, Petitioners did not get the adequate predeprivation hearing required.

III. The Courts' Disregard of the Vested Ownership of the Jordan Property Death Benefits Denies Petitioners their Due Process Rights.

Finally, the courts below collectively denied Petitioners their property rights without adequate due process. Again, the denial of Petitioners' due process and property rights reflects a refusal to adhere to the standards the Sixth Circuit itself established for such review. It reflects a compelling reason for this Court to intervene as a means to exercise the Court's supervisory role.

The courts below present Petitioners' claims as compromisable by the LifeTime Receivership. 48a, 31a. First, in the Decision and Order, 36a, the District Court states that the "matured" (vested) status of the Jordan Policies "dismisses" the fact that some LifeTime investors rescued LifeTime from financial collapse, and that commingling of funds also occurred, making it "equitable for the receivership to distribute assets to remaining Investors on a pro rata basis. . ." 49a – 50a. The District Court then mentions approvingly the belief that once non-consenting the Jordan Policies

investors' claims were disallowed, the remaining Jordan-policy proceeds would be distributed to the Jordan Investors who participated in the settlement 50a. The final Order 26a again cites the supposed but for payment by other LifeTime investors to prevent the Jordan policies from lapsing.

In effect, the District Court adopted the approach by the lower court that the Sixth Circuit rejected in *Liberte*, *supra*. The lower court ordered the contested policy proceeds to be used for the benefit of the receivership, 421 F. 3d at 381, and included in a pro rata distribution of the receivership estate, *Id.* at 382. The judge opined that to do otherwise would not "do equity" and would allow investors "to elevate their claims by standing on the backs of other . . . investors.. . " *Id.* The Sixth Circuit, however, noted,

> "Although equity and justice are appropriate considerations for distribution, they skirt the legal basis for [claimant's] claim that the . . . Policy's proceeds should never have been made a part of the receivership estate.
> The distinction between a hearing on the merits of a receiver's seizing of assets to be included in the receivership estate and the method of distribution of those assets is well recognized.

Id . at 384.

The Sixth Circuit further explained in *Liberte* that when a third party claims property (in opposition to the receivership), if the court finds the property does belong to a third party, the appropriate action is to make an order directing the receiver to turn over such

property. "The question of priorities and pro rata distribution, of course, does not enter into the problem when such an order is properly made." *Id.*

The Sixth Circuit's directives in *Liberte* reflect the limits on receiverships and the scope of a receiver's actions. "The general rule is that a receiver acquires no greater rights in property than the debtor had"; in other words, a receiver "stand[s] in the shoes of the entity in receivership." *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009). Accordingly, the receiver has lawful authority only over particular assets, and a receiver's equitable posers do not otherwise apply. Further, the supervising court has no jurisdiction to control that property. The Receiver has no basis to expand or avoid rights under the contract simply because the Court imposed a receivership. *Securities and Exchange Commission v. Narayan*, Civil Action 3:16-cv-1417-M ( ). The receiver thus can "only assert claims regarding Receivership property," and funds that ultimately belong to investors are "beyond the scope of the Receiver's authority." *Javitch v. First Union Secs., Inc.*, 2014 WL 3510603 at *3 (N.D. Ohio 2014) (Receiver does not have standing to pursue claims for money damages to recover funds on deposit held by escrow agent for the benefit of non-party customers). *Also See, In re Great Gulfcan Energy Tex., Inc.*, 488 B.R. 898, 910 (Bankr. S.D.Tex. 2013) ("[I]f a debtor's interest in property is limited at the time of filing, the estate's right in the property is also so limited."); *In re Chestnut*, 300 B.R. 880, 886 (Bankr. N.D. Tex. 2003), *aff'd*, 422 F.3d 298 (5th Cir. 2005) ("Whether something is property of the estate depends solely on whether an interest in that property exists under applicable nonbankruptcy law.").

The deciding courts below, including the Sixth Circuit's Opinion, 1a-25a, took a contrary approach in disregard of these well-established limits on the Receiver's power as well as its own. Further, the courts did not even provide Petitioners with as much process as the approach rejected by the Sixth Circuit in *Liberte:* Throughout, the district Court never announced the jeopardy to Petitioners' ownership claims, and right up until the final rulings, the courts disavowed that Petitioners did not retain the right to contest ownership. This Court should reject this construction and disallow the injection of "equity" considerations into this case to expand the Receiver's powers.

CONCLUSION

For the forgoing reasons, Petitioners request the United States Supreme Court grant review of The United States Court of Appeals for the Sixth Circuit's dismissal for lack of jurisdiction of Petitioner's appeal and grant the petition for writ of certiorari.

Respectfully submitted,

STEPHEN J. JOHNSON
Attorney At Law

9901 I.H. 10, West,
Suite 800
San Antonio, TX 78230
(210)558-2883

MARINA TRAMONTOZZI
Counsel of Record

40 Country Club Rd
N. Reading, MA 01864
mtramontozzi@tramontlaw.com
978-664-1671