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UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHIU LUNG LEUNG, Steve Leung, Chao-Lung Liang, Defendant-Appellant.	Ninth Cir. No. 13-10242 [N. Dist. No. CR 09-00110 SI-6]

DEFENDANT'S MOTION FOR RELEASE ON BAIL PENDING APPEAL

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 9(b) and 18 U.S.C. § 3143(b), appellant Steven Leung respectfully moves for this Court's order granting his release pending decision of his appeal. In 2010, Mr. Leung was indicted with several other defendants on a single count of violating the Sherman Ant-Trust Act. Some of those defendants were convicted of the offense and others acquitted after an initial trial, but jurors could not agree on a verdict as to Mr. Leung. The United States proceeded with a re-trial of Leung and finally secured his conviction in December, 2012. In April of this year, the district court sentenced Mr. Leung to a term of 24 months in prison and permitted his self-surrender, presently scheduled for September 9, 2013.

Mr. Leung's release prior to trial, through sentencing, and up to the present date, has rested on an unassailable finding that he presents neither a risk of flight nor a danger to the community. His present request for release pending appeal thus turns solely on the question whether he will raise a substantial, or "fairly debatable" question, on appeal within the meaning of the federal bail statute.

Mr. Leung's appeal meets and, indeed, surpasses that lenient test. As this Court has recognized, an appellate question may be deemed substantial where it raises important questions concerning the scope and meaning of decisions of the Supreme Court and/or arises from the application of well-settled principles to the facts of the instant case. *See United States v. Handy,* 761 F.2d 1279, 1281 (9th Cir. 1985). During post-trial proceedings in the district court, Mr. Leung

presented uncontradicted evidence that a juror had exhibited bias by violating the court's order not to discuss the case or decide guilt or innocence prior to deliberations. Mr. Leung's appeal will raise an important and unresolved question of law: i.e., whether Fed.R.Evid. 606(b) and the Supreme Court's decision in *Tanner v. United States*, 483 U.S. 107 (1987) necessarily bars a trial court from considering all juror evidence proffered after trial that reports juror bias and misconduct appearing *prior* to the commencement of deliberations. This Court should therefore order his continued release on bail pending appeal.

PROCEDURAL HISTORY

On June 10, 2010, the United States filed a superseding indictment against AU Optronics Corporation ("AUO"), AU Optronics Corporation of America ("AUOA"), and several AUO employees, including defendant Steven Leung. (Dist. Ct. Dkt. ["Dkt."] 8) AUO is a Taiwanese corporation engaged in the manufacture of TFT-LDC displays, better known as the flat panels that are incorporated into desktop monitors, laptop monitors, and other electronic devices. The superseding indictment alleged in one count that the defendants had agreed to fix prices in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. (Dkt. 8)

Prior to trial, the court ordered Mr. Leung and the other individual defendants released upon their satisfaction of certain conditions and a showing that such release did not present a risk of flight or a danger to the community.

Jury trial commenced before the Honorable Susan Illston on January 10, 2012. On March 13, 2012, verdicts were returned. (Dkt. 851) The jury found both

corporate defendants, AUO and AUOA, guilty. It found two AUO executives guilty and acquitted two others. (*Id*.) The jury was unable to reach a unanimous verdict as to defendant Leung.

A re-trial of defendant Leung commenced before Judge Illston on November 20, 2012. (Dkt. 1034) The jury returned a verdict of guilty against him on December 18, 2012. (Dkt. 1090) Defendant Leung thereafter filed a motion for a new trial wherein he advanced the jury bias and misconduct claim presented in this motion. On April 30, 2013, Judge Illston denied the motion on the merits (Dkt. 1149, 1156; *see also* Exh. D, at 3-4 [order re: motion for new trial]) and sentenced Mr. Leung to a term of 24 months in custody. (Dkt. 1149, Exh. A [judgment]) Judge Illston also ordered payment of a $50,000 fine. She permitted Mr. Leung's self surrender on September 9, 2013. (*Id*.)

On May 2, 2013, Mr. Leung filed a timely notice of appeal. (Dkt. 1159) On August 16, 2013, he filed his motion for release on bail pending appeal. (Dkt. 1175) The district court denied the motion with little comment at a hearing on August 30, 2013. (Dkt. 1189; Exhibit B; Exhibit C [hearing transcript]).

Again, Mr. Leung's present date for self-surrender is September 9, 2013. That date will be automatically stayed by operation of the filing of this motion. Ninth Cir. R. 9-1.2(e); *United States v. Fuentes*, 946 F.2d 621 (9th Cir. 1991).

I. THE COURT SHOULD CONTINUE MR. LEUNG'S RELEASE UNDER THE PRESENT CONDITIONS PENDING APPEAL

A. The Statutory Scheme

The statute governing release pending appeal, 18 U.S.C §3143(b), provides, in relevant part, as follows:

> **Release or detention pending appeal by the defendant – (1)** Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds –
>
> > **(A)** by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
> >
> > **(B)** that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in —
> >
> > > **(I)** reversal;
> > >
> > > **(ii)** an order for a new trial,
> > >
> > > **(iii)** a sentence that does not include a term of imprisonment; or
> > >
> > > **(iv)** a reduced sentence to a term of imprisonment less than the total of time already served plus the expected duration of the appeal process.
>
> If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title . . .

This Court addressed the "substantial issue" prong of the test for release pending appeal in *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985). In *Handy*, appellant was denied release by the district court which had rejected his suppression motion. The Court remanded the matter for reconsideration, defining a "substantial question" as a "fairly debatable question that calls into question the validity of the judgment." *Id*. at 1282-83.

> [P]roperly interpreted [under § 3143] "substantial" defines the *level of merit* required in the question presented and `likely to result in reversal or an order for a new trial' defines the *type of question* that must be presented.

Handy, 761 F.2d at 1281.

> As the D.C. Circuit stated in construing the meaning of 18 U.S.C. § 3143: [A] substantial question is one that is "fairly debatable," "fairly doubtful," or "one of more substance than would be necessary to a finding that it was not frivolous."

United States v. Perholtz, 836 F.2d 554, 555 (D.C.Cir 1987)(citing cases); *accord, United States v. Giancola*, 754 F.2d 898 (11th Cir.1985); *United States v. Randall*, 761 F.2d 122, 124-125 (2d Cir. 1985); *United States v. Miller,* 753 F.2d 19 (3rd Cir. 1985)(class of substantial questions includes one that is novel and not controlled by existing precedent).

The crux of the "substantial question" analysis is a reasonable basis for appeal, rather than a likelihood of success once the issues are fully developed:

> Congress did not intend to limit bail pending appeal to cases in which the defendant can demonstrate at the outset of appellate proceedings that the appeal will probably result in reversal or an order for a new trial . . . . [R]equiring the defendant to demonstrate to the District Court that its ruling is likely to result in reversal is tantamount to requiring the District Court to certify that it believes its ruling to be erroneous. Such an interpretation of the Act would make a mockery of the requirement of Fed.R.App.P. 9(b) that the application for bail be made.

Handy, 761 F.2d at 1280-81; *accord, Giancola, supra; Randall, supra.*

In *Handy,* the Ninth Circuit further expounded on the kind of issues that satisfy the "substantial question" requirement:

> The question may be "substantial" even though the judge or justice hearing the application for bail would affirm on the merits of the appeal. The question may be new and novel. *It may present unique facts not plainly covered by the controlling precedents. It may involve important questions concerning the scope and meaning of decisions of the Supreme Court.* The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable.

Handy, 761 F.2d at 1281 (emphasis added)(quoting *D'Aquino v. United States*, 180 F.2d 271, 272 (11th Cir. 1950)(Douglas, Circuit Justice). Stated otherwise, the district court should consider " 'whether there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail.' " *Handy*, 761 F.2d at 1281 (quoting *Herzog* v. *United States*, 75 S. Ct. 349, 351 (1955)).

The question then is not whether this Court at this stage believes Mr. Leung *will* prevail on appeal, but rather whether the issue that he raises is of the type that make "fairly debatable" the validity of the judgment within the meaning of the bail statute, *Handy*, and related precedent.

B. Mr. Leung's Release Would Present Neither A Risk of Flight Nor a Danger to the Community

During oral argument on the bail motion, Judge Illston expressly stated that she "did not disagree" that Mr. Leung had established, by clear and convincing evidence, that his release pending appeal would not present a risk of flight or a

danger to the community. *See* Exh. C, at 4. Any contrary finding would be flatly irreconcilable with the record. As Mr. Leung observed below, his pre-trial release was conditioned on execution of a substantial ($500,000) secured bond. He faithfully complied with all other conditions of release from that point forward. He underwent an initial trial where the jury reached no verdict; he was clearly aware that he could be convicted at a second trial and had ample opportunity to abscond before retrial if that was his intention, yet he voluntarily appeared to be tried again. He surrendered his passport before the conclusion of the retrial.

Furthermore, Mr. Leung has very substantial ties to the community. He, his wife, Bell, and his two children moved to the United States to live until all legal matters relating to his trial and conviction, including any incarceration, have been resolved. He and the two children are United States citizens. In the meantime, he has concluded a long term lease for an apartment in San Ramon, near his brother and his family. Mr. Leung's children have attended, and will continue to attend school in the San Ramon school district. Mr. Leung's elderly parents, too, live in the Bay Area. *See* Exh. A to Dkt. 1175 (Declaration of Steven Leung addressing these and related matters).

Finally, and perhaps most importantly, the district court has repeatedly found that Mr. Leung's release would present neither a flight risk nor a danger. There is simply no factual basis for departing from those findings here.

C. The Appeal Is Advanced in Good Faith and Will Raise a Substantial Question of Law And/or Fact Involving the District Court's Disposition of Defendant's Claim of Juror Bias and Misconduct

Mr. Leung is not appealing his conviction or seeking bail on appeal for the purpose of delay; here again, no plausible factual basis appears for concluding otherwise. See §31432(b)(1)(B). Accordingly, this motion must be decided on the only remaining ground placed in issue by the bail statute, i.e., whether he will raise a substantial question of fact or law likely to result in, *inter alia*, reversal or an order for a new trial.

In his motion for a new trial, Mr. Leung advanced a claim of juror bias and misconduct based on the sworn affidavit submitted by one juror, Loretta Simms following trial. Ms. Simms averred that certain female jurors, including juror C.B., had repeatedly discussed the facts of the case during the trial and had reached conclusions on the questions of guilt or innocence that no other evidence elicited at trial could alter. (Exh. E) The court considered the claim on the merits but rejected defendant's evidentiary proffer on the grounds that Fed.R.Evid. 606(b) foreclosed consideration of it.[1] For purposes of appeal, this Court must and

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[1] Rule 606 is entitled "Juror's Competency as a Witness.: Subsection (b) states:

(b) During an Inquiry Into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

will consider the averments in the Simms declaration to be true. If the Court finds that those averments state a claim of reversible error, it will reverse and either order a new trial or remand for an evidentiary hearing, with either remedy meeting the requirements of §3143(b)(1)(B). For that reason, and those that follow, the jury misconduct issue thus raises a fairly debatable, i.e., substantial, question within the meaning of §3143(b).

1. General Principles of Law.

a. Juror Bias

"The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors." *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.1998) (en banc); *see also Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Irvin v. Dowd*, 366 U.S. 717 (1961). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982)

Consistent with these principles, "the bias or prejudice of even a single juror would violate [the defendant's] right to a fair trial." *Dyer*, 151 F.3d at 973 (citation omitted); *see also Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) (a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"). And "the presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." *Dyer*, 151 F.3d at 973 n.2 (citation omitted). "Like a judge who is biased . . . the presence of a

biased juror introduces a structural defect not subject to harmless error analysis. *Id.*, citing *Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991).

"Voir dire plays a critical role in assuring criminal defendants that their Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge cannot fulfill [the] responsibility to remove prospective jurors who may be biased and defense counsel cannot intelligently exercise peremptory challenges." *United States v. Spaar*, 748 F.2d 1249, 1253 (8th Cir.1984). Although "[b]ias can be revealed by a juror's express admission of that fact, ... more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." *Gonzalez*, 214 F.3d at 1111-12, citing *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977).

A disqualifying bias may appear on a showing of either *actual* or *implied* bias. *Gonzalez*, 214 F.3d at 1111. "In essence, [a]ctual bias is bias in fact—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *Id*., at 1112 (internal quotations and citations omitted). If a defendant in the post-trial context shows that a juror "failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause," then he has demonstrated actual bias entitling him to a new trial. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); accord, *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir.2001). Whether a juror is dishonest is a question of fact. *Dyer,* 151 F.3d at 973.

b. Juror Misconduct

It is established beyond peradventure that a juror commits misconduct that may warrant dismissal when he or she disobeys the trial court's instructions. See, e.g., *United States v. Eldred*, 588 F.2d 746, 752 (9th Cir. 1978); *United States v. Almonte*, 594 F.2d 261, 267 (1st Cir. 1979). An instruction prohibiting premature deliberations, as was given in this case, is vital to protecting a defendant's right to a fair trial for a host of reasons. *See United States v. Resko*, 3 F.3d 684 (3rd Cir. 1993) (discussing reasons). *See also United States v. Jadlowe*, 623 F.3d 1, 17-18 (1st Cir. 2010) (quoting the discussion in *Resko* and deeming post-verdict inquiry into pre-deliberation case discussion cognizable).

c. The Right to a Hearing

In *Smith v. Phillips*, *supra*, the Supreme Court held:

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

Id., 455 U.S. at 215. *See also Dyer v. Calderon,* 151 F.3d 970, 974 ("[A] court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances." (citations omitted)); *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) ("[T]he Supreme Court has stressed that the remedy for allegations of jury bias is a hearing, in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial.") A similar rule applies where a claim of juror misconduct is at issue. *Dyer*, 151 F.3d at 978; A*ngulo,* 4 F.3d at 847.

Of course, as *Angulo* observes, an evidentiary hearing is not mandated every time there is an allegation of jury misconduct or bias. *Angulo,* 4 F.3d at 847. "[I]n determining whether a hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source. *Id.* (quoting *Hard v. Burlington N.R.R.*, 812 F.2d 482, 485 (9th Cir.1987)) Here, however, the content of the allegations facially indicate the presence of serious bias and misconduct, as discussed further below.

2. Evidence Relating to Bias and Misconduct

a. Jury Voir Dire

At the commencement of voir dire, the Court was at pains to inform jurors that they were not to discuss the case with one another or anyone else in order to fairly assess the charges and evidence against Mr. Leung. 1 RT 38-41. One of the prosecutors himself began his questioning of the jurors with a lengthy statement concerning the importance of impartiality. 1 RT 76-79. Defense counsel opened her questioning by stressing the same theme. 1 RT 100-101.

In the course of its initial admonitions, the court specifically stated:

> One of the things I will tell you every single time that you leave the courtroom is you may not discuss this matter with each other or with anyone else until the case is over. And one of the promises you'll have to make if you are on the jury is that until the case is completed, you can't talk to people about it, you can't answer questions about it . . .
> . . .
>
> This is something that we are slowly coming to grips with, and sometimes jurors find it hard to follow those rules. And the problem is if the jurors break those rules

> and do communicate it can cause all kinds of problems in the case, including a mistrial which would mean we'd have to start all over again, which would be a real shame.

(1 RT 38-40)

> One of the problems that happens is if you talk about it, you may find that you are making up your mind or you are talking yourself into a position or you are persuading yourself about how you feel about the case.
>
> And another instruction you will get is you are not to make up your minds until you have heard all the evidence, you must wait until the end after you have heard all the evidence to decide the case.

RT 40-41.

The Court's preliminary instructions before the taking of evidence emphasized the same directives, i.e, that jurors were to keep an open mind and to refrain from reaching decisions about the case and talking to other jurors about it until the commencement of deliberations. RT 158-59 (stressing, *inter alia*, that the prohibition specifically included case discussions with other jurors). Indeed, the court issued similar directives to the jurors on scores of occasions, usually at the onset of a recess, throughout the trial. *See* RT 324, 360, 402, 433, 505, 577, 621, 547, 715, 782, 833, 877, 922, 954, 985, 1056, 1090, 1119, 1141, 1187, 1223, 1260, 1270, 1336, 1416, 1516, 1564, 1593, 1613, 1662, 1694, 1726, 1772, 1807, 1847, 1887, 1907, 1949, 2036, 2062.

Finally, of particular significance, at the time the court gave its initial admonitions at the beginning of voir dire, the court specifically inquired, "Is there anybody here who couldn't promise not to communicate about the case until it's

over?" 1 RT 39. No juror, including juror C.B, whose presence in the courtroom is confirmed by her short voir dire conducted moments afterwards (1 RT 43-44) and who is the subject of the Simms declaration, indicated that they could not do so. Very shortly thereafter, the court said, "So it will be important that you follow those rules, that there be no communication of any sort [about the case], electronically, orally or any other way until the case is over. Anybody who can't promise that?" 1 RT 40. Only one juror—*not* juror C.B.— responded to the question, with only a request for clarification of the court's directive. *Id*.

b. Motion for a New Trial and the Court's Related Ruling

As noted, defendant's motion for a new trial relied in part on the affidavit of juror Simms as the basis for a claim of juror misconduct and bias. *See* Dkt. 1133, 1136; Exh. E (Simms declaration). In that declaration, Simms described her having heard other female jurors, specifically including juror C.B., repeatedly discussing the evidence in the case before the defense had begun to present evidence. The discussions, as reported, firmly supported the conclusion that such jurors had reached conclusions concerning the most fundamental issue in the case well prior to deliberations—indeed, even before the defense had presented any evidence. *See* Exh. E. Defendant contended that this violation of the court's instructions and related evidence of bias entitled him to a new trial or, at a minimum, an evidentiary hearing on the issue. Dkt. 1133, 1136 at 1-4.

The government first opposed the motion on the procedural ground that both the motion and the juror claim were untimely. Dkt. 1144, at 1-8. As a

substantive matter, the government argued that Fed.R.Evid. 606(b) prohibited consideration of the declaration, relying, *inter alia*, on *Tanner v. United States*, 483 U.S. 107 (1987) and various Ninth Circuit and extra-Circuit authorities. Dkt. 1144 at 8-11.

Following defendant's reply, the Court denied the motion in an order issued on May 2, 2013. Dkt. 1156. The court rejected the government's procedural claim but, relying primarily on *United States v. Williams-Davis*, 90 F.3d 490, 504-505 (D.C. Cir. 1996) and *United States v. Tierney*, concluded that Rule 606(b) precluded consideration of the Simms affidavit. Dkt. 1156; Exh. D at 3-4. Those decisions, too, rested in large part on the Supreme Court's *Tanner* decision.

3. It is Fairly Debatable Whether Evidence of the Jurors' Pre-Deliberation Case Discussions Were Cognizable Notwithstanding Fed.R.Evid. 606(b)

It is clear that *if* the averments made by Ms. Simms had been confirmed at a hearing, they would have supplied a powerful basis for finding that defendant had been denied his Sixth Amendment right to a fair and impartial jury and a verdict untainted by misconduct, thereby entitling him to a new trial. Thus, the central issue on which Mr. Leung's juror bias and misconduct claim will rise or fall involves the scope of Rule 606(b) itself.

Again, the question whether Rule 606(b), as applied in *Tanner*, categorically bars consideration of evidence of pre-trial discussions and deliberations, as was proffered here, is both important and unresolved. That conclusion appears for a variety of reasons. *First*, as the government conceded in

its briefing below, the text of the Rule *itself* may reasonably be read as "expressly bar[ring] juror testimony related to matters occurring *during jury deliberations.*" Dkt. 1144 at 9:17-18 (emphasis in original). See also 3 Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 6:21 (3d ed.2012) ("Because clear language in the provision limits proof of matters occurring 'during the course of the jury's deliberations,' it seems that Rule 606(b) does not apply to misconduct by jurors occurring prior to deliberations.")

Second, while *Tanner* invoked Rule 606(b) in declining to consider post-verdict claims that jurors had been using drugs and alcohol while sitting as jurors during trial, the Court did not expressly address the question whether the rule excludes juror testimony as to all matters occurring before or after deliberations. Thus, as Mueller and Kirkpatrick observe, *Tanner* simply supplied "some argument" that Rule 606(b) may, as a temporal matter, be read so broadly as to exclude evidence of the type Mr. Leung has proffered. 3 Mueller and Kirkpatrick, *Federal Evidence*, § 6:21.

Third, there are important factual bases for distinguishing this case from *Tanner* for purposes of deciding the operation of the Rule. *Tanner* involved questions of juror competence based on their reported physical condition during trial. The Court was not concerned with application of the Rule vis-a-vis pre-deliberation conduct that, as here, violated the trial court's express and repeated instructions.

In addition, this Court has recognized that post-trial evidence of juror misconduct may itself be considered as evidence of actual bias. See *United States v. Hayat*, 710 F.3d 875, 885, 889-91 (9th Cir. 2013). *See also United States v. Vartanian*, 476 F.3d 1095, 1096-97 (9th Cir.2007). Thus, evidence that jurors repeatedly discussed the evidence prior to deliberations and, indeed, even prior to commencement of the defense case in violation of the court's admonitions is evidence of both misconduct *and* bias. Demonstrating the presence of the bias does not reflect an attempt to "impeach the verdict," *see* Fed.R.606(b), but rather an attempt to establish a basis for juror disqualification that existed before the jury was ever sworn.

Fourth, notwithstanding the government's new trial arguments to the contrary, this Court has not expressly adhered to a categorical rule barring consideration of pre-deliberation conduct or statements evincing misconduct or bias. Indeed, even after Tanner, the Court has suggested that opposite is true. Thus, in *United States v. Henley*, 238 F.3d 1111 (9th Cir.2001), after discussing why racist statements made by a juror were for other reasons not precluded under 606(b), the Court observed:

> In this case, there would be even stronger reason to conclude that Rule 606(b) should not bar juror testimony regarding O'Reilly's alleged racist statements, because the statements in question were made *before* deliberations began and *outside* the jury room. Rule 606(b)'s primary purpose-the insulation of jurors' private deliberations from post-verdict scrutiny-would not be implicated by permitting juror testimony about what O'Reilly allegedly said while carpooling with other jurors.

Henley, 238 F.3d at 1121.

Fifth, notwithstanding the provisions of Rule 606(b) and the decision in *Tanner*, at least one other Circuit has approved a post-verdict inquiry into the fact and substance of pre-deliberation discussions concerning a case as a means of determining the prejudicial effect of erroneous pre-trial instructions permitting such discussion. *See United States v. Jadlowe*, 623 F.3d 1, 17-18 (1st Cir. 2010). That decision, issued well after *Tanner*, cannot be squared with a reading of Rule 606(b) that preempted inquiry into the juror claim raised in the present matter.

Sixth, even if Rule 606(b) is given an expansive reading and applied to juror evidence of juror statements and conduct occurring before deliberations, the court may arguably receive evidence of pre-deliberation discussions to further a bias inquiry without delving into a juror's subjective mental processes existing at any point in time. As Mueller and Kirpatrick observe,

> It seems that jurors should be allowed to testify (and their affidavits should be admissible to prove) that they commenced deliberations in violation of the court's instructions prior to the end of the case. Whether discussions during trial among jurors going to the merits should be allowed has itself become controversial, but if the rule is observed and jurors violate it, their testimony (or affidavits) on this matter does *not* fall within the coverage of Fed. R. Evid. 606(b). The reason is that it does not reveal the effect of anything on their minds or their mental processes, at least so long as the testimony or affidavit does not describe in any detail the statements actually made in such conversations, and instead described the general tenor of such conversations.

Mueller and Kirkpatrick, *Federal Evidence* § 6:21 (footnote omitted).[2]

Finally, putting aside the question whether evidence of the jurors' pre-deliberation case discussions were cognizable as a general matter, this Circuit has recognized an independent basis on which the court arguably should have considered it. Specifically, the Circuit adheres to the rule that "[s]tatements [offered in support of an application for a new trial] which tend to show deceit during *voir dire* are not barred by [Rule 606(b)]." *Hard v. Burlington Northern R.R.,* 812 F.2d 482, 485 (9th Cir.1987); *accord*, *Henley, supra*, 1121 (citing *Hard* and stating, "[i]f appellants can show that a juror 'failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause,' then they are entitled to a new trial." [quoting *McDonough Power Equipment, Inc., supra,* 464 U.S. at 556]).

Aware of its central importance to ensuring a fair trial, the district court in this matter directly asked jurors at the start of voir dire whether any could not promise adherence to the rule against talking to others about the case prior to deliberations. None of the jurors, including juror C.B., stated or suggested that they would have any such difficulty. Nor did juror C.B. volunteer anything when counsel engaged other jurors on their ability to remain impartial. *See, e.g.*, RT 100, et seq. The Simms declaration, however, avers that juror C.B. and others repeatedly broke their promise and defied the court's directive once the

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[2] In the present matter, the Court was thus authorized to consider at least those portions of the Simms declaration that reported the objective evidence of the other juror's pre-trial discussions.

evidentiary phase of trial was underway. A truthful answer on voir dire that they could not or would not refrain from communicating with others about the case before deliberations would have provided a valid basis for a challenge for cause. Certainly this is at least *arguably* or *debatably* true under *Henley* and *Hard*, such that Mr. Leung should have been afforded a hearing on his claim, and this is all that is required for purposes of satisfying the *Handy* criteria.

In light of the above, the proposition that Rule 606(b) categorically bars examination of a misconduct or bias claim based on discussions concerning the nature and significance of evidence that occur before deliberations have begun is, at least in this Circuit, "fairly debatable' within the meaning of the bail statute. The issue, moreover, is one that *should* be debated both because the Simms declaration proffered by Mr. Leung so strongly suggests a denial of his right to a fair trial and since its consideration would do nothing to invade the sanctity or secrecy of the formal deliberations themselves.

CONCLUSION

For the reasons stated, this Court should issue an order directing that Leung's release be continued for the duration of his appeal under the conditions imposed by the district court prior to its disputed bail order.

Dated: September 6, 2013

Respectfully submitted,

By /s/ Dennis P. Riordan
Dennis P. Riordan

Counsel for Defendant-Appellant
STEVEN LEUNG

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on September 6, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Signature: /s/ Jocilene Yue
Jocilene Yue

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