

1994

Constitutional Law - Sixth Amendment - Juror Misconduct - Premature Deliberations

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Recommended Citation

James P. Thomas, *Constitutional Law - Sixth Amendment - Juror Misconduct - Premature Deliberations*, 32 Duq. L. Rev. 983 (1994).

Available at: <https://dsc.duq.edu/dlr/vol32/iss4/15>

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CONSTITUTIONAL LAW—SIXTH AMENDMENT—JUROR MISCONDUCT—PREMATURE DELIBERATIONS—The United States Court of Appeals for the Third Circuit held that the use of a questionnaire was inadequate to enable the district court to fulfill its responsibility of determining whether a jury was prejudiced due to premature discussions of the case and that the district court should have conducted a further investigation into the nature and extent of the discussions in order to determine whether the jury was prejudiced.

United States v. Resko, 3 F.3d 684 (3d Cir. 1993).

In April of 1991, Louis Faustino Hidalgo and Jesus Cepeda, Jr. (“Appellants”) were arrested while attempting to make an illegal drug sale.¹ They were indicted by a grand jury and charged with violations of the Controlled Substance Act² and the Gun Control Act.³ Appellants were tried together in the United States District Court for the Western District of Pennsylvania.⁴ In its preliminary instructions, the district court repeatedly admonished the jury not to discuss the case until the close of the trial when all the evidence was in and the jury was formally given its instructions.⁵ Nevertheless, on approximately the seventh day of a nine-day trial, one of the jurors informed the court that several of the jurors had been discussing the case while on break and while waiting in the jury room.⁶ Appellants moved for individualized voir dire of the jurors in order to determine what had occurred and whether the jurors had been prejudiced by the alleged premature discussions.⁷ Alternatively, Appellants moved for a mistrial.⁸ The district court denied both motions, and instead gave each juror the following written questionnaire:

1. *United States v. Resko*, 3 F.3d 684, 687 (3d Cir. 1993).

2. *Resko*, 3 F.3d at 687. Appellants were charged with entering into a conspiracy to distribute cocaine and heroin and entering into a conspiracy to possess with intent to distribute cocaine in violation of sections 841(a)(1), 841(a)(2), and 846 of the Controlled Substance Act. 21 U.S.C. §§ 841(a)(1) & (2), 846 (1988).

3. *Resko*, 3 F.3d at 687. Appellants were charged with using a firearm in relation to a drug trafficking offense in violation of section 924(c) of the Gun Control Act. 18 U.S.C. § 924(c) (1988).

4. *Resko*, 3 F.3d at 687.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 688.

1. Have you participated in discussing the facts of this case with one or more other jurors during the trial?
2. If your answer to question No. 1 is "Yes", have you formed an opinion about the guilt or non-guilt of either defendant as a result of your discussion with other jurors?⁹

Only the jury members were present in the courtroom while answering this questionnaire.¹⁰ All the jurors responded "Yes" to the first question and "No" to the second question.¹¹ Subsequently, Appellants once again motioned the court to give a more detailed inquiry or to grant a mistrial, but the court denied this motion.¹² The trial resumed and the jury found Appellants guilty on all charges.¹³ Appellants appealed to the Third Circuit Court of Appeals alleging that, in light of their Sixth Amendment¹⁴ right to a fair trial before an impartial jury, the district court abused its discretion by failing to conduct a further inquiry into whether the jurors were prejudiced and by failing to declare a mistrial.¹⁵

The circuit court premised its discussion by stating that as a general rule jurors must not discuss a case prior to hearing all the evidence, hearing the court's instructions, and deliberating as a single unit.¹⁶ The court noted that the purpose of this rule is to protect a defendant's Sixth Amendment right to a fair trial and to maintain the defendant's due process right to have the government bear the burden of proving its case beyond a reasonable doubt.¹⁷

9. *Resko*, 3 F.3d at 688.

10. *Id.* at 688.

11. *Id.*

12. *Id.*

13. *Id.*

14. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" U.S. CONST. amend. VI.

15. *Resko*, 3 F.3d at 688.

16. *Id.* The court noted that most federal trial judges use the following preliminary instructions to jurors:

You will not be required to remain together while the court is in recess. It is important that you obey the following instructions with reference to the recesses of the court: First, do not discuss the case either among yourselves or with anyone else during the course of the trial. In fairness to the parties to this lawsuit you should keep an open mind throughout the trial, reaching your conclusion only during your final deliberations after all the evidence is in and you have heard the attorneys' summations and my instructions to you on the law, and then only after an interchange of views with the other members of the jury.

Id. (citing 1 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 10.14, at 273 (1977)).

17. *Id.* at 689-90 (citing *In re Winship*, 397 U.S. 358, 364 (1970)). *In re Winship* held that the Due Process Clause protects the accused against conviction except upon proof be-

The court explained that if premature discussions occur before the defense presents its evidence, any initial opinion formed by the jury would probably be unfavorable to the defendant.¹⁸

The court also premised its analysis by stating that the trial judge has discretion in dealing with allegations of jury misconduct, including the determination of whether jurors have been prejudiced as a result of premature discussions of the case.¹⁹ The court explained that the trial court would be in a better position than the appellate court to judge the effect of premature discussions and to determine the effectiveness of a cautionary instruction.²⁰

The court deduced that even given the results of the questionnaire, neither the appellate court nor the district court had any information concerning the nature or extent of the premature discussions and whether the discussions in fact prejudiced the jurors.²¹ This concerned the court for two reasons.²² First, the district court did not have enough information to determine whether the defendants had been prejudiced by the premature deliberations or to form an appropriate cautionary instruction.²³ Second, this lack of information hampered the appellate court's ability to review the district court's determination that the defendants were not prejudiced.²⁴

yond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. at 364.

The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

18. *Resko*, 3 F.3d at 688-89. The court explained that opinions formed as a result of premature discussions are unfavorable to the defendant because: 1) the jury has only heard the evidence presented by the prosecution, 2) once the juror has expressed his or her opinion, that juror may not approach the case with a fully open mind, 3) premature discussions among jurors impede the goal of jury decision making as a collective deliberative process, 4) premature jury deliberations are without the court's instructions on the reasonable doubt standard, and 5) once the jury forms an unfavorable opinion, the defendant would bear the burden of proof because through his or her evidence the defendant would have to change the opinions formed by the jury. *Id.* at 689.

19. *Id.* at 690.

20. *Resko*, 3 F.3d at 690 (citing *United States v. Pantone*, 609 F.2d 675, 679 (3d Cir. 1979) and *United States v. Chiantese*, 582 F.2d 974, 980 (5th Cir. 1978)). See notes 59-71 and accompanying text for a discussion of *Chiantese*.

21. *Id.* at 690-91.

22. *Id.* at 691.

23. *Id.*

24. *Id.* The court also stated that because the questionnaire was administered to the jury with no court personnel present, the jurors may have collaborated and formed a collective agreement to answer "no" to the second question, regardless of their personal views. *Resko*, 3 F.3d at 691. Therefore, the results were unreliable. *Id.*

Accordingly, the court held that the district court erred both in denying Appellants' request for a more extensive investigation into whether the jurors were prejudiced as a result of the premature deliberations and in denying Appellants' motion for a mistrial.²⁵ The court vacated the judgment of the district court and remanded for a new trial.²⁶

As the *Resko* court indicated, it is not clear where the rule that jurors may not partake in premature discussions of the case originated.²⁷ Nevertheless, the rule has been firmly established in practice in both federal and state courts.²⁸ A violation of this rule was first adjudicated in 1881 in *Pool v. Chicago B. & Q. R. Co.*²⁹ In *Pool*, the plaintiff brought suit for injuries sustained as a result of an accident while in the defendant's employ.³⁰ In the midst of the trial, one of the jurors expressed his opinion of the case to a non-member of the jury despite the court's instructions to the contrary.³¹ Nevertheless, the trial continued and the jury found in

25. *Id.* The court noted that this holding is consistent with the First Circuit's holding in *United States v. Richman*, 600 F.2d 286 (1st Cir. 1979). In *Richman*, one of the jurors referred to the others jurors as "bums" in a statement made to the court marshall. *Richman*, 600 F.2d at 295. The court held that when jury misconduct has been alleged, the district court should determine whether the misconduct, in fact, occurred, and if so, determine whether it was prejudicial. *Id.* at 295. Furthermore, if there were no grounds for a new trial, the court should specify the reasons it concluded the misconduct did not take place, or if the misconduct occurred the court should explain why it was not prejudicial. *Id.*

The court also noted that this holding comports with its holding in *United States v. Dowling*, 814 F.2d 134 (3d Cir. 1987). In *Dowling*, the district court asked the jurors to raise their hands if they had been exposed to anything that rendered them incapable of giving a fair trial after it was alleged that the jury received extra-record information about the facts of the case. *Dowling*, 814 F.2d at 135. This court held that the trial court's use of in banc questioning did not provide the district court with information about what extra-record information the jurors had been exposed to, nor did it permit the court to judge whether the jurors retained open minds. *Id.*

26. *Resko*, 3 F.3d at 696. The court pointed out that ordinarily a defendant must prove that the jury was prejudiced before a new trial will be ordered. *Id.* at 694. Since the jury misconduct occurred mid-trial and the trial court failed to evaluate the nature of the jury misconduct, or the existence of prejudice, the court was willing to grant a new trial. *Id.*

The court also explained that it was remanding for a new trial, as opposed to remanding for further investigation into prejudice, due to the passage of time and the difficulties involved in the district court reassembling the jury and the jurors recalling their states of mind. *Id.* at 695.

27. *Id.* at 688-89.

28. *Id.*

29. 6 F. 844 (C.C. Iowa 1881).

30. *Pool*, 6 F. at 845.

31. *Id.* at 848. A non-member of the jury testified that the juror told him that the plaintiff's attorney "had the court room full of Keokuk people, who, whenever he said anything, applauded, and that Keokuk thought they had got this thing fixed up very nice." *Id.*

favor of the defendant.³² The plaintiff then moved for a new trial on the grounds that the jury had been prejudiced as a result of the misconduct.³³ The court dealt with the issue of whether the juror's misbehavior rendered him an unfair and prejudiced juror thereby denying the plaintiff his right to a fair and impartial jury trial.³⁴ In consideration of this question, the court recognized that jurors will tend to adhere to their opinions once they have made them known to the public, regardless of the evidence subsequently presented.³⁵ Therefore, the court stated that once the juror prematurely discussed the case outside the jury room, he was no longer an impartial and unbiased juror.³⁶ Accordingly, the court set aside the verdict and granted a new trial.³⁷

In 1945, the Eighth Circuit Court of Appeals adopted the rationale of the *Pool* court in the landmark decision of *Winebrenner v. United States*.³⁸ Unlike *Pool*, which concerned premature jury discussions with a non-member of the jury, *Winebrenner* involved premature discussions exclusively among the jurors.³⁹ In *Winebrenner*, the defendant was being tried for a conspiracy to defraud the United States Air Force in the purchase of aircraft equipment.⁴⁰ Before the trial, the court failed to instruct the jurors that they should not discuss the case among themselves until the case had been finally submitted to them for deliberation.⁴¹ Instead, the court told the jury that it could discuss the case provided it did not reach any final conclusions.⁴²

The jury found the defendant guilty, and the defendant appealed to the Eighth Circuit Court of Appeals contending that the trial court's instructions constituted reversible error.⁴³ The appellate court stated that jurors should not discuss the case among themselves during a trial because they have not heard all of the

32. *Id.* at 844.

33. *Id.* at 845.

34. *Id.* at 849-50. The court noted that the right to a fair and impartial jury is the same in both civil and criminal cases. *Id.*

35. *Pool*, 6 F. at 850.

36. *Id.*

37. *Id.* at 851.

38. 147 F.2d 322 (8th Cir. 1945), *cert. denied*, 325 U.S. 863 (1945).

39. *Id.*

40. *Id.* at 323. Entering into a conspiracy to defraud the United States Air Force is a violation of 18 U.S.C. § 371 (1966).

41. *Id.* at 327.

42. *Id.*

43. *Winebrenner*, 147 F.2d at 323.

evidence and the court's final instructions.⁴⁴ The court explained that this had the effect of shifting the burden of proof from the prosecution to the defendant, who now had the burden of changing the prematurely formed opinion.⁴⁵ Additionally, the court explained that once a juror had expressed his or her opinion to another juror, the juror who made the statement was inclined to pay special attention to the evidence that confirms that view.⁴⁶ The *Winebrenner* court concluded that since the instructions given to the jury by the trial judge allowed it to discuss the case before all the evidence was presented, the defendant's right to a fair trial had been violated.⁴⁷ Accordingly, the judgment was reversed and the case submitted to the lower court with directions to grant the defendant a new trial.⁴⁸

In 1957, the United States Court of Appeals for the Second Circuit, when faced with a similar jury misconduct issue, explicitly distinguished extra-jury influence⁴⁹ from intra-jury⁵⁰ influence. In *United States v. Bando*,⁵¹ the defendants were tried for violations of the Victim and Witness Protection Act⁵² and the Fugitive Felon Act.⁵³ During the course of the trial, it was brought to the court's attention that while on a lunch break, two of the jurors had been discussing the conduct of the prosecutor and a witness.⁵⁴ Instead of questioning the two jurors who had been discussing the case, the trial judge admonished the entire jury that it should not form any opinion regarding the case until all the evidence had been submit-

44. *Id.* at 328.

45. *Id.* at 329.

46. *Id.* at 328. The court explained that this allowed the juror to avoid embarrassment before the other jurors should the juror change his or her tentative opinion. *Id.*

47. *Id.* at 329.

48. *Winebrenner*, 147 F.2d at 329. In his dissent, Circuit Judge Woodrough stated that because there was no hint or suggestion that any of the jurors actually engaged in premature discussions, the conviction should not be reversed. *Id.* at 330 (Woodrough, J., dissenting).

49. Extra-jury influence has been construed to cover publicity received and discussed in the jury room, evidence considered by the jury that was not admitted in court, and communications between jurors and third persons. *Government of Virgin Isl. v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975).

50. Intra-jury influences have been construed to cover discussions among jurors and intimidation or harassment of one juror by another. *Id.*

51. 244 F.2d 833 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957).

52. *Bando*, 244 F.2d at 836. Defendants were charged with entering into a conspiracy to injure a witness who was to testify before a grand jury in violation of section 1503 of the Victim and Witness Protection Act. 18 U.S.C. § 1503 (1984).

53. *Bando*, 244 F.2d at 836. Defendants were charged with entering into a conspiracy to remove a person from the state in order to prevent that person's arrest in violation of section 1073 of the Fugitive Felon Act. 18 U.S.C. § 1073 (1976).

54. *Bando*, 244 F.2d at 848-49.

ted.⁵⁵ The trial resumed and the defendants were convicted.⁵⁶

On appeal, the Second Circuit stated that since the incident did not involve a discussion between a juror and an outsider, the court's admonition was all the judicial action required.⁵⁷ Further, the court noted that the statements of the jurors were not prejudicial to the defendants since they were critical only of the prosecutor and the witness.⁵⁸

In 1978, the Fifth Circuit Court of Appeals elaborated on the distinction between intra-jury influences and extra-jury influences in *United States v. Chiantese*.⁵⁹ In this case, the defendant was charged with violating the Hobbs Act.⁶⁰ It was called to the trial court's attention mid-trial that members of the jury had been observed conversing with one another.⁶¹ Furthermore, it was reported to the trial court that a juror made critical comments concerning the defendant's attorney to two alternate jurors.⁶² In response, the defendant's attorney motioned for voir dire of the jury to determine if the statement had in fact been made, and if made, the effect it had on the jurors who heard it.⁶³ The trial court denied the motion stating that the conversations among the jurors were not similar to a typical jury prejudice case where outside influences corrupt the verdict.⁶⁴ The trial judge further explained that the statements related to the attorney's conduct and not to the case itself.⁶⁵

On appeal, the Fifth Circuit Court of Appeals stated that because there was a presumption of prejudice when a jury was influ-

55. *Id.* at 849.

56. *Id.*

57. *Bando*, 244 F.2d at 849. The *Bando* court distinguished this case from *Remmer v. United States*, 350 U.S. 377 (1956). In *Remmer*, an outsider told a juror, unbeknownst to the defendant, that he might make a profitable deal with the defendant. *Id.* at 378: The Supreme Court held that any indirect or direct communication with a juror relating to the matter pending was presumptively prejudicial and, as such, the lower court judge erred in failing to determine whether the defendant had been prejudiced as a result of the incident. *Id.* at 379.

58. *Bando*, 244 F.2d at 849.

59. 582 F.2d 974 (5th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979).

60. *Chiantese*, 582 F.2d at 975. Defendant was charged with attempting to interfere with interstate commerce in violation of section 1951 of the Hobbs Act. 18 U.S.C. § 1951 (1984).

61. *Chiantese*, 582 F.2d at 978.

62. *Id.* In a statement referring to the defendant's attorney, the juror was overheard saying "Stupid. Stupid. He's a pain in the . . ." *Id.*

63. *Id.*

64. *Id.* at 978.

65. *Id.* at 980.

enced by outside sources, a trial judge's failure to hold a hearing in these situations constituted an abuse of discretion and was reversible error.⁶⁶ However, the court distinguished this case on the basis that there was no outside influence.⁶⁷ As such, the court concluded that the principles concerning outside influences were not controlling.⁶⁸ Rather, the court stated that in situations which involve intra-jury influences such as premature jury discussions, the trial judge is afforded broad discretion in dealing with the situation.⁶⁹ The court reasoned that the trial court was in a much better position to judge the mood and the prejudices of the jury than is an appellate court which has only the record from which to evaluate these factors.⁷⁰ Accordingly, the court held that because the juror's comments did not pertain to the defendant's case, the trial judge did not abuse his discretion in not conducting a hearing.⁷¹

The broad discretion afforded the trial judge in dealing with premature deliberations has been reflected in the opinions of the appellate courts that have dealt with this issue. For example, in *United States v. Klee*,⁷² the defendant was tried for failure to file federal income tax returns.⁷³ Before trial, the court instructed the jury not to discuss the case until it was submitted to the jury by the court for decision.⁷⁴ However, the defendant presented to the court an affidavit of one of the jurors which stated that some of the jurors had prematurely discussed the case and that nine jurors had expressed premature opinions concerning the guilt or innocence of the defendant.⁷⁵ The trial judge denied the defendant's motion for a new trial stating that the only issue in dispute was the defendant's state of mind and that the jury demonstrated its open-mindedness on the issue by requesting a re-reading of the instructions of willfulness before it rendered a verdict.⁷⁶ The defendant was ultimately convicted, and appealed to the United States Court of Appeals for the Ninth Circuit alleging that the trial court erred in

66. *Chiantese*, 582 F.2d at 979.

67. *Id.*

68. *Id.* The court stated that there is a presumption of prejudice with extra-jury influences and therefore a trial judge's failure to conduct a hearing to determine whether the jury was prejudiced in these situations constituted reversible error. *Id.*

69. *Id.* at 980.

70. *Id.*

71. *Chiantese*, 582 F.2d at 980.

72. 494 F.2d 394 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974).

73. *Klee*, 494 F.2d at 394.

74. *Id.* at 395.

75. *Id.*

76. *Id.* at 396.

denying a mistrial.⁷⁷

On appeal, the Ninth Circuit stated that a mistrial would be granted when the premature discussions prejudiced the defendant so that the defendant was not given a fair trial.⁷⁸ The court explained that when trial judges rule on this question, the appellate court cannot properly second guess the conclusion of the trial judge who was in a better position to determine whether the conduct of the jury was prejudicial to the defendant.⁷⁹ Because the trial judge in *Klee* concluded that the defendants were not prejudiced as a result of the premature discussions, the court held that it was not an error to deny the mistrial.⁸⁰

A more recent case depicting the broad discretion afforded a trial judge in dealing with intra-jury influences was decided by the Third Circuit in *United States v. Clapps*.⁸¹ The defendants in *Clapps* were tried for violations of the Postal Reorganization Act.⁸² After all of the evidence had been presented in the case, but before the closing arguments, it was called to the court's attention by one of the jurors that several of the jurors had been discussing the case.⁸³ As an alternative to granting the defendants' motion for a mistrial, the court remedied any potential prejudice by conducting a voir dire examination.⁸⁴ The court removed two jurors based on this examination.⁸⁵ The trial resumed and the defendants were found guilty.⁸⁶

On appeal, the United States Appeals Court for the Third Circuit was confronted with the issue of whether the trial judge had abused his discretion in denying the defendants' motion for a mistrial.⁸⁷ Once again, the appellate court premised its opinion by stating that the trial court was in a better position than the appellate court to observe the impact of premature jury discussions and

77. *Id.* at 395.

78. *Klee*, 494 F.2d at 396 (citing *Cavness v. United States*, 187 F.2d 719, 723 (9th Cir. 1951)). Specifically, the court stated that "the test is whether or not the misconduct has prejudiced the defendant to the extent that he has not received a fair trial." *Id.*

79. *Klee*, 494 F.2d at 396.

80. *Id.*

81. 732 F.2d 1148 (3d Cir.), *cert. denied*, 469 U.S. 1085 (1984).

82. *Clapps*, 732 F.2d at 1149. Defendants were charged with fraudulent procurement and marking of absentee ballots for elections in violation of section 1341 of the Postal Reorganization Act. 18 U.S.C. § 1341 (1984).

83. *Clapps*, 732 F.2d at 1152.

84. *Id.*

85. *Id.* at 1152.

86. *Id.* at 1150-52.

87. *Id.* at 1152.

to judge the effectiveness of a cautionary instruction.⁸⁸ Because the trial court conducted a voir dire and concluded that the jurors were not prejudiced, the court held that there was no abuse of discretion in denying the motion for a new trial.⁸⁹

Although a majority of the cases hold that there has been no abuse of discretion by the trial judges in situations involving premature jury deliberations, there have been instances where the trial court judge has been held to have acted inadequately in response to these situations. One such instance was before the Supreme Court of Pennsylvania in *Commonwealth v. Kerpan*.⁹⁰ In *Kerpan*, the defendant was tried for arson⁹¹ and theft.⁹² In his introductory instructions to the jury, the trial judge allowed the jurors to hold discussions among themselves throughout the course of the trial.⁹³ However, several times during the trial, the judge instructed the jurors that they should not discuss the case among themselves and that they should not reach any premature conclusions.⁹⁴ The jury ultimately found the defendant guilty.⁹⁵

On appeal, the Supreme Court of Pennsylvania premised its discussion of the case by holding that premature jury deliberations were expressly prohibited.⁹⁶ The court further stated that in this

88. *Clapps*, 732 F.2d at 1152 (citing *United States v. Pantone*, 609 F.2d 675, 679 (3d Cir. 1979)). In *Pantone*, the trial judge conducted a corrective voir dire after it was brought to the court's attention that a juror had expressed to other jurors her opinion regarding the guilt of the defendant. *Pantone*, 609 F.2d at 679. Taking into consideration the results of the voir dire, the United States Court of Appeals for the Third Circuit held that the trial judge did not abuse his discretion by refusing to grant a mistrial. *Id.*

89. *Clapps*, 732 F.2d at 1152.

90. 498 A.2d 829 (Pa. 1985). See also, *State v. Gill*, 255 S.E.2d 455 (S.C. 1979) (holding that it was reversible error for the trial judge to advise the jurors that it was proper to begin deliberations before the close of the case) and *People v. Blondia*, 245 N.W. 2d 130 (Mich. Ct. App. 1976) (holding that a jury instruction which allowed the jury to discuss the case while the trial was ongoing was novel and inappropriate and constituted reversible error).

91. *Kerpan*, 498 A.2d at 830. The defendant was charged with arson in violation of section 3301 of the Pennsylvania Crimes Code. PA. CONS. STAT. ANN. tit. 18, § 3301 (1983).

92. *Kerpan*, 498 A.2d at 830. The defendant was charged with theft in violation of section 901 of the Pennsylvania Crimes Code. PA. CONS. STAT. ANN. tit. 18, § 901 (a) (1983).

93. *Kerpan*, 498 A.2d at 831.

94. *Id.* at 832.

95. *Id.* at 830.

96. *Id.* at 832. The Supreme Court of Pennsylvania recommended the following standardized jury instruction addressing the issue of premature jury deliberations:

2.03 AVOIDING PREMATURE OPINIONS

(1) Each of you must keep an open mind throughout the trial. In the oath you just took you swore to do so. You should avoid forming opinions about the guilt or innocence of the defendant or about any other disputed questions until you begin your deliberations.

(2) You should not talk with each other about the evidence or any other matter relat-

case, the jury was left with conflicting and confusing instructions regarding whether it was allowed to discuss the case, and if so, what it was allowed to discuss.⁹⁷ Hence, the supreme court did not find that the trial court's subsequent instructions were sufficient to clarify any misconceptions.⁹⁸ As such, the court held that the defendant's right to a fair trial had been violated and remanded the case to the trial court for a new trial.⁹⁹

Historically, the only cases dealing exclusively with premature discussions among jurors where the appellate courts have reversed the judgement of the trial court and remanded the case for a new trial were those in which the trial judge authorized the discussions. For example, in both *Winebrenner*¹⁰⁰ and *Kerpan*¹⁰¹ the trial judge advised the jurors that they were permitted to discuss the case throughout the trial. However, neither case asserted that premature discussions had actually taken place. This suggests that although trial judges are afforded broad discretion in dealing with issues involving premature jury discussions, specifically authorizing the jury to discuss the case during the trial is itself an abuse of this discretion and constitutes reversible error.

Contrary to this, in those cases where the trial judges did not authorize the discussions, the appellate courts have been reluctant to reverse the judgement of the trial court. This reluctance stems from the belief of the appellate courts that the trial court is in a better position to determine whether the jury has been prejudiced as a result of the premature discussions.

Although the Third Circuit Court of Appeals subscribes to this belief,¹⁰² it nevertheless held in *Resko* that the district court erred both in denying the defendants' request for a more extensive investigation into whether the jurors were prejudiced as a result of the premature deliberations and in denying the defendants' motion

ing to whether the defendant has been proven guilty until I send you to the jury room to deliberate on your verdict. Only then will you know enough about the evidence and the law to discuss the case intelligently and fairly.

Pennsylvania Suggested Standard Criminal Jury Instructions.

Id. at 832 n.7.

97. *Kerpan*, 498 A.2d at 832.

98. *Id.* The superior court had held that the introductory instructions were erroneous, but found that the subsequent instructions cleared up any misconceptions. *Id.* Accordingly, the superior court concluded that the error was harmless and affirmed the conviction. *Id.*

99. *Id.*

100. See notes 38-48 and accompanying text for a discussion of *Winebrenner*.

101. See notes 90-99 and accompanying text for a discussion of *Kerpan*.

102. *Resko*, 3 F.3d at 690.

for a mistrial.¹⁰³ This decision was based on the court's recognition that even with the results of the questionnaire, the district court had no information to back up its determination that the jury was not prejudiced.¹⁰⁴ The district court simply relied on the negative responses of the jurors when they were asked whether the premature discussions led them to form an opinion as to the guilt or innocence of the defendant.¹⁰⁵ The Third Circuit Court of Appeals stated that if the district court would have inquired into the nature and extent of the discussions, the trial judge most likely would have been able to justify his determination that no prejudicial conduct had occurred.¹⁰⁶

This holding suggests that appellate courts will not give deference to the trial judge's determination without factual support that the jury was not prejudiced as a result of premature discussions. Instead, according to *Resko* the trial judge must support his or her determination with sound reasoning beyond the fact that the jury stated that it was not prejudiced.

At first blush, this may seem like a more stringent standard than previously applied by the courts which must be met before a trial judge's denial of a mistrial in response to premature jury deliberations will be reversed. However, a further analysis dictates that the holding in *Resko* does not impose a more stringent standard than previously applied, it simply expresses that standard which has been implied in prior cases.

One case which does impose a less stringent standard than that imposed by *Resko* is *Bando*. The Second Circuit held in *Bando*¹⁰⁷ that because premature discussions involve intra-jury influences, all the judicial action required in these situations is that the trial judge instruct the jury that it should keep an open mind until all of the evidence has been presented.¹⁰⁸ However, in those cases decided after *Bando* where the appellate courts have not reversed the trial judge's denial of a mistrial due to premature deliberations, the trial judges have been able to support their determinations that the jury had not been prejudiced.

103. *Id.* at 691.

104. *Id.* at 690-91.

105. *Id.* at 687.

106. *Id.* at 692.

107. See notes 51-58 and accompanying text for a discussion of *Bando*.

108. The Second Circuit Court of Appeals nevertheless pointed out that the premature discussions in *Bando* were not prejudicial toward the defendant because they concerned only the prosecutor and a witness. *Bando*, 244 F.2d at 848.

For example, in *Chiantese*¹⁰⁹ the trial judge stated that the jury was not prejudiced because the premature discussions involved the attorney's conduct and not the case itself. In *Klee*,¹¹⁰ the trial judge concluded that the jury was not prejudiced because the only issue was the defendant's state of mind and the jury demonstrated its open-mindedness on the issue by requesting a re-reading of the instructions on willfulness. Finally, in *Clapps*¹¹¹ the trial judge determined that the jury was not prejudiced because the jurors who had been discussing the case were identified and removed from the jury.

In these cases decided prior to *Resko*, the conclusions drawn by the trial judges that the jurors were not prejudiced were supported with sound reasoning. In affirming these conclusions, each appellate court made reference to this reasoning. As such, the appellate courts have implied that such reasoning is required.

In *Resko*, however, the trial judge relied solely on the statements of the jurors that they were not prejudiced without disclosing any further reasons.¹¹² The Third Circuit Court of Appeals recognized this, and for the first time expressly stated that a trial judge must specify reasons as to why the premature discussions were not prejudicial to the defendant before denying a motion for a mistrial.¹¹³

In conclusion, if it is brought to the trial court's attention that the jurors have been prematurely discussing the case, the trial judge must first determine whether the discussions actually took place.¹¹⁴ If they did, the trial judge must next ascertain whether the discussions were prejudicial to the defendant.¹¹⁵ If the trial judge does not have enough information to make such a determination, he or she is required to conduct an investigation into the nature and extent of the discussions.¹¹⁶ Finally, the trial judge must specify reasons as to why the discussions were or were not prejudicial to the defendant before ruling on a mistrial.¹¹⁷ The dis-

109. See notes 59-71 and accompanying text for a discussion of *Chiantese*.

110. See notes 72-80 and accompanying text for a discussion of *Klee*.

111. See notes 81-89 and accompanying text for a discussion of *Clapps*.

112. *Resko*, 3 F.3d at 687.

113. *Id.* at 691.

114. *Id.*

115. *Resko*, 3 F.3d at 691.

116. In *Resko*, the court suggested that an individualized voir dire of the jurors would be the most effective manner to conduct an investigation. *Id.* The court also implied that a questionnaire would suffice if its contents adequately exposed the nature and extent of the discussions. *Id.* The questionnaire in *Resko* did not do this. *Id.*

117. *Id.*

trict court in *Resko* failed to follow this procedure.¹¹⁸ As a result, the Third Circuit expressly stated that the trial judge must make a reasonable determination that the defendant was not prejudiced by alleged jury misconduct.¹¹⁹ This is entirely consistent with those cases in which the appellate courts have deferred to the determination of the trial court that the jury misconduct was not prejudicial.

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118. See notes 1-15 and accompanying text.

119. See notes 14-26 and accompanying text.