No. 13-10242

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SHIU LUNG LEUNG, Steve Leung, Chao-Lung Liang,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Honorable Susan Illston
District Court No. 3:09-cr-00110-SI-6

OPPOSITION OF THE UNITED STATES OF AMERICA TO DEFENDANT'S MOTION FOR RELEASE ON BAIL PENDING APPEAL

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Appellant Shiu Lung Leung seeks release on bail pending appeal, arguing that his appeal raises a substantial question of law. His question is whether Federal Rule of Evidence 606(b) and the Supreme Court's decision in *Tanner v. United States*, 483 U.S. 107 (1987), preclude a district court from considering a juror declaration, submitted in connection with an untimely post-trial motion, in which the juror claims that some other jurors discussed evidence, and expressed views on guilt, prior to the close of evidence. It is not a substantial question both because the allegation of juror bias and misconduct was not timely and because Rule 606(b) and *Tanner* plainly preclude consideration of the juror declaration. Accordingly, the bail motion should be denied.

BACKGROUND

In June 2010, the United States indicted AU Optronics Corporation ("AUO"), its wholly owned subsidiary, and several employees on charges of price-fixing in violation of the Sherman Act, 15 U.S.C. § 1. AUO is a major manufacturer of thin-film transistor liquid crystal display ("TFT-LCD") panels, electronic components that are used in computer monitors, televisions, and other consumer electronics. The indictment charged that AUO conspired with other TFT-LCD manufacturers to fix worldwide prices of TFT-LCD panels.

A jury convicted AUO, the subsidiary, and two of the individuals in March 2012. It failed to reach a unanimous verdict on defendant Leung. He was retried

and convicted later that year. On the day the second jury returned its verdict, a juror notified Leung's counsel that other jurors had prematurely discussed the case. Mot. Ex. D at 3; *see also* Def.'s Reply to Gov't's Opp'n to Mot. For Acquittal and/or New Trial at 2, *United States v. Leung*, No. 3:09-CR-110 (N.D. Cal. Apr. 24, 2013) (ECF No. 1145) ("Ms. Simms did contact the defense immediately after the verdict."). Four months later, Leung moved for acquittal or, alternatively, a new trial based on that juror's declaration. *See* Mot. Ex. E (the Simms declaration). The trial court denied the motion based on Fed. R. Evid. 606(b) although the court noted its untimeliness, too and sentenced Leung to 24 months of imprisonment. Mot. Exs. A, D. Leung then moved in the district court for release on bail pending appeal, which the court denied. Mot. Exs. B, C. Leung's self-surrender date was September 9, 2013, until he filed this motion, which stayed his surrender pending its resolution.

ARGUMENT

I. Standard for Detention After Conviction and Pending Appeal

Under the Bail Reform Act of 1984, a criminal conviction is presumed correct, and "the burden is on the convicted defendant to overcome that presumption." *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) (citing S. Rep. No. 98-225, at 26 (1983)). Thus, a defendant convicted and sentenced to a term of imprisonment must be detained pending appeal unless a judicial officer finds "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" and "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 the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b). This provision reflects Congress's view that "once a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances." *United States v. Miller*, 753 F.2d 19, 22 (3d Cir. 1985) (quoting H. Rep. No. 91-907, at 186-87 (1970)).

A "substantial question" is "one of more substance than would be necessary to a finding that it was not frivolous." *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985) (quoting *Giancola*, 754 F.2d at 901). And a substantial question is likely to result in reversal or a new trial only if the question is "so integral to the merits of the conviction" that an appellate holding to the contrary will likely require a reversal of the conviction or a new trial. *Giancola*, 754 F.2d at 900 (quoting *Miller*, 753 F.2d at 23). Questions that are substantial yet harmless or insufficiently preserved do not satisfy the Bail Reform Act's requirements. *Id.* at

900-01. The defendant seeking release bears the burden of meeting the Act's requirements. *United States v. Wheeler*, 795 F.2d 839, 840 (9th Cir. 1986).

On appeal, this Court reviews the district court's legal determinations de novo but the "underlying factual determinations for clear error." *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003).

II. Leung Has Not Presented a Substantial Question Permitting Bail.

A. Leung's Motion for Either Acquittal or a New Trial Was Untimely.

Leung first complained of juror bias and misconduct more than four months after his conviction, in a motion for acquittal or, alternatively, a new trial under Federal Rules of Criminal Procedure 29 and 33, respectively. But both rules impose fourteen-day time limits on motions following guilty verdicts. Fed. R. Crim. P. 29(c)(1), 33(b)(2). A court may extend those deadlines in rare circumstances not invoked or implicated here. Fed. R. Crim. P. 45(b)(1).

The district court recognized that the motion was not timely, "particularly . . . for allegations of potential juror misconduct, which were brought to counsel's attention immediately after the verdict." Mot. Ex. D at 3. But the court resolved the motion on the merits, "leav[ing it] to the Court of Appeals to figure out if I was barred from making those decisions on account of untimeliness, because [the motion] was, as I noted then and will note again, late." Mot. Ex. C at 3-4.

The Supreme Court demands strict compliance with such deadlines "because of [the] insistent demand for a definite end to proceedings." *Eberhart v. United States*, 546 U.S. 12, 19 (2005). In *Eberhart*, the Court held that a district court must "observe the clear limits of the Rules of Criminal Procedure" when the government invokes them. *Id.* at 17 (describing a court's duty to enforce deadlines as "mandatory"). While the government did not do so in *Eberhart*, thereby forfeiting its timeliness objection by failing to raise it, the government in this case did assert a timeliness objection in opposing Leung's post-trial motion. Having properly invoked the deadline imposed by the rules, the district court should have enforced that deadline. Because Leung's motion did not comply with the timing requirements of Rules 29, 33, or 45, his appeal of that motion's denial raises no substantial question. It was time-barred, and bail should be denied for that reason alone.

B. When a Verdict's Validity Is Challenged, Federal Rule of Evidence 606(b) Prohibits Jurors from Testifying About the Pre-Deliberation Conduct of Fellow Jurors.

Even if this Court looks to Leung's arguments on the merits, it will not find a substantial appellate question. Leung primarily argues that Federal Rule of Evidence 606(b) does not bar a juror's testimony about pre-deliberation discussion, or at least that the question remains "unresolved." Mot. 15. But no court has

adopted Leung's narrow reading of the rule, which in any event is foreclosed both by *Tanner* and circuit precedent.

When a verdict's validity is questioned, Rule 606(b) prohibits a juror from testifying about (1) "any statement made or incident that occurred during the jury's deliberations," (2) "the effect of anything on that juror's or another juror's vote," or (3) "any juror's mental processes concerning the verdict." Fed. R. Evid. 606(b)(1). As the district court observed, only the first of these circumstances includes reference to the jury's deliberations. Mot. Ex. D at 3. The rule also lists three exceptions, none applicable here, which are not limited to, nor even directed at, the deliberation context. Fed. R. Evid. 606(b)(2).

Given the rule's plain language, it is no surprise that courts have consistently interpreted Rule 606(b) to prohibit consideration of juror testimony about jury influences, regardless of their timing. In *Tanner*, for example, the Supreme Court held that Rule 606(b) prohibited juror testimony alleging alcohol and drug consumption by other jurors, even though the alleged misconduct occurred during the trial, prior to the jury's deliberation. 483 U.S. at 121. The Court observed that "there appears to be virtually no support" for the proposition that "Rule 606(b) is inapplicable to the juror affidavits." *Id.* Nor did the Court think that the defendants were entitled to an evidentiary hearing, because "jurors are observable

by each other, and may report inappropriate juror behavior to the court *before* they render a verdict." *Id.* at 127.

Leung attempts to distinguish *Tanner* by pointing out that the jurors' drug and alcohol use in *Tanner* did not "violate[] the trial court's express and repeated instructions," Mot. 16, but that distinction is not meaningful. Ingesting cocaine is illegal irrespective of any jury instruction, and something is amiss if courts must advise jurors not to inebriate themselves during trial. *Tanner*'s prevailing message is clear enough: the time to address jurors' alleged misconduct is "*before* they render a verdict," 483 U.S. at 127, not four months later.

Likewise, this Circuit has repeatedly prohibited consideration of post-verdict juror testimony offered to impeach the jury's verdict. For instance, in *United States v. Davis*, this Court refused to consider allegations of juror misconduct stemming from a juror's statement that "[f]rom the first day I knew [the defendant] was guilty." 960 F.2d 820, 828 (9th Cir. 1992) (citing, among other authorities, Rule 606(b)); *see also United States v. Pimentel*, 654 F.2d 538, 542 (9th Cir. 1981) (holding that the district court properly refused to consider post-trial evidence that some jurors had prematurely decided on the defendant's guilt).

This Court's approach is shared broadly in the federal courts, which have refused in numerous cases to permit a juror to testify about the pre-deliberation conduct of other jurors. *See United States v. Williams-Davis*, 90 F.3d 490, 504-05

(D.C. Cir. 1996) (collecting cases); *United States v. Tierney*, 947 F.2d 854, 869 (8th Cir. 1991) (affirming the district court's refusal to grant a mistrial for pre-deliberation juror discussion); *United States v. Shalhout*, 280 F.R.D. 223, 230-31 (D.V.I.) (holding that Rule 606(b) barred an alternate juror's allegation that other jurors commented midtrial on the defendants' guilt and ethnicity), *aff'd*, 507 F. App'x 201, 206 (3d Cir. 2012) (unpublished) ("Evaluating jurors' pre-deliberation statements necessarily requires inquiring into their thought process to determine whether or not the premature statements affected their verdict, an inquiry that is prohibited under Rule 606(b)." (internal quotation marks and brackets omitted)); *United States v. Oshatz*, 715 F. Supp. 74, 76 (S.D.N.Y. 1989) (holding that Rule 606(b) rendered inadmissible a juror's post-verdict revelation that other jurors "had made up their minds" midtrial). Thus, Rule 606(b) prohibits consideration of post-verdict juror testimony regarding juror conduct, including pre-deliberation conduct.

In response, Leung cites two inapposite cases to support his claim that a substantial question concerning the scope of Rule 606(b) exists. The first, *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001), involved a juror's use of racial slurs, which was evidence that he lied during voir dire. No analogous circumstance is presented here. *See infra* Section II.C. In the second case, *United States v. Jadlowe*, 628 F.3d 1, 17-18 (1st Cir. 2010), the district court erroneously

instructed the jury that they could discuss the evidence midtrial, an error the First Circuit deemed harmless. In neither case did the court consider post-verdict juror testimony to impeach the jury's verdict.

Therefore, there is no substantial question on appeal that Rule 606(b) prohibits consideration of the juror declaration that Leung proffers.

C. Jurors Were Not Dishonest During Voir Dire.

Leung also argues that the jurors who allegedly engaged in pre-deliberation discussions were dishonest and biased during voir dire because they did not admit then that they would later disobey its instruction not to discuss the case prior to deliberations. This contention is meritless and unsupported. The allegation of pre-deliberation discussion in the juror declaration casts no light on whether, during voir dire, any jurors intended to subsequently violate the court's instruction or harbored any bias against Leung.

By contrast, Leung relies on examples of juror conduct that unmistakably established dishonesty during voir dire. The juror's use of racial slurs in *Henley* demonstrated that his disclaimer of racial bias on his jury questionnaire was untruthful. 238 F.3d at 1121. Likewise, in *Hard v. Burlington Northern R.R.*, the plaintiff obtained evidence that one juror was formerly the defendant's employee, and that evidence contradicted how the juror depicted their relationship during voir dire. 812 F.2d 482, 484-85 (9th Cir. 1987). Moreover, the nature of the dishonesty

in both cases revealed actual bias for or against one of the parties. No similar proof of dishonesty or actual bias during voir dire exists in this case, another reason that Leung has failed to present a substantial question for appeal.

CONCLUSION

For the reasons set forth above, Leung's motion for release on bail pending appeal should be denied.

Respectfully submitted.

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September 13, 2013

CERTIFICATE OF SERVICE

I, Adam D. Chandler, hereby certify that on September 13, 2013, I electronically filed the foregoing Opposition of the United States of America to Defendant's Motion for Release on Bail Pending Appeal with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

September 13, 2013

/s/ *Adam D. Chandler*
Attorney