

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO. 08-450
v.	:	
	:	
CHRISTOPHER WRIGHT, et al.	:	

ORDER

AND NOW, this day of February, 2009, it is hereby **ORDERED** that the Defendants' Motion to Conduct a Mid-Trial Individualized *Voir Dire* of the Jury is hereby **GRANTED**.

BY THE COURT:

Eduardo C. Robreno, U.S. District Judge

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UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO. 08-450
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**DEFENDANTS' MOTION FOR THE COURT CONDUCT A MID-TRIAL
INDIVIDUALIZED VOIR DIRE OF THE JURY**

Defendants Christopher Wright, Ravinder Chawla, Hardeep Chawla and Andrew Teitelman, Esquire, move the Court to conduct a mid-trial individualized *voir dire* of the jury in order to determine whether Juror Number ("No.") 2 has already made up her mind concerning the guilt or innocence of some or all of the Defendants and, if so, whether she has: (1) expressed her opinions and/or feelings to any other jurors; and (2) whether she has engaged in pre-deliberation discussions of the case with any other jurors. In support of this motion, Defendants respectfully state as follows:

1. Juror No. 2 has engaged in inappropriate conduct throughout the course of this trial and has grown increasingly hostile in her facial expressions, body language and overall behavior towards the Defendants, their counsel and at least one family member of a Defendant who has been sitting in the galley during trial.

2. On or about January 28, 2009, all counsel approached the Court at side-bar and discussed the fact that Juror No. 2 appeared to be sleeping or "nodding off" during trial. Additionally, it was unclear whether Juror No. 2 was wearing headphones at certain times during the trial. At that time, counsel for the Defendants and the government agreed that no action should be taken with respect to Juror No. 2.

3. After the side-bar discussion regarding Juror No. 2, counsel for the defense has observed Juror No. 2 acting outwardly hostile to the Defendants and others associated with them.

4. Defense counsel has observed Juror No. 2 lift up her jacket/sweatshirt to cover part of her face while laughing at a testifying defendant; roll her eyes, smirk, shake her head and laugh at defense counsel while they have conducted both direct and cross-examinations of witnesses; lift herself partially out of her jury seat and strain to look at a defendant and laugh after that defendant's name was mentioned by a testifying witness; glare at defense counsel and not look away until counsel first looks away; and speak to at least one other juror, while laughing, upon immediately rising from her seat during a recess.

5. In addition to defense counsel's observations, at least one family member of one Defendant has informed defense counsel that Juror No. 2 has constantly glared at her while sitting in the galley and does not look away unless the family member first looks away from Juror No. 2.

6. Moreover, defense counsel has observed Juror No. 2 continuing to either "nod off" or not pay attention and close her eyes while either a defendant has testified or defense counsel has examined witnesses.

7. Because of the heightened nature and continuing conduct of Juror No. 2, the Defendants submit that the Court should individually *voir dire* the Juror to determine whether she has already decided the issue of some or all of the Defendants' guilt or innocence and, if so, whether she has discussed her feelings with any other jurors, thus engaging in pre-deliberations of the case.

8. The Court has discretion to make a thorough inquiry of a juror's misconduct and resulting prejudice to defendants under the Third Circuit's opinion, United States v. Resko, 3

F.3d 684 (3d Cir. 1993) (granting defendants a new trial and holding that the district court erred by refusing to conduct a more thorough inquiry into potential prejudice suffered by the defendants from the jury's misconduct of engaging in pre-deliberations of the case).

9. If the Court determines that Juror No. 2 (1) has already decided the issue of guilt or innocence as to the Defendants; or (2) continues to engage in inappropriate and hostile behavior and potentially disrupts the rest of the jury and prejudices the Defendants, she should be excused under the reasoning set forth by in United States v. Delgado, 289 Fed.Appx. 497, 2008 WL 3890360 (3d Cir. Aug. 22, 2008) (Gardner, J.) (dismissing juror for inappropriate behavior during trial).

WHEREFORE, Defendants respectfully request that the Court conduct a mid-trial individualized *voir dire* of the jury to determine whether Juror Number 2 has already made up her mind concerning the guilt or innocence of some or all of the Defendants and whether she has engaged in pre-deliberation discussions of the case with any other members of the jury.

Respectfully submitted,

/s/ William A. DeStefano

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Dated: February 8, 2009

testifying witness; glare at defense counsel and not look away until counsel first looks away; and speak to at least one other juror, while laughing, upon immediately rising from her seat during a recess. In addition to defense counsel's observations, at least one family member of a Defendant has informed defense counsel that Juror No. 2 has constantly glared at her while sitting in the galley and does not look away unless the family member first looks away from Juror No. 2. Moreover, defense counsel has observed Juror No. 2 continuing to either "nod off" or not pay attention and close her eyes while either a Defendant is testifying or defense counsel is examining witnesses. Because Juror No. 2 has engaged in inappropriate conduct throughout the course of this trial and has grown increasingly hostile in her facial expressions, body language and overall behavior towards the Defendants, their counsel and others, we respectfully submit that the Court should individually *voir dire* the jury to determine whether Juror No. 2 has already made up her mind regarding the guilt or innocence of some or all of the Defendants, and, if so, whether she has expressed her opinions and/or feelings to any other members of the jury or engaged in pre-deliberation discussions of the case with other jurors.

II. ARGUMENT

The District Court has broad discretion to deal with a situation involving allegations of intra and extra-jury juror misconduct. See United States v. Resko, 3 F.3d 684, 690 (3d Cir. 1993). In Resko, the Third Circuit granted the defendants a new trial and held that the district court erred by refusing to conduct a more thorough inquiry into the potential prejudice suffered by the defendants from the jury's misconduct by discussing the case before the conclusion of all the evidence. See id. at 686. On the seventh day of a nine day trial, the district court learned that jurors had been discussing the case. See id. The court had the jurors complete a 2-part questionnaire, asking if they had in fact engaged in discussions and whether the discussions had

lead them to form a believe as to the defendants' guilt or innocence. See id. All of the jurors responded that they had engaged in discussions but claimed that they had not yet formed any opinion as to guilt or innocence. See id. The court denied defendants' requests for individualized *voir dire* to find out what exactly had occurred and the extent of any prejudice resulting to the defendants from the premature deliberations. See id. The Third Circuit held the District Court erred by not engaging in a more thorough analysis of the jury misconduct and possible prejudice suffered by the defendants, vacated the convictions and granted a new trial. See id.

The Third Circuit explained its reasons for granting the defendants a new trial, focusing on the principle that jurors must not engage in discussions before they have heard all of the evidence and the court's legal instructions and have begun deliberating as a collective body. See id. at 688. The Court explained that because the government presents its evidence first, "any premature discussions are likely to occur before the defendant has a chance to present all of his 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." Id. at 689. Second, once a juror expresses his or her views in the presence of other jurors, he or she is likely to continue to adhere to that opinion and to pay greater attention to evidence presented that comports with that opinion. See id. Thus, the mere fact of expressing her views may cause the juror to approach the case with less than a fully open mind and adhere to the "publicly expressed viewpoint." Id. Third, the jury system is meant to involve decision-making as a collective, deliberative process and premature discussions among individual jurors may thwart that role. See id. Fourth, because the court provides the jury with legal instructions after all the evidence is in, jurors who engage in premature deliberations do so without the benefit of hearing the "reasonable doubt"

instruction. See id. Fifth, if premature deliberations occur before the defendant presents all his evidence, the burden of proof, in effect, shifts from the government to the defendant. See id. Finally, requiring the jury to refrain from premature discussion of the case protects a defendant's Sixth Amendment right to a fair trial as well as his due process right to place the burden on the government to prove its case beyond a reasonable doubt. See id. at 689-90.

While clearly recognizing that the trial court has discretion to handle allegations of jury misconduct, the Third Circuit in Resko found that the trial court could not have had enough information to make a reasoned determination that the defendants would not suffer prejudice or even be able to give an appropriate cautionary instruction. See id. at 691. According to the Third Circuit, the manner in which the questionnaire was administered was unreliable because the jurors were together when they filled it out with no court personnel present. See id. Significantly, the Court found that the trial court should have conducted an individualized *voir dire* upon which it could have determined whether the jurors could have maintained an open mind. See id. The Third Circuit noted that its approach comported with the approach of the First Circuit which has specified that when jury misconduct (including improper intra-jury influences) has been alleged, the trial court should: (1) ascertain whether the misconduct actually occurred; (2) if it did, determine if it was prejudicial; and (3) if there are no grounds for a new trial, specify the reasons it decided that misconduct did not occur, or occurred but was non-prejudicial. See id. We respectfully submit that the Court should engage in this three-step approach with respect to Juror No. 2.

Finally, if the Court finds that Juror No. 2 has engaged in misconduct and that the Defendants have suffered prejudice therefrom, the Third Circuit has held that district courts have discretion to dismiss a juror for inappropriate behavior. See United States v. Delgado, 289

Fed.Appx. 497, 2008 WL 3890360 (3d Cir. Aug. 22, 2008) (Gardner, J.). In Delgado, the trial court dismissed a juror for inappropriate behavior, which included sleeping during proceedings, trying to make conversation with trial counsel, making inappropriate advances to members of the jury and court personnel, making racial remarks and arriving late to court. The district court found that the juror's behavior was "poison to the deliberation process" and that the juror had to be dismissed to preserve "the integrity of deliberations." See id. at *502. The Court, of course, does not need to even consider dismissal until a thorough *voir dire* is conducted of Juror No. 2.

III. CONCLUSION

For all the foregoing reasons, Defendants, Christopher Wright, Ravinder Chawla, Hardeep Chawla and Andrew Teitelman, Esquire, respectfully request that the Court conduct a mid-trial individualized *voir dire* of the jury to determine whether Juror Number 2 has already made up her mind regarding the guilt or innocence of some or all of the Defendants, and if so, whether she has spoken to other jurors regarding her opinions and/or feelings or engaged in pre-deliberation discussions of the case with other jurors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this day a true and correct copy of the foregoing Motion For the Court to Individually *Voir Dire* the Jury was served this day by electronic means upon the following counsel.

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/s/ Terri A. Pawelski

Dated: February 8, 2009