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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SHIU LUNG LEUNG Defendant.	Case No. 09-CR-0110 SI DEFENDANT'S REPLY TO GOVERNMENT'S OPPOSITION TO MOTION FOR ACQUITTAL AND/OR NEW TRIAL Date: April 29, 2013 Time: 11:00 a.m. Judge: The Honorable Susan Illston

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I. THE MOTION SHOULD NOT BE DENIED FOR UNTIMELINESS

a. The Rule 29 Motion Was Preserved

At the end of the government's case, the defense made a motion under Rule 29 on any and all grounds. This motion was made again at the end of the defense case, and was made yet again after the verdict. Thus, the defense Rule 29 motion was timely made. However, after the verdict, the defense indicated it would be filing a brief on this issue, and the court indicated the defense could file its post-trial motions whenever it wanted to, but we should "try" to get them resolved substantially in advance of the sentencing. The government did not object to this language at the time. A date for sentencing was set for March 29th. On January 28th, the defense emailed Ms. Tewksbury, indicating a need for a continuance of the sentencing date for thirty days, and asking for a stipulation. The government would not agree at that time, so the defense filed a motion to continue the sentencing and the post-trial motions. After that motion was filed, the government contacted the defense and agreed to a stipulation rather than have to appear in court for the motion to continue. Although the stipulation did not reference the post-trial motions the way the motion to continue did, the defense believed that the stipulation applied to both.

The government is now arguing that the Rule 29 motion is untimely, however they ignore the the fact that the defense had preserved its motion in a timely manner. That oral motion referenced any and all grounds. The briefing filed by the defense in support of a Rule 29 motion only dealt with two issues, issues that had been briefed and ruled on by the court during the first trial. While the defense concedes that this court is not likely to overturn the ruling on these two issues, we would argue that the issue has been preserved and should not be considered untimely.

b. The Rule 33 Motion Was Not Untimely

At the time of the verdict, a sentencing date was set and the defense indicated it would also be filing post-verdict motions. As noted above, the court informed the defense to file the motions whenever they wanted, but "we'll just try to get them resolved significantly in advance." RT 2313 12-14. The court was within its rights to allow an extension of the filing of the motion, as this decision to allow the extension occurred within the fourteen day period following the verdict. The defense believed that the motions could be filed at any time before the sentencing date. When filing for the motion to continue the sentencing, it continued to be the defense belief that a continuance was for both the motions

and the sentencing. The defense motion to continue clearly stated this. However, when Ms. Tewksbury stated she was not available to appear in court, and would now prefer to sign a stipulation, the defense in good faith withdrew the motion to continue and instead filed a stipulation. This did not amount to an agreement that post-verdict motions would not be filed.

In addition, as will be explained more thoroughly below, the defense could not file the motion for a new trial based on juror misconduct any earlier than it did. Although Ms. Simms did contact the defense immediately after the verdict, an interview was not able to be conducted at that time. The defense was then unable to re-contact Ms. Simms to interview her and get specifics from her until late March. Although the defense was preparing a motion based on juror misconduct, it could not be completed until Ms. Simms was interviewed and agreed to provide an affidavit. Once the defense was able to meet with Ms. Simms, she agreed to provide an affidavit and one was prepared and sent to her the same day. However, the defense then lost contact with Ms. Simms for a period of time because she was going through some changes in her employment status. She was not able to check her email regularly and was also experiencing problems with her cell phone. The defense finally made contact again with Ms. Simms and she signed the affidavit and returned it the next day. The defense could not have filed this motion without its supporting affidavit, but did file it as soon as possible.

c. The Rule 33 Motion Should Be Distinguished From A Rule 29 Motion And Should Not Be Denied On Grounds of Untimeliness

"Federal Rule of Criminal Procedure 33(a) allows a district court to "vacate any judgment and grant a new trial if the interest of justice so requires." But "[a]ny motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period." Rule 33(b)(2). This deadline is rigid. The Rules provide that courts "may not extend the time to take any action under [Rule 33], except as stated" in Rule 33 itself. Rule 45(b)(2). The Court of Appeals for the Seventh Circuit has construed Rule 33's time limitations as "jurisdictional," permitting the Government to raise noncompliance with those limitations for the first time on appeal. 388 F.3d 1043, 1049 (2004). However, there is "a critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule." *Kontrick v. Ryan,* 540 U.S. 443, 456, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). ***Rule 33 is an example of the latter***." *Eberhardt v. US* 546 U.S. 12, 13 (S.Ct. 2005). (emphasis added).

Interestingly, while the government does cite the *Eberhardt* case, they make no mention of the fact that the case held that a Rule 33 motion is ***not*** jurisdictional, and thus does not require the strict adherence that a rule governing subject matter jurisdiction does. The government instead cites to *United States v. Canova*, 412 F.3d 331 (2d Cir. 2005). However, this case pre-dates the Supreme Court's ruling in Eberhardt, and specifically does not reach the issue of whether Rule 33 is jurisdictional or not, since the lower court had heard the motion for a new trial on its merits and denied it. *United States v. Canova*, 412 F.3d 331, 348 (2d Cir. 2005).

As the government concedes in a footnote, Rules 29, 33 and 45 were amended in 2005. Since that amendment, courts have held that even if a motion has been filed in an untimely manner, this does not automatically exclude a court from hearing the motion.

"Rule 33 must be read in conjunction with Federal Rule of Criminal Procedure 45, which provides that "[w]hen an act must or may be done within a specified period, the court ... may extend the time ... on a party's motion made ... after the time expires if the party failed to act because of excusable neglect." Fed.R.Crim.P. 45(b). *See* Advisory Comm. Notes to 2005 Amendments of Rule 33 ("[U]nder Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect."); *United States v. Robinson*, 430 F.3d 537, 541 (2d Cir.2005) ("The time limitations specified in Rule 33 are read in conjunction with Rule 45, which establishes how to compute and extend time.")."
U.S. v. Munoz, 605 F.3d 359, 367 (6th Cir. 2010).

Under the current Rules, the court is not required to rule on the request for extension within the 14 days under Rule 33, and more importantly, the power to extend the deadline is no longer limited by Rule 45(b)(2). The Advisory Committee Notes to the 2005 Amendments, state in part: "Further, 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 addition, Rule 45(b)(1) now provides 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." (emphasis added). The court may extend the time, or if a party makes an untimely motion then the "excusable neglect" standard of Rule 45(b)(1)(B) comes into play.

"In *Pioneer Investment Services Co. v. Brunswick Associates*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), the Supreme Court construed the phrase "excusable neglect" as it is used in Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure:

The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to *esp[ecially] through carelessness*." The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness.... Hence, by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *U.S. v. Munoz, id* at 368.

In the case at bar, assuming this court were to find the motion to be untimely, there was excusable neglect. The defense team acted reasonably in believing that the sentencing date set was also a date for the motions. Both defense attorneys are experienced criminal attorneys, with extensive experience in State court proceedings. It is the routine practice in State court to hold the hearing for motions for new trials at the same time as the sentencing. In this case, since there was no actual date set for the post-trial motions, the defense team made inquiries of an experienced Federal criminal attorney and were informed that filing the motion two weeks before the date set before the court was sufficient. Even assuming this was error, it was nothing more than a careless error. The day after the motion was filed, in response to an email from the defense, the government made it known that they felt the motion was untimely. At that time the defense offered to stipulate to a continuance for as much time as the government felt was necessary to respond. Since the government has responded, a continuance is not needed. However, any neglect by the defense team should be found to be excusable under the totality of the circumstances, and certainly Mr. Leung should not be deprived of a hearing to determine if his constitutional rights to a fair trial, decided by an impartial jury were upheld.

II. THE COURT SHOULD HOLD A HEARING TO DETERMINE IF THERE WAS JUROR MISCONDUCT

a. The Issue Is Not Untimely

The government claims that this court should not hold a hearing because the claim of misconduct is untimely, and that the claim should have been brought to the court's attention during trial. However, the defense was unaware of the specific juror misconduct until weeks after the verdict.

As soon as Ms. Simms described the specific conduct of certain other jurors, and it became clear that they had committed misconduct, the defense prepared an affidavit outlining the misconduct and provided it to Ms. Simms to sign. However, as stated earlier, (and outlined in the Cashman Affidavit), Ms. Simms was undergoing certain unrelated personal issues that made it impossible for the defense to get in touch with her. When communication was re-established, the affidavit was promptly signed and the already written motion was filed upon receipt of the affidavit.

The government also claims that due to delay Ms. Simms cannot remember details. They also make accusations of Ms. Simms being unsure or of wavering in her testimony, accusations which are not supported by any facts. The defense fails to see how this should result in the denial of a hearing, but instead would argue that any ambiguity that might exist could and should be cleared up by a hearing. Ms. Simms heard several conversations at several times during the long trial. She has signed an affidavit to this effect under penalty of perjury. The affidavit is not conclusionary and is quite specific as to many details. There is nothing in the affidavit to suggest any uncertainty as to what she heard. However, the best way to determine how specific Ms. Simms' memory is would be to hold a hearing and have her address the court directly.

Nor does the only case cited by the government on this issue further their argument, as it is not on point. In *United States v. Lakhani*, 480 F3d. 171, (3d Cir. 2007), a juror gave an interview in which she discussed actions that had occurred in the deliberation room. Her statements to a reporter dealt with the thought processes of herself and the other jurors during *deliberations.* In this case, Ms. Simms' affidavit does not deal with actions occurring during deliberations, not does it deal with the thought processes used to reach a verdict. Instead, her affidavit describes jurors discussing the case before the defense case had even begun, and indicating an unwillingness to even listen to any evidence the defense might present. This conduct is completely inconsistent with the conduct of "a panel of impartial, 'indifferent' jurors," such as Mr. Leung was entitled to. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.) (en banc), *cert. denied*, 525 U.S. 1033, 119 S.Ct. 575, 142 L.Ed.2d 479 (1998).

b. The Affidavit Is Admissible

The government also argues that the affidavit is not admissible and cites to *United States v. Campbell*, 684 F.2d 141 (D.C.Cir. 1982), to support their argument. However, once again the government is misconstruing the affidavit offered by Ms. Simms. The Campbell case dealt with whether a court should consider a juror statement regarding actions that occurred during deliberations.

This is not a case of reviewing the actions or thought processes of jurors during deliberations. Rather, this is an allegation that certain jurors did not follow the court's instructions to remain open minded and to "listen to all the evidence." A juror need not accept the testimony of all witnesses, however, a juror is not allowed to simply and willfully disregard evidence offered because they have already made up their minds. The misconduct is not the fact that certain jurors may have believed the defendant was guilty, nor does the misconduct relate to the reasons why the jurors may have reached their decision. Instead, it is the fact that certain jurors were not willing to listen with an open mind to the defense cross examination and the defense evidence from a point very early on in the case. This misconduct denied Mr. Leung of an impartial jury from very early on in the proceedings, and resulted in a decision by a biased jury.

The government cites several other cases in an effort to persuade the court not to consider Ms. Simms' affidavit, however they are not on point as they are all factually distinguishable. In the case of *United States v. Williams-Davis* 90 F.3d 490, (D.C. Cir. 1996), the defense presented the court with affidavits from jurors claiming misconduct during the trial by the forewoman in the case. Far from excluding these affidavits, the district court accepted and considered them and then held a hearing to question the forewoman about the allegations. So this case actually supports the defense request for the court to consider Ms. Simms' affidavit and to hold a hearing.

The government also cites to *United States v. Davis* 960 F.2d 820 (9th Cir. 1992), however once again this case is not on point. In that case, the defense raised on appeal for the first time the fact that after the verdict a juror gave an interview stating she knew Davis was guilty from the first day. The court held that this was just her personal feelings and not improper. This is a far cry from more than one juror stating before the government had even rested their case they have made up their mind, and nothing presented could sway them to change it.

Nor does the *Oshatz* case cited by the government support their position. Although they state in their brief that this dealt with a juror's testimony about other juror's making up their minds, (Document 1144, 10:23-25), this is not accurate. *Oshatz* actually deals with the affidavit of an individual who worked for the defense, not the affidavit of a juror. This individual stated in his affidavit that a juror approached him after the verdict and stated that the other jurors had made up their minds early on. The juror herself never presented an affidavit. This case dealt with a motion for a new trial or an investigation. The court did consider the affidavit, and found that the juror's remarks bear upon a "matter or statement occurring during the course of the jury's deliberations" or "concern the juror's

mental processes." *United States v. Oshtz* 715 F. Supp 74, 76 (S.D.N.Y. 1989). While the court did deny the motion for a new trial or investigation, it did consider the affidavit, even though it was not even from the juror herself.

The case of *United States v. Pimental* 654 F.2d 538 (9th Cir, 1981) cited by the government did not deal with juror misconduct at all, but involved a motion for a new trial based on a claim of improper limitation of voir dire. While it is true that the court upheld the disregarding of the affidavit of the defense investigator who spoke to some jurors after the verdict regarding their thought processes, the issue of juror misconduct was not even raised. This case is completely inapposite and does not support the government's argument that Ms. Simms' affidavit is inadmissible.

The government also cites to *Tanner v. United States*, 483 U.S. 107, (1987), for the proposition that juror statements are inadmissible to impeach a verdict. However, there are exceptions to the Tanner rule. Indeed, Tanner itself is quite factually distinguishable from the case at bar, as it involves claims of juror incompetence, not juror bias. Ms. Simms' affidavit makes a case for juror bias, in that two or more jurors became biased against Mr. Leung early on and then refused to consider anything offered by the defense. In Tanner, the court indicated that while a defendant is entitled to a competent jury, there are several aspects of the trial process that could protect this right. However, in a case of juror bias, these aspects cannot adequately protect the defendant's right. (See *United States v. Villar*, 586 F.3d 76, (1st Cir. 2009). In Villar, the issue was racial bias, and the court noted that "Many courts have recognized that Rule 606(b) should not be applied dogmatically where there is a possibility of juror bias during deliberations that would violate a defendant's Sixth Amendment rights". (Id at 86.) In this case, the juror misconduct occurred *before* deliberations, which take this case even further outside the Rule 606(b) umbrella.

c. Conclusion

None of the cases cited by the government truly stand for the proposition that an affidavit alleging juror misconduct before deliberations should not be admitted into evidence and considered by the court. The affidavit in this case is admissible, and should be considered by this court, and be the basis for a new trial. The one thing the cases cited make perfectly clear is that the decision to hold a hearing is in the discretion of the court, and if this court were to hold such a hearing it would not be an abuse of that discretion. The defense requests this court order a hearing and allow both parties the opportunity to interview other jurors to see if Ms. Simms' allegations can be corroborated. Mr. Leung was and is entitled to have his constitutional rights scrupulously protected. If several jurors were not fair and impartial his rights were not protected and he should be granted a new trial.

CONCLUSION

For the reasons stated, the Court should grant the defendant an acquittal under Rule 29 and/or should order a new trial under Rule 33.

DATED: April 24, 2013

Respectfully Submitted,

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