DENNIS P. RIORDAN (SBN 69320)
dennis@riordan-horgan.com
DONALD M. HORGAN (SBN 121547)
don@riordan-horgan.com
RIORDAN & HORGAN
523 Octavia Street
San Francisco, CA 94102
Telephone: (415) 431-3472
Facsimile: (415) 552-2703

Attorneys for Defendant-Appellant
SHIU LUNG LEUNG

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]

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR RELEASE ON BAIL PENDING APPEAL

Introduction

Defendant Leung has moved the Court for an order granting his release on bail pending his appeal pursuant to 18 U.S.C. § 3143(b). The motion rests on his claim that he has satisfied the lenient standard set forth in *United States v. Handy,* 761 F.2d 1279 (9th Cir. 1985) and related precedent because he has raised an issue that is "fairly debatable" on appeal. As discussed in his opening motion ("Motion"), that issue arises from Mr. Leung's claims that (1) he was deprived of his right to a trial before a fair and impartial jury as result of juror bias and misconduct disclosed in a post-trial declaration submitted by a member of the trial jury and (2) that, at a minimum, he was entitled to an evidentiary hearing on the matter.

Mr. Leung responds to the arguments raised by the United States in its opposing memorandum ("Opp."), in turn, below.

I. THE JUROR BIAS AND MISCONDUCT CLAIM HAS BEEN PRESERVED FOR PURPOSES OF APPEAL

The government first urges the Court to deny the motion because Mr. Leung's Rule 33 motion for a new trial, which first advanced the juror misconduct and bias claim, was purportedly untimely as a matter of law pursuant to Fed.R.Crim.Pro. 33 and 45. *See* Opp., at 4-5 (citing judge Illston's statement at district court bail hearing that the new trial motion had been "late.") This argument is unavailing for several reasons.

First, despite expressing its dissatisfaction with the motion's ultimate filing date when she ruled on the new trial motion, Judge Illston "decline[d] to deny [it]

as untimely" and disposed of its claims, including the juror claim disputed here, on the merits (just as she reached the merits in connection with the bail motion). *See* Motion, Exh. D, at 3. The judge could not have so proceeded had she considered the motion and its claims procedurally barred under the Rules as a matter of law. And her decision to reach the merits cannot be cast as an abuse of discretion given defendant's substantial compliance with the Rules (see below) and the Supreme Court's holding in *Eberhardt v. United States*, 546 U.S. 12, 13 (2005) that the time limits applicable to motions under Rule 33 are not jurisdictional.

Second, and in any event, Judge Illston had the authority to grant a "significant" extension of time on her own motion prior to the expiration of the normal 14-day period applicable to the filing of a motion under Rule 33. *See* Fed.R.Crim.P. 45(b)(1) (providing in part, "When an act must or may be done within a specified period, the court on its own may extend the time, *or* for good cause may do so on a party's motion."); Advisory Committee Note to Rule 45(b), 2005 amendment ("[T]here is nothing to prevent the court from granting the defendant a significant extension of time, under [inter alia, Rule 33(b)(2)), as long as it does so within the seven-day [since expanded to fourteen day] period.")

Judge Illston granted just such an extension in this case. After the verdict, she inquired about sentencing dates. (*See* attached Exh. F, excerpt of 12/18/12 transcript, at 2312). Defense counsel responded that, "we have some motions that we'll be wanting to brief and "would need some time for that." *Id*. After setting an initial sentencing date of March 29, 2013, the Judge stated she would move the date if the presentencing report were not ready, then told defense counsel to "go

ahead and file your motions *whenever you want to*, but we'll just try to get them resolved substantially in advance, so he'll know what to expect." (*Id*., at 2313) (Emphasis added) Given these exchanges, defense counsel reasonably believed that the Rule 33 could be filed any time before the sentencing date, and reasonably acted on that belief. (*See* Dkt. 1133, motion for new trial, filed on April 14, 2013, before April 29, 2013, sentencing.)

Third, subsequent developments did not alter the scope of the court's authorization. As defense counsel detailed in their reply (Dkt. 1103) supporting the Rule 33 motion, in late January, 2013, counsel concluded they needed more time to prepare for the post-trial motions and sentencing. Counsel thereafter filed a motion to continue the March 29th date for purposes of both the motions and the sentencing. (Dkt. 1103) After the prosecutor informed defense counsel that she was unavailable on the scheduled hearing date, the parties executed a stipulation, later approved by the court, that continued the sentencing hearing to April 29th. (Dkt. 1145 [new trial reply], at 1-2 and accompanying declaration of counsel; Dkt. 1106 [stipulation]; Dkt. 1107 [order]) While the stipulation and order did not expressly provide for a continuance for motion (as opposed to sentencing) purposes, defense counsel, based on their filed motion (Dkt. 1103) and their discussions with the government, reasonably understood that it did so.

Fourth, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of "excusable neglect." In response to the government's

timeliness objection to the motion for a new trial, defense counsel made an unrefuted showing that they had not filed it earlier in part because they had been prevented from securing the critical declaration from juror Simms due to circumstances out of their control rendering Simms unavailable. (*See* Dkt. 1145 [new trial reply] and accompanying declaration of counsel) If the filing delay could be characterized as caused by counsel's "neglect" at all, it was clearly "excusable" under 45(b)(1)(B). Certainly this would constitute a viable and legally defensible ground supporting the district court's exercise of discretion in reaching the juror claim on the merits.

Finally, whether or not Mr. Leung conclusively establishes that his motion was timely under the Rules, he has surely shown that his claim to that effect is "fairly debatable" under the lenient standard established under the bail statute. *See Handy*, 761 F.2d at 1282-83.

II. THE JUROR BIAS AND MISCONDUCT CLAIM PRESENTS A SUBSTANTIAL ISSUE ON APPEAL WITHIN THE MEANING OF THE BAIL STATUTE

As to the substance of defendant's arguments, the government does not dispute that Mr. Leung's release on bail would present no risk of flight or danger to the community, or that his appeal is taken for the purposes of delay. Nor does the government challenge Leung's contention that the allegations in the Loretta Simms declaration, if credited, would establish an egregious violation of the Court's express admonitions, distinctly stated in the preliminary instructions and scores of times throughout the trial, that jurors were not to discuss the case with one another or reach any conclusions concerning guilt or innocence prior to

deliberations. The government instead confines itself to arguing that Ms. Simms's allegations are flatly non-cognizable under Fed.R.Evid. 606(b)(1) and that there is no reasonable debate to the contrary.

The government first argues that the Rule prohibits consideration of juror affidavits concerning pre-deliberation jury conduct because only one clause of the Rule bars consideration of matters occurring during deliberations, while the other clauses are not so temporally limited. Opp., at 6. But as the government itself conceded in the district court, a fair construction of the 606(b)(1) is that *all three* of its clauses are concerned with matters occurring only *during* deliberations. *See* Motion, at 8 n.1 [text of Rule]); Motion at 16; 3 Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 6:21 (3d ed.2012). Under that reading, the language of the Rule itself authorized substantive consideration of all of Ms. Simms's allegations.

Predictably, the government seeks support for its position by invoking *Tanner v. United States*, 483 U.S. 107 (1987), wherein the Court declined to consider the defendant's post-verdict claims that jurors had been using drugs and alcohol while sitting as jurors during the trial. Opp., at 6-7. As defendant has observed, however (*see* Motion, at 15-16), *Tanner* did not expressly decide whether the rule categorically excludes juror testimony as to all matters occurring before or after jury deliberations—a point to which the government does not directly respond.

In any event, *Tanner* certainly did not involve allegations of repeated acts of juror misconduct arising from repeated disregard of the court's repeated

instructions. The government attempts to dismiss the distinction, Opp., at 7, but the effort is unpersuasive particularly because, unlike the conduct in *Tanner*, the verifiable acts of misconduct give rise to a fair inference of actual *juror bias*—an allegation that the defendant in *Tanner* never advanced.

On this point, Mr. Leung has demonstrated that the misconduct arising from the defiance of the court's instructions is itself a basis for establishing the presence of juror bias. Motion, at 17 (citing *United States v. Hayat*, 710 F.3d 875, 885, 889-91 (9th Cir. 2013) and *United States v. Vartanian*, 476 F.3d 1095, 1096-97 (9th Cir.2007). And even assuming, *arguendo*, that Rule 606(b)(1) should be read to extend to juror evidence of juror conduct prior to deliberations, the district court could have inquired into the fact of juror misconduct (e.g., premature deliberations) during that period for purposes of a bias inquiry *without* inquiring into the jurors subjective mental processes themselves. Motion, at 18-19 (citing Mueller and Kirkpatrick, *Federal Evidence* § 6:21). All such circumstances distinguish *Tanner* in a manner that the government's opposition largely ignores.

Contrary to the government's next claim, see Opp., at 7, Ninth Circuit precedent does not categorically prohibit consideration of pre-deliberation conduct or statements evincing misconduct or bias under the kind of circumstances appearing here. In *United States v. Pimental*, 654 F.2d 538, 542 (9th Cir. 1981), cited at Opp., 4-5, the Court invoked Rule 606(b) in declining to consider post trial affidavits averring that certain jurors had made up their minds about defendants' guilt prior to the time of the court's instructions. But the defendants in *Pimental* advanced a claim of inadequate trial court voir dire rather than pre-

existing juror bias. 654 F.2d at 542. The claim, moreover, was founded entirely on evidence of the juror's mental processes rather than verifiable acts of pre-deliberation misconduct and/or dishonesty. *Id*. Of great significance, the Court in *Pimental* barred the evidence on the grounds that "[t]estimony of a juror concerning the motives of individual jurors and conduct *during deliberation* is not admissible." *Id*. (Emphasis added) That, again, is not the circumstance presented here.

United States v. Davis, 960 F.2d 820 (9th Cir. 1992), cited at Opp. 7, is likewise of no help to the government. There the defendant challenged the verdict, apparently for the first time on appeal, by citing a juror's statement that he had believed the defendant guilty from the outset of trial. While it cited Rule 606(b) and other authority in summarily rejecting the evidence as simply reflecting the juror's "personal feelings and beliefs," the Court was not confronted with a bias claim based on repeated and verifiable acts of misconduct or of deceitful responses on voir dire.

Significantly, the government fails to respond to the Ninth Circuit's suggestion in *Henley*, cited in Motion, at 17-18, and decided well after *Tanner*, that post-trial juror testimony concerning racist remarks made by a juror prior to deliberations were cognizable not only because of their racial content but also because they were made "*before* deliberations began and *outside* the jury room," and hence did not strictly implicate the prohibition of Rule 606(b). See *Henley*, 238 F.3d at 1121, cited in Motion, at 17-18. Certainly Henley did not consider that the cognizability of the evidence had been settled by *Davis, Pimental*, or any

other Ninth Circuit decisions.[1]

The government next relies on several extra-Circuit decisions to support its claim concerning the absolute bar to evidence of pre-deliberation discussion purportedly raised by Rule 606(b)(1). Opp., at 7-8. Putting aside the bases on which these cases may be distinguished, the government's discussion misses the point. Mr. Leung has not asserted that Rule 606(b) conclusively permits admission of statements contained in the Simms declaration or that certain other Circuits have not disagreed with his reading of the Rule, but simply that the issue is, at a minimum, unsettled and "fairly debatable." *See*, e.g., *Henley*, 238 F.3d at 1121; *Jadlowe*, 623 F.3d at 20. *See also* Mueller & Kirkpatrick, *supra, Federal Evidence,* § 6:21. That, again, is all that is required to raise a "substantial question" for purposes of this motion.

Finally, in his opening motion, Mr. Leung observed that this Circuit has held 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)]." Motion, at 19-20, citing *Hard v. Burlington Northern R.R.,* 812 F.2d 482, 485 (9th Cir.1987);

---

[1] The government contends that neither *Henley* nor *United States v. Jadlowe*, 623 F.3d 1, 17-18 (1st Cir. 2010), on which Lueng also relies, "involved any ruling that a court can consider post-verdict juror testimony to impeach the jury's verdict." Opp., at 9. *Henley* authorized consideration of such testimony not as a means of impeaching the jury's verdict but, as here, of locating disqualifying juror bias. *Jadlowe* authorized such inquiry in determining the prejudicial effect of erroneous jury instructions. Neither inquiry should have been permitted under the government's broad construction of 606(b)(1).

accord, *Henley, supra*, 1121. *c., supra,* 464 U.S. at 556]).[2]

The government counters that the allegations of misconduct set forth in the Simms declaration shed "no light" on whether the jurors who, during voir dire, promised not to prematurely discuss the case were being untruthful or harbored any bias towards Leung. Opp., at 9. This argument flatly ignores a fair reading of the Simms declaration, Motion, Exh. E, the aversions of which, in the absence of a hearing, must be regarded as true. That declaration supplies an ample factual basis for concluding that when the jurors identified and described by Ms. Simms failed to respond to the Court's express inquires whether they could and would refrain from pre-deliberations discussions, they were engaging in actionable deceit, particularly where they allegedly engaged in such discussions even before the end of the prosecution's case and despite the admonition given over and over throughout the trial. If corroborated after inquiry at a hearing, such deceit would supply the basis for a finding of actual bias in violation of Mr. Leung's Sixth Amendment rights.

/ /

/ /

/ /

/ /

/ /

[2] This Circuit's rule on this question is not followed in all other Circuits but is binding on all other Ninth Circuit panels. *Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004).

CONCLUSION

For the foregoing reasons, and for those stated in the opening memorandum, the Court should issue an order releasing Mr. Leung on bail pending appeal.

Dated: September 20, 2013

Respectfully submitted,
Dennis P. Riordan
Donald M. Horgan

RIORDAN & HORGAN

By /s/ Donald M. Horgan
Donald M. Horgan

Attorneys for Defendant
STEVEN LEUNG

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

I hereby certify that on September 20, 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.

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

Signature: /s/ Jocilene Yue
Jocilene Yue

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on_____, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature: _____
Jocilene Yue