HEATHER S. TEWKSBURY (Cal. Bar No. 222202)
BRENT SNYDER (Cal. Bar No. 165888)
Antitrust Division
U.S. Department of Justice
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, CA 94102-3478
Telephone: (415) 436-6660
Facsimile: (415) 436-6687
heather.tewksbury@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG, Defendant.	No. CR-09-0110 SI UNITED STATES' OPPOSITION TO MOTION FOR RELEASE ON BAIL PENDING APPEAL Pretrial Conf. Date: August 30, 2013 Time: 11:00 a.m. Court: Hon. Susan Illston Place: Courtroom 10, 19th Floor

INTRODUCTION

Defendant Steven Leung's motion for release on bail pending appeal should be denied because it fails to raise any substantial appellate question. The motion is based both on a claim of juror misconduct and on the appellate issues raised by his convicted co-defendants. Both grounds for bail pending appeal are without merit.

The alleged juror misconduct claim fails to raise a substantial question on appeal because it is time-barred, juror testimony is incompetent to impeach the jury's verdict, and there is no evidence that any jurors were dishonest in their voir dire responses. Likewise, Leung's reliance on the appellate arguments of his convicted co-defendants fails because this Court and the Ninth Circuit have already ruled that those arguments do not raise substantial appellate questions meriting bail pending appeal.

Accordingly, the Court should deny Leung's motion for bail pending appeal.

ARGUMENT

Leung may be released on bail pending appeal only if (1) he is not a flight risk or danger to the community and (2) his appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in, among other things, an order for a new trial. *See* 18 U.S.C. § 3143(b)(1). "[P]roperly interpreted, '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." *United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985). In order to demonstrate a "substantial question," Leung must show that he has an appellate issue that is "fairly debatable." *Id.* at 1281.

Leung cannot meet this standard. Even if he does not pose a significant flight risk or constitute a danger to the community, Leung has not raised an appellate issue that is fairly debatable because his motion for a new trial was untimely and the juror declaration upon which his juror misconduct claim relies is incompetent to impeach the jury's verdict. Finally, Leung's reliance on his convicted co-conspirators' appeal as a basis for bail pending appeal fails because those arguments have already been rejected by the Court and the Ninth Circuit in denying the convicted co-conspirators' motions for bail pending appeal.

I. Leung's Motion Was Untimely

Although the Court denied Leung's motion for a new trial on the merits, the Court also found that Leung's motion was untimely:

> Defendant filed this motion almost four months after entry of the verdict. The Court had expressly communicated its wish, however, to resolve any post-trial motion "substantially in advance" of the sentencing hearing, initially set for March 29, 2013, and continued to April 29, 2013. The Court notes that the filing of post-trial motions four months after the verdict and two weeks before the sentencing fails to satisfy this request. This is particularly true for allegations of potential juror misconduct, which were brought to counsel's attention immediately after the verdict.

Dkt. 1156 at 3 (Order Denying Motion for Judgment of Acquittal and for New Trial).

A "motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). Under Rule 45, the court can extend the deadlines for good cause on a defendant's motion as long as the motion is made "before the originally prescribed or previously extended time expires." Fed. R. Crim. P. 45(b)(1)(A). The Supreme Court has made clear that parties must strictly comply with these rules. The Supreme Court has stated that the time limits in Rule 33 are "admittedly inflexible because of Rule 45(b)'s insistent demand for a definite end to proceedings. These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Eberhart v. United States*, 546 U.S. 12, 19 (2005). "[D]istrict courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Id*. at 17 (holding that while the "emphatic" time limits in Rule 33 can be forfeited if not invoked because they are not, strictly speaking, "jurisdictional," once invoked, the court's duty to impose them is "mandatory."). The government invoked those rules in opposing Leung's Rule 29 and Rule 33 motions. And because Leung did not comply with Rules 33 and 45, those rules preclude consideration of his new trial motion.

Accordingly, Leung's appeal of the Court's order denying a new trial on grounds of juror misconduct does not raise a substantial question on appeal because the underlying motion was time-barred under Rules 33 and 45.

II. There Was No Jury Misconduct Warranting a New Trial

Leung's motion for release on bail pending appeal also fails on the merits. Leung first argues that the question of whether Fed. R. Evid. 606(b) applies to juror testimony regarding their pre-deliberation discussions "has not been firmly resolved." Dkt. 1175-1 at 11. Leung then argues that Rule 606(b) is inapplicable altogether because certain jurors lied during voir dire when they said they could adhere to the Court's instructions not to discuss the case. Dkt. 1175-1 at 12. Both arguments by Leung are meritless.

A. Juror Simms' Declaration Was Incompetent to Impeach the Jury's Verdict

Leung's primary argument is that Rule 606(b) only prohibits jurors from testifying about matters that occurred during the jury's deliberations and does not foreclose jury testimony about pre-deliberation juror conduct. Dkt. 1175-1 at 11. This argument has not been accepted by courts that have considered the issue.

Although Rule 606(b) could be read to apply only to statements and incidents during the course of jury deliberations, courts have not adopted such a narrow interpretation of the rule. As the Court found in denying Leung's motion for new trial, "[b]y its own language the statute appears to target testimony regarding communications made 'during the course of the jury's deliberations or . . . [testimony] to the effect of anything upon that or any other juror's mind . . .' that influences deliberations." Dkt. 1156 at 3. This broader interpretation is entirely consistent with the other relevant case law. The Supreme Court, Ninth Circuit, and many other courts have repeatedly applied Rule 606(b) more broadly to pre-deliberation intra-jury statements and conduct.

In *Tanner v. United States*, the Supreme Court held that juror testimony alleging frequent alcohol and drug consumption by fellow jurors was incompetent under Rule 606(b), even though the alleged conduct occurred during trial and before deliberations. 483 U.S. 107, 121 (1987). In holding that testimony from multiple jurors about alcohol and drug consumption was incompetent to impeach the jury's verdict, the Supreme Court concluded that the appellants "have presented no argument that Rule 606(b) is inapplicable to the juror affidavits . . . , and in fact, there appears to be virtually no support for such a proposition." *Id.* The Court also held

that the defendants were not entitled to an evidentiary hearing regarding the misconduct allegations because, among other reasons, "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 dismiss the holding in *Tanner* by arguing that the jurors in that case apparently were not disregarding a specific court instruction, as was purportedly the case here. Dkt. 1175-1 at 11. That is not a meaningful distinction. No instruction about drug and alcohol use during trial should have been necessary in *Tanner* or any other trial. Jurors could and would assume that they were not permitted to ingest illegal drugs, such as cocaine, during the court day or at any other time.

Moreover, *Tanner* underscores that point that the alleged juror misconduct should have been called to the Court's attention "*before* they render[ed] a verdict," not four months later. *Tanner*, 483 U.S. at 127. That is precisely what occurred in the case primarily relied upon by Leung, *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993). In *Resko*, the court learned of pre-deliberation discussions when a juror reported them to the court during the trial. *Id.* at 687. As a result, Rule 606(b) was inapplicable to the case and did not bar consideration of the juror testimony or efforts by the trial court to ascertain the nature and extent of the discussions. Here, Juror Simms did not report the alleged misconduct to the Court until four months after the conviction, despite being purportedly aware of it pre-deliberation.

Under those circumstances, the Ninth Circuit has clearly indicated that it will not consider post-verdict juror testimony to impeach a jury's verdict. For instance, in *United States v. Davis*, the Ninth Circuit refused to consider allegations of juror misconduct based on a juror's statement that "[f]rom the first day I knew [the defendant] was guilty." 960 F.2d 820, 828 (9th Cir. 1992). The court held that "[t]he juror's statement reflects his personal feelings and beliefs concerning [the defendant] . . . [and] is insufficient to set aside a verdict." *Id.*(citing, *inter alia*, Rule 606(b)).

Similarly, in *United States v. Pimentel*, the defendants obtained post-trial evidence that some jurors had made up their minds about the guilt of the defendants before the close of the case. 654 F.2d 538, 542 (9th Cir. 1981). The Ninth Circuit held that the trial court had properly

refused to consider the evidence: "Testimony of a juror concerning the motives of individual jurors and conduct during deliberation is not admissible. Juror testimony is admissible only concerning facts bearing on extraneous influences on deliberation, in the sense of overt acts of jury tampering." *Id.* (citations omitted).

The Ninth Circuit is not alone. Numerous other courts have refused to permit juror testimony regarding pre-deliberation juror conduct to impeach a jury's verdict. *See United States v. Williams-Davis*, 90 F.3d 490, 504-05 (D.C. Cir. 1996) (analyzing cases); *see also United States v. Tierney*, 947 F.2d 854, 869 (8th Cir. 1991) (affirming trial court's refusal to grant a mistrial for pre-deliberation discussions by jurors); *United States v. Oshatz*, 715 F. Supp. 74, 76 (S.D. N.Y. 1989) (holding that a juror's post-verdict statements to an investigator that other jurors "had made up their minds" after testimony of government's chief witness was inadmissible as internal matter under Rule 606(b)); *United States v. Shalhout*, 280 F.R.D. 223, 230-31 (D. V.I. 2012) (holding that an alternate juror's allegation that she overheard other jurors comment prior to the close of evidence that the defendants were "already guilty . . . and you know how – how everybody feels about Arabs . . ." did not warrant a new trial because those statements were barred under Rule 606).

In response to this considerable authority that Rule 606(b) prohibits consideration of post-verdict juror testimony regarding pre-deliberation conduct, Leung can cite only two inapposite cases in support of his argument that his appeal will present a substantial question. The first, *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001), involved a juror's use of racial slurs, which indicated that he had lied on a jury questionnaire during the voir dire process. The second case, *United States v. Jadlowe*, 628 F.3d 1, 17-18 (1st Cir. 2010), involved the trial court erroneously giving a pre-trial instruction to jurors (found to be harmless error) that it was permissible for them to engage in pre-deliberation discussions about the evidence. Neither case involved any ruling that a court can consider post-verdict juror testimony to impeach the jury's verdict.

Accordingly, in light of *Tanner*, Ninth Circuit authority, cases from other circuits, and Rule 606(b), there is not a substantial question on appeal related to the Court's ruling that Rule 606(b) and related case law prohibited consideration of Juror Simms' declaration.

B. There Is No Evidence That Any Jurors Were Untruthful During Voir Dire

Leung also argues that the jurors who allegedly engaged in pre-deliberation discussions were dishonest and biased during voir dire because all jurors were asked by the Court if they could follow its instruction not to discuss the case.[1] This argument is entirely unsupported. The mere fact that Juror Simms claims that certain jurors engaged in discussions after hearing evidence during trial does not prove that any of those jurors intended to do so or had any bias whatsoever against Leung at the time of voir dire. Juror Simms does not and cannot opine on what the intentions of those jurors were at the time of voir dire, or at any time for that matter.

By contrast, the cases relied upon by Leung in support of his argument involved conduct by jurors that unequivocally established that they had been dishonest in answering questions during voir dire. For instance, in *Henley*, a juror's use of racial slurs during trial demonstrated that his juror questionnaire answer disclaiming racial bias was dishonest. 238 F.3d at 1121. Likewise, in *Hard v. Burlington Northern R.R.*, the plaintiff submitted evidence that a juror was a former employee of the defendant and had thus been dishonest in answering voir dire questions that were intended to ascertain the nature and extent of any such prior relationship. 812 F.2d 482, 484-85 (9th Cir. 1987). No similar evidentiary proof of dishonesty or bias at the time of voir dire exists in this case that would justify further inquiry or a new trial.

[1] Although the Court's initial instruction during voir dire did mention the duty not to "discuss this matter with each other," the vast majority of the instruction related to other things jurors should not do, such as not reading or listening to news stories related to the case, not researching the case, and not using social media to communicate about the case. Tr. Vol. 1 at 38-40. There is no evidence that any jurors engaged in such communications. In fact, one juror reported to the Court having heard a radio story he believed was related to the case. Trial Tr. vol. 7 at 1025-29. Yet, Juror Simms not once reported the alleged pre-deliberation discussions, despite purportedly observing those discussions and knowing that they were improper at the time.

III. The Claims Advanced By AUO on Appeal Have Been Found Not To Raise Substantial Questions Meriting Bail Pending Appeal

Leung also contends that the appeals of convicted co-defendants H.B. Chen and Hui Hsiung raise substantial questions that merit his release on bail pending appeal. Dkt. 1175-1 at 13. These same arguments were previously raised by Leung's convicted co-defendants and rejected by the Court in connection with their motions for bail pending appeal. *See* Dkt. 1094 (Order Stating Reasons for Denying Defendants' Motions for Bail Pending Appeal). The Ninth Circuit also rejected the arguments. *See United States v. Hsiung*, No. 12-10492 (9th Cir. Jan. 22, 2013) (Dkt. 23). Leung has not provided any basis that would justify the Court revisiting these prior rulings.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Steven Leung's motion for release on bail pending appeal.

Dated: August 23, 2013

Respectfully submitted,

/s/ Brent Snyder
Brent Snyder
Antitrust Division
U.S. Department of Justice