

No.

In the Supreme Court of the United States

JAMES ALVIN CHANEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a criminal defendant's Fifth Amendment right of due process and Sixth Amendment right to a trial by an impartial jury violated when the trial court fails to investigate or notify the parties of a juror allegation made mid-trial of pre-deliberation discussions?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

JAMES ALVIN CHANEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner James Alvin Chaney respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, James Alvin Chaney was a defendant in district court with Lesa Chaney, and Ace Clinique of Medicine, LLC. They were also appellants in the Sixth Circuit. James Alvin Chaney and Lesa Chaney are individuals. Thus, there are no disclosures to be made pursuant to Supreme Court Rule 29.6. Ace Clinique of Medicine, LLC was a limited liability company and was not a subsidiary or affiliate of a publicly owned corporation. There was no parent corporation or affiliate. There was no financial interest in a parent corporation or affiliate. Respondent is the United States of America.

LIST OF PROCEEDINGS

This case originated on October 2, 2014, when Petitioner James Alvin Chaney was indicted by a federal grand jury in the Eastern District of Kentucky, *United States v. James A. Chaney*, 6:14-cr-00037-1. The final judgment was entered on October 3, 2017 and an amended final judgment was entered on November 7, 2017. Petitioner filed his notices of appeal on October 13, 2017 and November 7, 2017.

The case proceeded to the United States Court of Appeals for the Sixth Circuit, *United States v. James Alvin Chaney, M.D. aka Ace Chaney*, 17-6239 and 17-6351. The final judgment was entered on April 11, 2019.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix A, *infra*, 1a-34a) is *United States v. Chaney*, 921 F.3d 572 (6th Cir. 2019). This Opinion includes three consolidated cases and the relevant Opinion regarding James Alvin Chaney is designated as 17-6239 and 17-6351.

The relevant Opinion of the United States District Court for the Eastern District of Kentucky at London, is *United States v. Chaney*, 211 F.Supp.3d 960 (EDKY 2016) that issued on September 30, 2016. (Appendix B, *infra*, 35a-86a).

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2019 (Appendix C, *infra* 87a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional right to an impartial jury under the Sixth Amendment, which provides in relevant part: "[i]n 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" U.S. Const. amend VI.

Additionally, this case involves a federal criminal defendant's constitutional right to due process under the Fifth Amendment, which provides in relevant part: "[n]o 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." U.S. Const. amend V.

STATEMENT

Petitioner, James Alvin Chaney, seeks a Writ of Certiorari under Supreme Court Rule 10(a) on the grounds that the Sixth Circuit Court of Appeals has "entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

1. The Petitioner, James Alvin Chaney, was one of three defendants charged in a 256-count second superseding indictment (R.190). He was specifically charged with conspiracy to distribute and/or dispense Schedule II or III controlled substances outside the usual course of professional practice and not for a legitimate medical purpose, 21 U.S.C. § 846; unlawfully distributing or dispensing a controlled

substance that was not for a legitimate medical purpose and in the usual course of professional medical practice, 21 U.S.C. § 841(a)(1); maintaining a place for the purpose of unlawfully distributing or dispensing controlled substances that was not for a legitimate medical purpose and in the usual course of professional practice, 21 U.S.C. § 856(a); conspiracy to commit money laundering, 18 U.S.C. § 1956(h); and acquiring and obtaining possession of a controlled substance by misrepresentation, fraud, deception, or subterfuge, 21 U.S.C. § 843(a)(3) and 18 U.S.C. § 2.

He was also charged with conspiracy to commit health care fraud, 18 U.S.C. § 1349, health care fraud, 18 U.S.C. § 1347 and 18 U.S.C. § 2; making false statements relating to health care matters, 18 U.S.C. § 1035; and money laundering in violation of 18 U.S.C. § 1957. (R. 190, Second Superseding Indictment, Page ID# 1877-1920).

2. A lengthy trial proceeded and a mixed verdict was returned by the jury. He was convicted of 175 counts. (R.281, Verdict Form, Page ID# 2954-2984).

3. The day after the jury returned the verdict, juror 116, an alternate juror, contacted Petitioner's trial counsel and left a voicemail. Trial counsel reported this message to the trial court and a telephonic conference was held. (R. 285, Telephone Conf, Page ID# 2988). The trial court chose to conduct a limited *in-camera* interview without the parties present (Appendix B, 54a-55a).

During this *in-camera* interview, the alternate juror revealed that immediately after the Government's opening argument, two jurors were talking about the case, specifically about Petitioner's house. (Appendix B, 54a). The

alternate told these jurors to not discuss the case and they argued with her until another juror pointed out a printed instruction on the wall. (*Id.*) However, these two jurors continued to deliberate early in the case (*Id.*). The alternate also stated that mid-trial the jury commented about witness testimony, defense counsel's appearance, and lighting in the courtroom. (*Id.* at 55a)

The alternate juror said: “- - I actually wanted to talk to you when it was – I had told Renee - - I talked to her twice, and the last time she told me that - - that she wasn't going to tell you that I - - that I had called, and that for me to just ask the jurors not to do that myself, and I didn't feel that was appropriate for me to ask them- -”(R. 291, Sealed Transcript, Page 4). The juror worried about a fair trial (*Id.*) and explained she heard two jurors discussing the case. She said, “—you know, the – his house, Dr. Chaney's house and everything.” (*Id.*)

4. It was during this post-trial investigation into jury misconduct, that Petitioner learned for the first time that the trial judge had been notified of this misconduct just five days into the trial. This was well before the close of evidence or deliberation.

The trial court indicated that third-hand information was relayed to him that a juror expressed “‘some frustration with the process’ and ‘concerns about how serious[ly] the jury was taking their duty.’” (Appendix B, 52a). Rather than investigate further, or notify the parties, the trial court instructed the jury to bring any concerns to his attention. (*Id.* at 53a). The alternate juror attempted to comply

with the trial court's instructions and tried to bring her renewed concerns to light but was prohibited by court personnel. (R. 291, Sealed Transcript, Page 4).

5. Petitioner sought permission to conduct "further inquiry and investigation" into the alternate's statements, but this request was denied. (Appendix B, 55a).

6. Petitioner subsequently filed a Motion for a New Trial and argued that a new trial was warranted due to juror misconduct (Appendix D, 89a). Petitioner argued (1) that immediately after opening statements two jurors were discussing the case despite the court's instructions; (2) this information was conveyed to the trial judge; (3) the parties were not informed by the trial judge therefore preventing them from making proper objections or motions; and (4) the jurors continued to discuss the case despite the order not to do so. (*Id.* at 89a-90a).

Petitioner argued that this pre-deliberation discussion by the jurors impacted his right to a fair and impartial jury; and had he known, he would have sought a mistrial or the dismissal of the two jurors (*Id.* at 90a). Petitioner argued that his "Sixth Amendment right to a fair and impartial jury was violated and it materially affected the defense of the case." (*Id.* at 91a).

6. The district court denied the Motion for a New Trial. (Appendix B).

Concerning the trial court's failure to notify the parties about the allegation of jury misconduct or investigate the allegation – the court provided that it was not aware that jurors were prematurely deliberating. (*Id.* at 56a). The court provided:

"[t]he clerk never indicated to the Court that a juror had commented on pictures of the Chaney's house, nor did she report any of the alternate's additional concerns. All of these claims appeared for the first time in the

alternate's post-verdict interview. The Court could not have alerted the parties to these allegations prior to discovery that they existed.” (*Id.*)

The trial court wrote that since the complaint reported to him was nebulous in nature, a “‘basic remedial action’ was necessary in lieu of a more ‘intrusive remedy;’” (*Id.* at 60a) and therefore, he “‘immediately chose to instruct the jury that if they had ‘any issues that relate[d] to the jury instructions,’ they should ‘bring those to [the Court’s] attention.’” (*Id.*).

Concerning the duty to notify the parties of the initial allegation of jury misconduct, the court questioned whether defendants’ “declaration of a right to be present here simply begs the question, as the ultimate issue is whether the court clerk’s vague report raised ‘substantial’ enough concerns to warrant any response from the Court” (*Id.* at 62a).

The court further provided that “even if the Court’s decision somehow violated Rule 43, the Supreme Court has expressly held that a ‘violation of Rule 43 may in some circumstances be harmless error.” (*Id.* at 62a)(citing *Rogers v. United States*, 422 U.S. 35, 35 (1975)). The court then analyzed whether this possible error was harmless and whether the court’s conduct created “a reasonable possibility of prejudice.” (*Id.*)(citing *United States v. Harris*, 9 F.3d 493, 499 (6th Cir. 1993)). The court reasoned that “none of the alternate’s detailed post-verdict allegations were sufficiently serious to warrant a mistrial” or violate Petitioner’s right to a fair trial (*Id.* at 63a-68a).

The trial court concluded that the alternate juror’s information about pre-deliberation discussions did not mandate retrial for the following reasons: First, the

alternate provided a “meticulous account of the discussions that she felt were ‘inappropriate.’” (*Id.* at 65a). Also, “[t]he fact that two jurors may have commented on a single piece of evidence at the very start of the Government’s case – but proceeded to refrain from such discussion for the remainder of a remarkably complex two-month trial - raises little concern about the jury’s ability to keep an open mind throughout the presentation of the evidence.” (*Id.* at 66a) Finally, the trial court concluded a retrial was not mandated despite the juror misconduct because “the jury returned a carefully drawn split verdict on the Chaney’s 256-count indictment, finding the Chaney’s guilty of many counts but acquitting them of over a hundred others.” (*Id.* at 67a).

7. On September 28, 2017, Petitioner was sentenced to a total amount of 180 months imprisonment followed by three years of supervised release (R. 519, Amended Judgment, Page ID# 10265-10273). He was ordered to pay a special assessment of \$17,500.00 and restitution in the joint and several amount of \$12,703,796. (*Id.*)

8. Petitioner timely filed his notices of appeal and in part argued to the Sixth Circuit that the trial court erred by failing to make a sufficient inquiry into the initial concerns raised mid-trial by the alternate juror. The Sixth Circuit held that “[a] new trial is warranted based on juror misconduct only if the misconduct ‘resulted in prejudice to [the defendant.]’” (Appendix A, 30a)(citing *United States v. Bowling*, 900 F.2d 926, 935 (6th Cir. 1990)). The Sixth Circuit opined that the district court “acted recklessly by choosing to keep the information about potential

jury misconduct from defense counsel.” (*Id.* at 32a). However, the court concluded that “a new trial is not warranted because the post-interview with juror 116 revealed there was no juror misconduct that could have warranted a new trial, and thus there was no prejudice” (*Id.*). No analysis was made by the trial court concerning whether the error was harmless or whether the trial court’s conduct created a reasonable possibility of prejudice. *United States v. Harris*, 9 F.3d 493, 499 (6th Cir. 1993).

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit’s Ruling Creates an Inter-Circuit Split between the Third Circuit and the Sixth Circuit and the Question Presented Raises Constitutional Issues of Great Significance

The United States Constitution guarantees all criminal defendants the right to a “fair trial” by an “impartial jury.” Furthermore, a criminal defendant is guaranteed due process of law. U.S. Const. Amends. V & VI. It is the district court's role to safeguard these rights during all stages of trial, beginning with jury selection and ending with the jury's verdict. *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Due process requires “a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent judicial occurrences and to determine the effect of such occurrences when they happen.” *Id.*

In *Tanner v. United States*, 483 U.S. 107 (1987), this Court explained that a defendant's right to an impartial jury is protected by numerous aspects of the trial process, including *voir dire*; observation by the court, court personnel and counsel;

and evidentiary hearings at which non-jurors are permitted to testify regarding their observations of juror misconduct. *Id.* at 126-127.

In Petitioner Chaney's case, the trial court and court personnel had ample opportunity to safeguard his right to an impartial jury but failed to do so. The Sixth Circuit called this inaction "reckless" but did not find that prejudice occurred because of the trial court's post-trial investigation into the matter. (Appendix B, 32a). In this decision, the Sixth Circuit relied on *United States v. Bowling*, 900 F.2d 926 (6th Cir. 1990).

In *Bowling*, after the trial concluded, defense trial counsel learned that two jurors discussed the defendant's case in the corridors of the courtroom. The scope of the conversation led defense trial counsel to conclude that the juror had determined guilt prematurely and violated the court's order not to discuss the case. The witnesses who heard the statements, and observed the demeanor of other jurors testified at a subsequent hearing, but the trial judge would not allow questioning of the jurors. *Id.* at 930. The defendant appealed and sought a new trial, but the Sixth Circuit held that a "defendant must show that the juror misconduct resulted in prejudice to his defense in order to be afforded a new trial. *Id.*

Here, Petitioner argued prejudice occurred because of the court's failure to notify the parties. Had trial counsel known of the pre-deliberation discussions concerning Petitioner's "house and everything," a motion for a mistrial would have been made or at the very least – the trial counsel would have moved to replace the two offending jurors. (Appendix D, 91a-92a). Petitioner's case can be differentiated from

this Sixth Circuit *Bowling* opinion because -- here, the trial court and court personnel knew about the complaint during the pendency of the trial, and yet, failed to investigate the misconduct or alert the parties.

A jury's impartiality is endangered by colloquy among jurors about the case prior to the beginning of formal deliberation. The danger is that "such conversations may lead jurors to form an opinion as to the defendant's guilt or innocence before they have heard all of the evidence, the arguments of counsel, and the court's instructions." *United States v. Yon*, 702 F.2d 1341, 1345 n.1 (11th Cir. 1983). See also, *United States v. Resko*, 3 F.3d 684, 689 (3rd Cir. 1993).

The Third Circuit in *Resko* concluded that "since the prosecution presents its evidence first, any premature discussions are likely to occur before the defendant has a chance to present all of his or her evidence,, and it is likely that any initial opinions formed by the jurors, which will likely influence other jurors, will be unfavorable to the defendant for this reason." *Id.* "[T]he jury system is meant to involve decision making as a collective, deliberative process and premature discussions among individual jurors may thwart that goal." *Id.* "[B]ecause the court provides the jury with legal instruction only after all the evidence has been presented, jurors who engage in premature deliberations do so without the benefit of the court's instructions on the reasonable doubt standard." *Id.* (Citing *Winebrenner v. U.S.*, 147 F.2d 322, 327 (8th Cir. 1945)).

Resko further opined that "if premature deliberations occur before the defendant has had an opportunity to present all of his or her evidence and jurors

form premature conclusions about the case, the burden of proof will have been, in effect, shifted from the government to the defendant, who has the burden of changing by evidence the opinion thus formed.” *Id.* “Finally, requiring the jury to refrain from prematurely discussing the case with fellow jurors in a criminal case helps protect a defendant's Sixth Amendment right to a fair trial as well as his or her due process right to place the burden on the government to prove its case beyond a reasonable doubt.” *Id.* at 689 (citing, *In Re Winship*, 398 U.S. 358,364(1970)).

The trial judge learned mid-trial in *Resko* that the jurors were discussing the case. The judge promptly notified the parties and a two-part questionnaire was given to the jury to determine whether the discussions led them to form an opinion as to guilt or innocence. All jurors admitted to a discussion but denied forming an opinion. The defendants requested individualized voir dire and when the request was denied the defendants asked for a mistrial. *Id.* at 687-688.

The Third Circuit held that “it is far easier for a district court to address allegations of jury misconduct when they come to light mid-trial rather than after the verdict has been entered and the jury discharged. Before the jury has been discharged, a district judge can more readily and more fruitfully explore whether misconduct has in fact occurred and if so, its effect on the jurors. Thus, the balance of practical considerations counselling in favor of further investigation into intra-jury misconduct are much greater when the misconduct is alleged mid-trial

rather than post-verdict, when the district court's inquiry will likely be less productive while consuming more time and resources.” *Id.* at 694-695.

The Sixth Circuit’s finding that the judge was “reckless” by failing to notify the parties, but not finding prejudice or an abuse of discretion, is in direct conflict with the opinion of the Third Circuit in *United States v. Resko*, 3 F.3d 684 (3rd Cir. 1993). With these present facts, it is likely that if heard by the Third Circuit, that Circuit would have found an abuse of discretion by the trial court’s failure to notify the parties or failure to properly investigate the allegations of misconduct. The Third Circuit would not have penalized Petitioner and his codefendants by their inability to provide concrete prejudice that resulted from the court’s inaction during trial. “Although ordinarily a defendant must establish prejudice before a new trial will be ordered, in the circumstances here, in which there is unequivocal proof of jury misconduct discovered mid-trial coupled with a failure by the district court to evaluate the nature of the jury misconduct or the existence of prejudice, we conclude that a new trial is warranted. Given the importance of the Sixth Amendment rights at stake and the relative ease with which the district court here could have properly assessed the impact of the jury misconduct, it would be unfair to penalize the defendants for the lack of evidence of prejudice.” *Id.* at 694.

. The ruling of the Sixth Circuit Court of Appeals affirming the trial court’s order denying a new trial should be reversed. Due to the impact on a criminal defendant’s right to due process and right to have a trial before an impartial jury, this Court should grant certiorari to address the circuit split concerning what a trial

court must do when notified mid-trial of pre-deliberation discussions by an empaneled jury.

CONCLUSION

For the reasons stated herein, Petitioner James A. Chaney respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

Dated July 10, 2019

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