No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES A. CHANEY,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTORARI TO

THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTORARI

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QUESTION(S) PRESENTED

Number 1:

In light of United States v. Ruan, were the jury instructions in Chaney incorrect and should Dr. Chaney's conviction be vacated?

Number 2:

"A Conflict Between the Circuits" : Where does the burden of proving prejudice lie regarding unrecorded ex parte discussions between court officer's and jurors, and can an evidentiary hearing be denied by the party without the burden of proof?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Chaney, 921 F.3d 572 (6th Cir. 2019)

United States v. Chaney, 2016 U.S. Dist. LEXIS 135190 (E.D. Ky. Sept. 30, 2016).

United States v. Chaney, No.: 6:14-cr-00037

[All of Chaney's §2255 Pleadings are Sealed and in District Court Chambers]

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[XX] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[XX] reported at United States v. Chaney, No.: 22-5524; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[XX] reported at United States v. Chaney, 6:14-cr-00037; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was **November 17, 2022**.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment of the Constitution

Sixth Amendment of the Constitution

Fourteenth Amendment of the Constitution

21 U.S.C. §885

21 U.S.C. §841(a)(1)

21 U.S.C. §846

21 C.F.R. §1306.04(a)

Federal Rules of Evidence 606(b)(2)-(B)

Federal Rules of Criminal Procedure 43(a)

Miscellaneous

Controlled Substance Act

Kentucky Medical Practice Act

Kentucky Board of Medical Licensure Investigative Report

DE 575 - The Initial §2255 Petition (Sealed and in District Court Chambers)

DE 272 - The Jury Instructions, United States v. Chaney, No.: 6:14-cr-37 (April 18, 2016)

CITATION OF AUTHORITIES

SUPREME COURT **Pg.ID**

CIRCUIT COURT

STATEMENT OF THE ISSUE

In light of **United States v. Ruan**, were the jury instructions in Chaney incorrect and should Dr. Chaney's conviction be vacated?

INTRODUCTION

There are rare occasions in the practice of common law when one reads an insight into an accepted issue that radically transforms all assured reasoned understanding and appreciation of that topic and instantly commands the requisite attention of all practitioners in that field. It is as if a light has shown in from an open clerestory window and illuminated the well-worn stolid text of an often read, but repeatedly misconstrued, statute with a spotlight from a superior force from on high.

The opinion of Supreme Court Justice Stephen G. Breyer in **United States v. Ruan, 142 S.Ct. 2370, 213 L.Ed. 706: 2022 U.S. LEXIS 3089,** with the following simple and once read seemingly obvious statements, overturned decades of muddled thinking in criminal practice embedded in incorrect charges to the jury repeated over decades in hundreds of district courts and their appellate realms:

1.) 21 U.S.C. §841's knowingly and intentionally mens rea applies to authorization. After a defendant produces evidence that he or she was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so. **142 S.Ct. 2372;**

2.) In §841 prosecutions, then, it is the fact that the doctor issued an un-

authorized prescription that renders his or her conduct wrongful, not the fact of the dispensation itself. In other words, authorization plays a crucial role in separating innocent conduct and, in the case of doctors, socially beneficial conduct from wrongful conduct. **142 S.Ct. 2377**; and,

3.) But §841 uses words "knowingly and intentionally," not "good faith," "objectively," "unreasonable," or "honest effort." And the government's standard would turn a defendant's criminal liability on the mental state of a hypothetical "reasonable" doctor, rather than on the mental state of the defendant himself or herself. **142 S.Ct. 2374.**

Now that the light of Justice Stephen G. Breyer with the unanimous approval of the entire Supreme Court has shown through, it is incumbent for all parties in positions of authority to right the wrongs inflicted upon the innocent.

STATEMENT OF THE CASE

Petitioner, Dr. James A. Chaney was convicted of unlawfully dispensing or distributing controlled substances under 21 U.S.C. §841(a)(1), and conspiring to unlawfully distribute or dispense controlled substances under 21 U.S.C. §846.

At trial Chaney contended that he prescribed valid prescriptions for controlled substances which were done and intended to be done as authorized. In fact, following an exhaustive investigation by the Kentucky Board of Medical Licensure ("KBML"), just prior to the federal indictment, it was determined that **ALL** of Dr. Chaney's prescriptions (from 2006 to 2012) were issued as authorized for legitimate medical purposes and in the usual course of professional practice and **not** in violation of the board's rules and regulations or the **Kentucky Medical Practice Act, governed by the Kentucky Revised Statutes (K.R.S.). [Appen-**

dix D].

Therefore, neither Dr. Chaney nor any reasonable party would have had any reason to believe that he "knowingly and intentionally performed an unauthorized act." Nonetheless, Dr. Chaney is currently serving a 15-year sentence for actions that were **not** criminal.

By giving erroneous and misleading jury instructions, the district court gutted Dr. Chaney's defense and authorized the jury to convict without the government having to prove beyond a reasonable doubt that he possessed the "vicious will" or **subjective "culpable mental state"** to act in an unauthorized manner.

In essence, because the jury was not instructed on the appropriate mens rea "except as authorized" **element** of the offense and the district court erroneously inserted **"more objective elements"** into §§841 and 846, the jury convicted Dr. Chaney for conduct that was not unlawful, and is not today unlawful.

An error of such magnitude calls for the Supreme Court's supervisory powers to decide, "whether the district court's jury instructions in light of **Ruan** were erroneous, prejudicial and fundamentally contrary to the notion of fair proceedings in a fair tribunal?"

Therefore, Dr. Chaney submits this timely petition for a Writ of Certorari as his habeas corpus pleadings have not yet been exhausted and the issues are ripe for the Court to consider his valid claims of Constitutional deprivation under the Fifth and Sixth Amendments, which have been raised since the Initial §2255 Petition.

STATUTORY BACKGROUND

The Controlled Substance Act ("CSA") makes it unlawful for "any person knowingly and intentionally to manufacture, distribute, or dispense" a controlled substance, "[e]xcept as authorized." 21 U.S.C. §841(a)(1). 21 C.F.R. §1306.04(a) authorizes registered physicians to distribute controlled substances by issuing prescriptions, so long as the prescriptions are "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice."

Prior to the United States Supreme Court's June 27, 2022 decision in **Ruan v. United States, 142 S.Ct. 2370,** the Sixth Circuit Court had consistently held that a physician may be convicted if he failed to act "in accordance with what he reasonably believed to be proper medical practice." **United States v. Volkman, 797 F.3d 377,387-88 (2015).** Thus, if the government proved that the doctor's belief was **objectively** "[un]reasonable," the jury was free to convict under Section 841(a)(1), **id. at 388,** rendering a doctor's **"subjective"** intent irrelevant.

The Supreme Court rejected this approach in **Ruan** and held that §841(a)(1) requires the jury to find that a physician **subjectively intended** to prescribe in an unauthorized manner. **142 S.Ct. 2375.** The Court emphasized that Section 841's mens rea requirement "plays a critical role in separating a defendant's wrongful from innocent conduct." **Id. at 2379.**

FACTUAL BACKGROUND

Dr. Chaney practiced medicine in his hometown of Hazard, Kentucky for over 20-years. He was elected Chief of Staff at Hazard ARH Regional Medical

Center and held the position of Professor of Medicine at Pikeville College School of Medicine, Assistant Professor of Medicine at Marshall University School of Medicine, and Adjunct Professor of Medicine at the University of Kentucky in addition to serving on various local and state boards.

At all relevant times, Dr. Chaney was a registered physician with a license to practice medicine in Kentucky and possessed a DEA registration number to dispense Schedule II, III, IV, and V controlled substances.

At the time of Dr. Chaney's trial (2016), Direct Appeal (2019) and habeas corpus pleading (beginning in July 2020), **United States v. Volkman, 797 F.3d 377 (6th Cir. 2015)** was controlling law in the Sixth Circuit, which in light of **Ruan**, is incorrect and a misrepresentation of law.

Therefore, any objection prior to the **Ruan** decision concerning the mens rea "except as authorized" clause of §841's "knowingly and intentionally" clause would have been futile. **Leary v. United States, 395 U.S. 27-28 (1969)**(forgiving defendant's failure to timely object where Court of Appeals precedent was binding when the issue arose, would have rendered the objection futile.) **Grosso v. United States, 390 U.S. 62,70-71 (1968)**(excusing a defendant's failure to raise claim where Supreme Court precedent, binding when the issue arose, precluded them).

Certainly, prior to **Ruan**, any reasonable petitioner could not have anticipated that the current Sixth Circuit Court or any of it's district courts would have agreed that their precedent was an incorrect representation of the mens rea "except as authorized" **element** of a crime under §841 or §846. Indeed, physician's for decades have been arbitarily prosecuted on an erroneous understanding of the scienter requirement and lack of appropriate jury instructions

in the Sixth Circuit, and they show no signs of being willing to change their behavior or to voluntarily vacate their wrongful convictions even today. Despite the chilling legal environment, Dr. Chaney did persistently raise Fifth and Sixth Amendment issues throughout his habeas pleadings, as he does now.

SUMMARY OF THE ARGUMENT

As an incarcerated pro se in pauperis petitioner, Dr. Chaney only recentÌy ly was aware of the Supreme Court's landmark decision in **United States v. Ruan, 142 S.Ct. 2370 (June 27, 2022)**. This decision which clarified ambiguous and unconstitutionally vague language of jury instructions in 21 U.S.C. §841 trials was not available to Chaney at the time of his Direct Appeal or the timely filing of his habeas corpus pleadings beginning in July 2020, which have not been exhausted pending this Court's review.

Dr. Chaney was at all relevant times (March 6, 2007 - October 14, 2014) duly licensed by the Kentucky Board of Medical Licensure ("KBML") and Drug Enforcement Agency ("DEA") to practice medicine and prescribe controlled substances. Dr. Chaney's KBML and DEA Certificates were submitted into evidence at trial satisfying the 21 U.S.C. §885 production requirement under **Ruan.**

Dr. Chaney's conviction for dispensing **"authorized"** controlled substances should be vacated, because the trial judge issued erroneous and misleading instructions to the jury. As detailed below and in the **Ruan** decision by the Supreme Court, the lower court in **Chaney** based it's charge to the jury on an incorrect and erroneous understanding of Section 841's scienter requirements that does not comport with the standard set forth in **Ruan.**

In particular, 21 U.S.C. §841's knowingly and intentionally mens rea ap-

plies to the "except as authorized" clause. This means that in a §841 prosecution in which a defendant meets his burden of production under 21 U.S.C. §885, the government must prove beyond a reasonable doubt that the defendant knowingly and intentionally acted in an unauthorized manner." **Ruan, 142 S.Ct. 2370.**

In **Chaney**, the defendant met it's production requirement, but the charge to the jury did **not** require the government to prove beyond a reasonable doubt that the defendant knowingly and intentionally acted in an unauthorized manner, nor was the jury instructed on the requisite **"subjective standard"** that Chaney possessed a "viciouswill" and "culpable mental state" to act in an unauthorized manner. **Ruan, 142 S.Ct. 2377.**

The language of the 21 U.S.C. §841 (and §846) jury instructions in **Chaney** are vague, "ambiguous and written in generalities, susceptible to more precise definition and open to varying constructions,: **142 S.Ct. 2378,** and fails to provide the kind of notice that would enable ordinary people to understand what conduct it prohibits or whether it encourages arbitrary and discriminatory enforcement and prosecution." **(Id.)**

Moreover, neither Dr. Chaney or the jury were put on notice that the 21 U.S.C. §841 knowingly and intentionally mens rea applied to the "except as authorized" clause meaning that he knowingly and intentionally acted in an unauthorized manner or intended to do so. Critically, the jury was **not** instructed that in order for Dr. Chaney to be found guilty of violating §841 (or §846), the government was required to prove beyond a reasonable doubt that he possessed the **subjective "culpable mental state"** to act in an unauthorized manner.

"Authorization" is an **objective** determination governed by the controlling regulations, but post-**Ruan** there is an **additional subjective element** that must

also be satisfied - the government was required to prove that Dr. Chaney also possessed the "culpable mental state" to act in an unauthorized manner. **142 S.Ct. 2377.**

The government did not meet their burden nor did the district court apply the requisite mens rea qualifier to the "except as authorized" element of Section 841 in it's charge to the jury. The failures of the lower court and the U.S. Attorney did not require the jury to conclude that Dr. Chaney knowingly and intentionally acted in an unauthorized manner and a panel of ordinary citizens could **not** draw that inference from the undefined and ambiguous language used in the jury instructions.

In fact, the trial court instructed the jury to decide Dr. Chaney's guilt or innocence based upon a hypothetical "reasonable doctor" practicing somewhere in the United States, instead of considering whether Dr. Chaney **himself**, possessed a "culpable mental state" and whether he knowingly and intentionally acted in an unauthorized manner.

Given appropriate and legally correct mens rea instructions concerning the "except as authorized" **element** of a violation of §841, the jury could have easily found Dr. Chaney not guilty. By stripping scienter from the case and adding **"more objective standards"** such as "good faith," "reasonable," and an "honest effort" into the jury instructions, the court rendered it possible to convict a well-intentioned doctor, like Dr. Chaney.who according to the Kentucky Board of Medical Licensure prescribed in an "authorized" manner. **[Appendix D].**

In essence, the trial court's **instructional error** may have allowed the U.S. Attorney to prosecute and the jury to convict Dr. Chaney for conduct that is **not** unlawful. By foreclosing Dr. Chaney's due process right to the lawful mens rea application to the "except as authorized" clause, adding confusing "more obj-

ective standards," and failure to issue a **"subjective standard"** into the elements of a crime under §841 (and §846), the jury instructions "provided no assurance that the jury reached its verdict after finding those questions or matters." **McDonnell v. United States, 579 U.S. 550,578 (2016).** Where, as in **McDonnell**, the jury instructions "lacked important qualifications, rendering them significantly overinclusive," in **Chaney**, because the jury was incorrectly charged it may have convicted him for conduct that is not unlawful.

ARGUMENT

As the Supreme Court observed in **Ruan**, an error of this magnitude "separates" a physician's "wrongful from innocent conduct," **142 S.Ct. 2379**, and is cognizable as "plain-error."

As a preliminary matter Dr. Chaney has not yet exhausted his habeas corpus appeals pending this Court's review of his claims of Constitutional deprivation. In fact, because the jury was not correctly instructed on the mens rea **element** of the "except as authorized" clause of 21 U.S.C. §841, it may have convicted Dr. Chaney for conduct that is not unlawful resulting not only in plain, but structural-error. Faced with this possibility, it "cannot be concluded that the jury's **instructional errors** were harmless beyond a reasonable doubt." **Neder v. United States, 527 U.S. 1,16 (1999).**

The Sixth Circuit has long been in agreement that "[i]t is clear that omitting instructions that are ... [related] to the elements that go to the question of guilt or innocence is plain-error." **United States v. Damara, 621 F.3d 474,478 (6th Cir. 2010); United States v. Castano, 543 F.3d 826,833-37 (6th Cir. 2008)**(holding that, the district court's instructions, which risked the

jury convicting the defendant of a "non-existent offense" was plain error). Moreover, the district court committed plain error in it's failure to define an essential **element** of the charge against the dedendant. **United States v. Baird, 134 F.3d 1276,1238 (6th Cir. 1988).**

In light of **United States v. Ruan, 2372, 213 L.Ed. 706; 2022 LEXIS 3089,** it was plain error for the district court to instruct the jury that they should find Dr. Chaney guilty if he did not follow undefined "objective standards" in the similarly undefined "usual course of professional practice generally accepted in the United States" and "acting in good-faith." **[Appendix E at 2837 & 2846].**

Moreover, the trial court failed to instruct the jury that the government was required to prove beyond a reasonable doubt that Dr. Chaney possessed the mens rea culpable mental state of "knowingly and intentionally" violating 21 U.S.C. §841 by acting in an unauthorized manner.

Specifically, the Court in **Ruan** held:

> "Section 841's 'knowingly and intentionally' mens rea applies to the statute's 'except as authorized' clause. Once a defendant meets the burden of producing evidence that his or her conduct was 'authorized' the government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an (213 L.Ed.2d 711) unauthorized manner. Pp. 4-16." **142 S.Ct. 2372.**

The standard set forth in **Ruan, 142 S.Ct. 2370,** states that, 21 U.S.C. §841's knowingly and intentionally mens rea applies to the "except as authorized" clause, meaning that once Dr. Chaney met the burden of production of his authorization to prescribe controlled substances, the burden shifted back to the government requiring them to prove beyond a reasonable doubt that Chaney

(himself), not a hypothetical "reasonable doctor," knowingly and intentionally acted in an unauthorized manner with a **subjective "culpable mental state."** The government did not do this, and the charge to the jury did not require them to do so.

In fact, "Count 1 of the indictment charges each of the defendants - Dr. James A. Chaney, Lesa L. Chaney, and Ace Clinique of Medicine - with conspiring to knowingly and intentionally distribute and/or dispense Schedule II (oxycodone) and III (hydrocodone) controlled substances, outside the usual course of professional practice and without a legitimate medical purpose, in violation of 21 U.S.C. §846." **[Appendix E at 2836].**

Counts 2-62 charge the defendants, Dr. James A. Chaney and Ace Clinique of Medicine with violating 21 U.S.C. §841(a)(1), which make it a crime to unlawfully distribute or unlawfully dispense Schedule II or III controlled substances ... by means of presigned prescriptions, **[Appendix E at 2844].** The jury however, was **not** instructed that presigned prescriptions were "authorized" by the **Kentucky Board of Licensure and <u>not</u> in violation of the <u>Kentucky Medical Practice Act</u>.**

Additionally and erroneously, the trial judge further instructed the jury that concerning **Counts 1-62** of the indictment:

> "[T]he phrase, 'usual course of professional practice' means that the practitioner has acted in accordance with 'a standard of medical practice recognized and accepted in the United States.' A physician's own individual treatment methods do not, by themselves, establish what constitutes a usual course of professional practice." **[Appendix E at 2837 & 2846].**
>
> "Good faith in this context means good intentions and an honest exercise of professional judgement as to a patient's needs. If a physician dispenses the drug in good faith, then

the doctor has dispensed the drug for a legitimate medical purpose and in the usual course of accepted medical practice. That is, he had dispensed the drug lawfully." **[Appendix E at 2837 & 2846].**

All of the controlled substances that Dr. Chaney prescribed were done and were intended to be done pursuant to **"authorized"** prescriptions. In fact, **Dr. Chaney had been advised by the Kentucky Board of Medical Licensure ("KBML")** (whose mission is to protect the health and safety of it's citizens, and is charged with the scrupulous monitoring and investigation of physician's legitimate use of controlled substances in the usual course of professional practice) **after and exhaustive investigation,** two years before the federal indictment, determined that **all** of Chaney's prescriptions and treatment methods were **NOT** in violation of the **Kentucky Medical Practice Act (K.R.S.)** or any of their policies and procedures, and therefore, neither he nor any reasonable party had reason to believe otherwise. **[Appendix D].** Specifically, the "KBML" investigated Dr. Chaney concerning the occasional use of presigned prescriptions.

The investigation and findings of the **KBML** strongly supports Dr. Chaney's assertion that he did **not** possess the requisite "vicious will" or "subjective culpable mental state" to knowingly and intentionally act in an unauthorized manner. Certainly, **Ruan** strengthens Chaney's argument that he was prosecuted for conduct that he could **not** have anticipated would violate 21 U.S.C. §§841 or 846, because it required the government to prove beyond a reasonable doubt that Chaney issued or conspired to issue prescriptions which he knew were unauthorized.

Moreover, even though 21 U.S.C. §841 and §846 **do not** contain a "good-faith" clause, the district court in **Chaney** erroneously and prejudicially inserted one in the jury instructions. **[Appendix E at 2837 & 2846].**

Just as in the case of **Ruan**, the district judge in **Chaney** set forth a more **"objective 'good-faith' standard"** into the jury instructions concerning the elements of a crime under §841 and §846 that was erroneous and unlawful resulting in prejudice to Chaney and was misleading and confusing to the jury panel.

The Supreme Court in **Ruan** rejected the notion that the district court is at liberty to inject additional **"objective standards"** into the elements of a crime under §841 (or §846). Specifically, the Court noted, "the [trial] court ... set forth a 'more objective standard,' instructing the jury that a doctor acts lawfully when he prescribes in 'good faith as part of his medical treatment of a patient in accordance with the standard of medical practice recognized and accepted in the United States.'" **142 S.Ct. 2375.**

In fact, the district court's jury instructions concerning what constitutes a violation of §§841 and 846 in **Chaney** are nearly mirror-images of that found in the lower court's charge to the jury in **Ruan.**

Put simply, the Supreme Court in **Ruan** has specifically rejected the district court's instructions to the jury in **Chaney** which effectively substituted the knowingly and intentionally mens rea standard for that of an **"objectively reasonable good-faith effort" or "objectively honest-effort standard."**

The trial judge's charge to the jury in **Chaney**, turned the defendant's criminal liability on the mental state of a hypothetical "reasonable doctor" somewhere in the United States, **not** on the mental state of Dr. Chaney himself/ **Ruan, 142 S.Ct. 2381.**

Finally, relying on the **"mens rea canon"** the Court in **Ruan** interprets 21 U.S.C. §841 to require a mens rea instruction for **each element** of the offense, which according to the Supreme Court includes the "except as authorized" clause. (Justict Alito concurring, 2022 U.S. LEXIS 33). BBecausetthe prosecution

was **not** required to produce evidence that Dr. Chaney possessed the requisite mens rea "knowingly and intentionally" subjective culpable mental state to act in an unauthorized manner and the jury was **not** instructed properly on the **elements** of the crime under §841 (or §846), the trial proceeded under plain-error discarding Chaney's Due Process and Sixth Amendment rights to a fair trial in a fair tribunal.

The prosecution bears the burden of producing evidence and proving beyond a reasonable doubt with respect to every element of the offense. **(Patterson v. New York, 432 S.CT. 197,210, 53 L.Ed. 281,** observing that, "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all elements involved in the definition of the offense of which the defendant is charged.") This means, the district court's erroneous and prejudicial jury instructions violated Dr. Chaney's "due process rights" and created "plain-error" because the judge did not instruct the jury that mens rea applied to the "except as authorized" clause of §841. **(Id. at 210).**

In fact, the Court in **Ruan**, explained that the "except as authorized clause of §841, while differing from an element [of the crime] in some respects, is sufficiently like an element in respect to the matter at issue here as to warrant similar legal treatment. **(142 S.Ct. 2381). Indeed, §841 ... nowhere uses words such as 'good faith', 'reasonable', or 'honest effort.'" (Id.)** (emphasis added)

In essence, the district court's instructions to the jury was an "inaccurate statement of law" because it did not set forth all elements of 21 U.S.C. §841 whereby, "knowingly and intentionally mens rea applied to the except as authorized clause. "A proposed jury instruction must be a correct statement of the law." **United States v. Newman, No.: 20-6428 (6th Cir. 2021).**

CONCLUSION

In light of the Supreme Court's decision in **Ruan**, the Constitutional deprivation suffered by Dr. Chaney and in the interest of justice, the Court should VACATE the conviction and REMAND the case for further porceedings.

ISSUE #2:

"A Conflict Between the Circuits" : Where does the burden of proving prejudice lie regarding unrecorded ex parte discussions between court officer's and jurors, and can an evidentiary hearing be denied by the party without the burden of proof?

STATEMENT OF THE CASE

Since **1892** throughout all Federal and Appellate Courts, except the Sixth Circuit, jurists of reason have all agreed that Supreme Court precedent guarantees that when a "court officer" has mid-trial unrecorded ex parte meetings and discussions with the "entire jury panel" who are discussing the **"merits"** of the prosecutions evidence, the trial court must convene an evidentiary hearing to ensure that the defendant's Sixth Amendment guarantees are not violated. **See: Mattox v. United States, 146 U.S. 140,150 (1892).**

Anything less flunks the Supreme Court's and all other Federal Circuit Court's (except the Sixth Circuit's), guarantees that all defendants must have a "meaningful opportunity" to demonstrate these "communications," and "their impact," and "whether or not [the contacts were] prejudicial in a hearing with all parties permitted to participate." **Remmer v. United States, 347 U.S. 230**

(1954).

The **"Conduct At Issue"** raised by the petitioner in his **Initial §2255 Petition and now,** is a court officer's (jury administrator) secret unrecorded ex parte meetings and discussions with the entire impaneled jury that unconstitutionally deprive Chaney of due processcand his Sixth Amendment rights that the Sixth Circuit has simply refused to acknowledge. **[Appendix F].**

The evidentiary fact that a court officer held mid-trial ex parte meetings and discussions with the **entire panel,** who were in the process of discussing the **merits** of the prosecution's evidence, **"the case ... and everything,"** made the requisite showing of an extraneous influence requiring an evidentiary hearing under **FRE 606(b)(2)-(B).** Instead of convening a hearing, the district court abused it's discretion and created **"plain-error"** by refusing to even acknowledge the jury administartor's extra-judicial role in interfering with Chaney's due process rights under the Fifth Amendment, the Confrontation Clause of the Sixth Amendment, the denial of the right to counsel and the right to be present under **FRCP 43(a).**

As the Sixth Circuit Appellate Court noted on Direct Appeal, "the district court acted recklessly by choosing to keep information about potential jury misconduct from defense counsel." **Chaney, 951 F.3d 572 (2019).** Despite the Sixth Circuit Court of Appeals' acknowledgement of the lower court's "reckless" procedural, plain, and reversible-error, the Court's have even denied Chaney his Supreme Court right to an evidentiary hearing to determine the full extent of the harmful prejudice associated with the lower court's error. **See: Remmer v. United States, 347 U.S. 230 (1954); Smith v. Phillips, 455 U.S. 209 (1982); Porter v. Illinois, 479 U.S. 898,900 (1986).**

The Sixth Circuit Court of Appeals is the **only** Circuit to hold that **Remmer**

v. United States, is no longer good law. In United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1984), citing, Smith v. Phillips, 455 U.S. 209 (1982), the Sixth Circuit announced that Phillips reinterpreted Remmer so as to shift the burden of proving prejudice to the defendant. No other Federal Appellate Court, however, has departed from Remmer's statement of the legal standard for evaluating the effect of improper judicial contact.

Importantly, in Chaney, the Sixth Circuit has further extrapolated from Remmer to hold that because Chaney has **not already** proven prejudice resulting from a "non-existent record" of the jury administrator's secret unrecorded ex parte meetings and discussions with the **entire jury panel**, an evidentiary hearing is not warranted.

Even though there is no record concerning the "nature and manner of the information" [a court officer] "conveyed to the entire jury" to prove prejudice from, the merits of Chaney's predicate claims have been completely ignored, despite substantial evidence of malfeasance by a court officer. **(See: Appendix F).**

The procedural rulings by the magistrate, district and appellate courts' are "plain-error" and not only contrary to the Supreme Court's legal standard in Phillips, Remmer, and Porter, but also to extensive case precedence throughout every other federal circuit court. **(See: United States v. Littlefield, 752 F.2d 1429,1431-32 (9th Cir. 1985)**(criticizing Pennell); **Owen v. Duckworth, 727 F.2d 643,646 (7th Cir. 1984); United States v. Delaney, 732 F.2d 639,642 (8th Cir. 1984); United States v. Hines, 696 F.2d 722,730-31 (10th Cir.1982); Holoson v. Wilson, 737 F.2d 1,47-49, 237 U.S. App. 219 (D.C. Cir. 1984); Haley v. Blue Ridge Transfer Co., 802 F.2d 1532,1535 & n.5 (4th Cir. 1986)**(civil case)(distinguishing Phillips).

All Circuit Courts except the Sixth Circuit hold to the legal principles **strictly forbidding** ex parte contacts and extra-judicial conveyance of information to the impaneled jury. Only the Sixth Circuit requires the defendant to prove prejudice from a **"non-existent record"** of a court officer's secret unrecorded mid-trial meetings and discussions with the entire jury without an opportunity to do so in a **Remmer**-style evidentiary hearing.

In essence, the Sixth Circuit wants to approve it's own subterfuge and require the defendant to devine it from a non-existent record. They are failing to forbid their court's secret unrecorded discussions with jurors and are depriving defendants such as Chaney their 5th, 6th, and 14th Amendment rights to fair proceedings in a fair tribunal, making not one but two wrongs which most definitely does not make right.

The Sixth Circuit not only shifts the burden of proof in proving prejudice to the defendant, but also requires the defendant to do so without a **"record"** of the conduct or a "meaningful opportunity" to do so with the benefit of an evidentiary hearing that is essential to requisite fact-finding.

ARGUMENT

The Sixth Circuit requires the defendant to prove prejudice prior to an evidentiary hearing, even when there is **uncontested evidence** of a court officer's secret mid-trial unrecorded ex parte meetings and discussions with the entire jury panel, who were discussing the merits **("the case ... and everything")** of the prosecution's case-in-chief. **[See: Appendix F].**

Although there are many good reasons to believe that Dr. Chaney was severly prejudiced by the court officer's actions **[Appendix F]**, without an evid-

entiary hearing, it is impossible to secure testimony and evidence. For example, two Jurors (#116 and 34), who were "worried" about Dr. Chaney receiving a fair trial, were denied access after multiple attempts, to voice their concerns to the judge and there are multiple uncontested references to secret unrecorded meetings and discussions between the jury administrator and the entire panel and individual jurors. **[Appendix F].**

In essence, the Sixth Circuit has required Chaney to prove prejudice without a record of the **"Conduct At Issue" [Appendix F]**, or the opportunity to make any factual findings necessary to prove prejudice, contrary to Supreme Court precedence detailed below.

Moreover, in response to the defendant's multiple requests for a **Remmer** style hearing so that factual determinations of "what was the **nature and manner** of the information [the jury administrator] conveyed to the [entire] jury" can be made, the lower courts have responded that since Chaney has **not already** proven prejudice, a hearing is not warranted.

The uncontested evidentiary fact that the jury administrator held mid-trial unrecorded ex parte discussions with the **entire jury panel** represents a "colorable claim of an extraneous influence" concerning "intentional and improper contact and communications" with "the obvious potential to affect the verdict." **FRE 606(b)(2)-(B). See: United States v. Davis, 177 F.3d 522,527 (6th Cir. 1999); United States v. Frost, 125 F.3d 346 (6th Cir. 1997).**

Indeed, in every Circuit Court (except the Sixth Circuit), circumstances such as these where the discussions concerned the **matters before the jury ("the case ... and everything")**, a **Remmer**-style hearing must be convened.

Instead of convening a hearing, the district court abused it's discretion and created "plain-error" by refusing to acknowledge his jury administrator's

extra-judicial conduct in denying Chaney's due process rights under the Fifth Amendment, the Confrontation Clause of the Sixth Amendment, the denial of the right to counsel and the right to be present during all critical stages of the proceedings.under **FRCP 43(a).**

As the Supreme Court in **Parker v. Gladden, 385 U.S. 363,364 (1966)**, explained, "it would be blinking reality to not consider the effect a bailiff may have on the jury" and "the jury could easily conceive that the bailiff speaks for the judge." The Court in **Parker**, post-**Remmer**, also found it necessary to make factual determinations of what the bailiff actually said to the entire jury **before** making any findings concerning prejudice or harmlessness.

Put simply, the courts' in Chaney do not want to know what every member of the jury may have to say in an evidentiary hearing concerning what the jury administrator's meetings and discussions regarded.

As a result of the jury administrator's extra-judicial conduct, Chaney raised three additional predicate claims of Constitutional deprivation in his **Initial §2255 Petition [DE 575]:**

1.) The denial of the right to counsel, **at 11;**

2.) The denial of due process, **at 15:** and,

3.) The denial of the right to be present under FRCP 43(a), **at 15.**

Since Chaney has not already proven prejudice from a **"non-existent record"** of the jury administrator's Constitutionally forbidden behavior, these claims have been denied by the lower courts' as being of no moment.

In **Remmer v. United States, 347 U.S. 227-230 (1954)**, the Court set out a clear procedure to deal with this kind of ex parte contact to eliminate the danger of a jury relying on extra-judicial communications. "In a criminal case, any private communication, contact, tampering, directly or indirectly, with a

juror about the matter pending before the jury is, for obvious reasons, presumptively prejudicial, if not made in pursuance of known court rules and the instructions and directions of the court made during trial with full knowledge of the parties."

According to **only** the Sixth Circuit, **Smith v. Phillips, 455 U.S. 215 (1982)**, has reinterpreted **Remmer v. United States, 347 U.S. 227 (1954)**, to shift the burden of proving prejudice to the defendant. However, the **Phillips** Court maintains the "due process requires the trial court to conduct a hearing during which the defendant has the opportunity to prove bias." **(Id.)**. Moreover, neither **Phillips** nor any Federal Circuit Court, except the Sixth, requires the defendant to prove prejudice **without a record** of the "private communications, contact, tampering, directly or indirectly, with a juror [entire panel] about the matter ["the case ... and everything"] pending before the jury."

In Chaney, the Sixth Circuit has taken this Court's decision in **Phillips** to a further extreme by requiring him, in direct contravention of due process and Supreme Court precedence, to prove prejudice **without a record** of the "Conduct At Issue" even before a fully warranted evidentiary hearing is held. **See: Remmer, 347 U.S. at 230; Phillips, 455 U.S. at 205; Porter v. Illinois, 479 U.S. 898,900 (1986)**(citing **Remmer** and **Phillips**, holding,... "we have held that the defendant is entitled to a hearing with all parties permitted to participate."). This has not yet occurred in Chaney.

In fact, **Phillips**,strengthens Chaney's arguments, "these private communications between third parties and jurors ... render a criminal verdict vulnerable because they are prima facie incompatible with the Sixth Amendment." **455 U.S. 209,215. [See: Initial §2255 Petition, DE 575 at 15;.Sealed and In-Chambers].**

Moreover, the district court in Chaney did exactly what the Supreme Court in **Remmer** said the trial court's should not do - "decide and take final action ex parte on [the] information ... [that] was received in the case." **347 U.S. 229-230.** This in turn cause the Sixth Circuit Appellate Court to admonish the "district court [for] act[ing] recklessly by choosing to keep information about potential jury misconduct from defense counsel." **(Chaney, 921 F.3d 572).** However, the Sixth Circuit Court failed to require the district court to "determine the circumstances ... in a hearing with all interested parties permitted to participate." **Remmer, 347 U.S. 229-230.** In fact, the movant is unable to find a Supreme Court case that denies a defendant an evidentiary hearing when circumstances such as those in Chaney appear.

Critically, the jury administrator's unrecorded secret ex parte meetings and discussions with the entire jury panel (as opposed to an individual juror) were **not** before the Appellate Court on Direct Appeal, **(Chaney, 921 F.3d 572 (6th Cir. 2019))**, but were raised in the Initial §2255 habeas corpus pleading as the predicate **GROUND FOR RELIEF #2, [DE 575 at 11]**, and the evidence and arguments made meet the circumstances that require an evidentiary hearing.

The magistrate judge failed to even consider the discussions the jury administrator had with the entire jury panel and incorrectly only focused on her communications with one Juror (#116). The magistrate established the record later adopted whole-cloth by the district and appellate courts' final analysis of Chaney's claims in finding that, "communications raised by Juror 116's interview and the Court's subsequent Rule 606(b) analysis fail for lack of prejudice." **[Appendix C at 10].**

Contrary to the Supreme Court's decision in **Rogers v. United States, 422 U.S. 35,45 (1975)**, the magistrate made these factual findings without even

knowing or considering (and without a record) the "nature and manner of the information conveyed to the jury" by a court officer. In fact, **Rogers**, holds "it was reversible error for the trial court to respond to jury questions without the presence of the defendant." **(Id.)** Moreover, the Court explains, that determination of "the nature and manner of the information conveyed to the jury" is a necessary component in any findings of prejudice or harmlessness under FRCP 43(a). **(Id.)**

The Seventh Circuit Court in **Moore v. Knight, 368 F.3d 943 (2008)** agrees, "the [trial] court's factual findings 'never addressed what the jury was told during the ex parte communications' [with the bailiff] - this half of the inquiry is a necessary component of any determination of prejudice." **[DE 575 at 15]**.[1] Indeed, the Seventh Circuit, unlike the Sixth Circuit is in agreement with the Supreme Court, the horse pulls the cart.

As the Supreme Court in **Remmer, 347 U.S. 229** concludes, "we do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents may have been harmful or harmless." **[DE 575 at 31]**.[1]

The magistrate judge's analysis continues, "[t]he court is unaware of a Sixth Circuit holding that a jury administrator's comments such as these described by Juror 116 constitutes misconduct." **(Id. at fn.5).** The magistrate made this factual finding" out of absolutely thin air, since what the jury administrator actually said to the **entire jury panel** and what their response was is still **unknown, because there is no record.**

The magistrate fails to mention the series of other discussions and meetings the jury administrator had with the entire jury panel and the jury foreman (#34) who resigned in disgust after the jury administrator repeatedly un-

[1] DE 575 refers to Chaney's Initial §2255 Pleading which is sealed.

surped the judge's role and prohibited the juror from speaking with the judge about his concerns that Dr. Chaney was not receiving a fair trial. **[Appendix F]**. Despite the magistrate's epic oversight, he nonetheless foreclosed any investigation, or even discussions of, prejudice, except his own.

Despite extensive Supreme Court Case Law requiring an evidentiary hearing, the magistrate continues to protest, "there was not even the possibility of prejudice stemming from any of the events described during the en camera interview of Juror 116, **including any statement by the jury administrator.**" This forecloses the possibility of any prejudice from counsel's failures to raise the extraneous influence, Rule 43, and Rule 606(b) arguments relating to the en camera interview." **[Appendix C at 10-11]**. He doth protest too much for it is impossible to discuss "the possibility of prejudice" without a written record. Indeed, the only certainty is that there is "a possibility of prejudice," and that an evidentiary hearing is necessary to determine the probability and the extent of the prejudice to protect Chaney's guarantees under the Fifth and Sixth Amendments.

Not only is the Sixth Circuit the only Federal Circuit Court that finds **Remmer** is "no longer good law," it further degrades **Smith v. Phillips**, **Porter v. Illinois**, **Rogers v. United States**, **and Parker v. Gladden** **(supra)**, by mandating a defendant to prove prejudice of a "court officer's" unlawful conduct without a record of the "Conduct At Issue" or any opportunity to do so in an evidentiary hearing, despite a colorable claim of an extraneous influence appearing in the form of documented unrecorded extra-judicial meetings and discussions with the entire jury panel.

According to the Sixth Circuit Court's rulings in Chaney, not only has exhaustive Supreme Court precedent been eviserated, but the case sets new pre-

cedence whereby the Courts are at liberty to conclusively determine that no prejudice exists and harmlessness can be devined without knowing anything about what was said or the "nature and manner of the information that was conveyed to the entire jury panel" unlawfully.

CONCLUSION

Under the notion of fair proceedings and in the interest of justice, the Supreme Court, in light of Chaney should VACATE the conviction and REMAND the case announcing the correct legal standard that requires trial courts to convene evidentiary hearings in cases of secret unrecorded extra-judicial communication with the jury and correct the glaring disparities found in the Sixth Circuit's treatment of this issue in comparison to all other Circuit Courts.

Respectfully submitted,

02/13/2023
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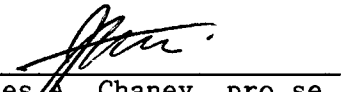

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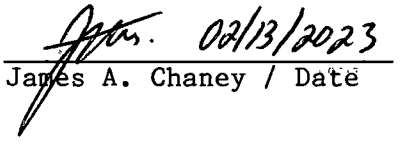
OATH OF PERJURY

I declare, under the penalty of perjury, the foregoing is true and correct to to best of my knowledge and belief.



James A. Chaney / Date