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

DARA L. CASHMAN (SBN 115018)
DENNIS R. CASHMAN (SBN 133390)
CASHMAN LAW OFFICES
Pier 9, Suite 100,
San Francisco, CA 94111
Telephone: (415) 956-9900
Facsimile: (415) 956-9210
Email: denniscashman@att.net

Attorneys for Defendant
STEVEN LEUNG

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. STEVEN LEUNG, Defendant.	Case No. CR-09-0110 (SI) **REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR RELEASE ON BAIL PENDING APPEAL** Date: August 30, 2103 Time: 11 a.m. Judge: The Honorable Susan Illston

Introduction

Defendant Leung has moved the Court for an order granting his release on bail pending his appeal in this matter. The motion relies in part on his claim that he was deprived of his right to a trial before a fair and impartial jury and in part on the legal claims that have been advanced by his previously convicted co-defendants (Hui Hsiung, Hsuan Bin Chen, AU Optronics Corporation, and AU Optronics Corporation America) in their pending Ninth Circuit appeals (Case Nos. 12-10492, 12-10493, 12-10500, and 12-10514). The latter claims are equally applicable to Mr. Leung. *See* defendant's opening memorandum ("Mem."), at 13-14.

Mr. Leung submits that, based on the present briefing, including the present reply, he is entitled to an order granting his release on bail prior to his present September 9th surrender

date. Alternatively, he respectfully requests that the Court continue his release to a date later than October 18, 2013, the date set for oral argument in the Ninth Circuit appeals involving his co-defendants. The Ninth Circuit panel that hears argument next month will be the first court to consider the merit of appellants' claims on full briefing totaling hundreds of pages, rather than the cursory briefing permitted on bail motions. The requested continuance of Mr. Leung's surrender date would permit the Court to consider whether that argument, and the Ninth Circuit's oral response to it, support the conclusion that the legal claims common to Mr. Leung and his co-defendants should be deemed fairly debatable, and hence substantial, within the meaning of 18 U.S.C. § 3143.

I. MR. LEUNG HAS PRESENTED SUBSTANTIAL ISSUES WARRANTING AN ORDER FOR RELEASE ON BAIL PENDING APPEAL

The government begins its memorandum in opposition to Mr. Leung's motion ("Opp.") by asserting that the Court should deny the present motion because Leung's motion for a new trial, which first advanced the juror misconduct and bias claim and the others advanced in the present bail motion, was untimely as a matter of law pursuant to Fed.R.Crim.Pro. 33 and 45. *See* Opp., at 2. The Court's post-verdict statements, however, were fairly interpreted as granting defendant an extension of time to file the motion, as authorized by the Rules. 15 RT 2313. Furthermore, despite expressing its dissatisfaction with the ultimate filing date, the Court "decline[d] to deny [the] motion as untimely" and addressed its claims, including the bias and misconduct claim, on the merits. *See* Dkt. 1156, at 3.

The Court did not commit legal error in so proceeding. Certainly there is no basis for concluding, much less beyond any reasonable debate, see *United States v. Handy*, 761 F.2d 1279, 1282-83 (9th Cir. 1985), that the previously asserted claims have somehow been waived or that they are not actionable for purposes of Mr. Leung's pending appeal.

A. Juror Misconduct and Bias

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 truly challenge Mr. Leung's contention that the allegations contained in the Loretta Simms declaration,[1] if credited, would establish an egregious violation of the Court's express admonitions, distinctly stated in the preliminary instructions and multiple 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. See Mem., at 8-10 and Exh. B. The government instead confines itself to arguing that Ms. Simms's allegations are flatly non-cognizable under Fed.R.Evid. 606 and that there is no reasonable debate to the contrary. Opp., at 3-6.

In support of its argument concerning the effect of Rule 606(b), the government relies primarily on *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 3-4. As defendant has noted, however, Mem., at 11, *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 in the form of repeated acts of misconduct arising from disregard of the court's instructions. The government attempts to dismiss the distinction, Opp., at 4, but the effort is unpersuasive in part because, unlike the conduct in *Tanner*, the verifiable acts of misconduct give rise to a fair inference of actual juror bias.

The Ninth Circuit has recognized that post-trial evidence of juror misconduct may 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

[1] At one point in his opening memorandum, defendant inadvertently referred to "Ms. Linn" as the juror who submitted the declaration. See Mem., at 13:11. The declaration was in fact submitted by Ms. Simms.

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), as much as an attempt to demonstrate a basis for juror disqualification that existed before the jury was ever sworn. Furthermore, as Mr. Leung has also argued, evidence that indicates jurors were deceptive during their responses on voir dire, at least in this Circuit, independently falls outside the ambit of the rule. See Mem., at 12-13 (citing *United States v. Henley*, 238 F.3d 1111 (9th Cir.2001) and *Hard v. Burlington Northern R.R.*, 812 F.2d 482, 485 (9th Cir.1987)).

In addition, 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.

3 Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 6:21 (3d ed.2012) (footnote omitted).[2]

The government's remaining arguments are likewise unavailing.

First, the government contends that Mr. Leung "primarily relies" on *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993) and seeks to distinguish *Resko* because it involved a pre-verdict inquiry into juror discussions. But Mr. Leung relied on *Resko* solely because it

[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.

expresses the rationale for prohibiting premature deliberations in a criminal case. See Mem., at 6-7. The more pertinent case is *United States v. Jardlowe*, 623 F.3d 1 (1st Cir. 2010), which relied on *Resko* for purposes of exploring the rationale *and*—contrary to the government's present interpretation of the Rule—engaged in a post-verdict inquiry into the substance of jurors' pre-deliberation case discussions. *See id.*, at 20 (expressly holding that Rule 606(b) did not preclude inquiry into substance of pre-deliberation discussions, and observing, "The relevant inquiry ... is not into the nature of the formal deliberations that occurred once the presentation of evidence concluded, but the nature of any juror discussion about the case prior to the formal deliberations. *Probing such premature discussions is neither impermissible nor impossible.*") (Emphasis added)

Second, contrary to the government's suggestion, 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. Opp., at 4-5. 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 of 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. 4, also fails to support the government's position. 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 again was

not confronted with a bias claim based on repeated and verifiable acts of misconduct or of deceitful responses on voir dire.

Third, the government fails to respond to the Ninth Circuit's suggestion in *Henley*, cited at Mem. 11-12 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. Certainly Henley did not consider that the cognizability of the evidence had been settled by *Davis*, *Pimental*, or any other Ninth Circuit decisions.[3]

Fourth, the government relies on several extra-Circuit decisions to support its claim concerning the absolute bar to evidence of pre-deliberation discussion purported raised by Rule 606(b). Opp., at 5. 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 authorizes 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; *Jardlowe*, 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, the government asserts that there is "no evidence" that jurors had been untruthful during voir dire. Opp., at 6. This claim simply ignores a fair reading of the Simms declaration, the aversions of which, in the absence of a hearing, must be regarded as true. That declaration supplies an ample factual basis for the inference that when the jurors identified and described by Ms. Simms failed to respond to the Court's express inquires whether they could

[3] The government contends that neither *Henley* nor *Jardlowe* "involved any ruling that a court can consider post-verdict juror testimony to impeach the jury's verdict." Opp., at 5. *Henley* permitted consideration of such testimony not as a means of impeaching the jury's verdict but, as here, of locating disqualifying juror bias. *Jardlowe* permitted such inquiry as determining the prejudicial effect of erroneous jury instructions. Neither inquiry should have been permitted under the government's broad construction of 606(b).

and would refrain from pre-deliberations discussions, they were engaging in actionable deceit, particularly where they allegedly engaged in such discussions despite the admonition given over and over throughout the trial. If corroborated after inquiry at a hearing, such deceit would form the basis for a finding of actual bias in violation of Mr. Leung's Sixth Amendment rights.

B. Remaining Legal Issues

Mr. Leung considers the remaining issues in the case, as presented in his opening memorandum (at 13-14) and presented by his co-defendants in the course of their pending appeals, to be fairly joined by the present briefing.

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. Alternatively, Mr. Leung requests that the Court continue his release to a date following October 18, 2013, i.e., the date set for oral argument in the Ninth Circuit appeals involving his co-defendants.

Dated: August 27, 2013

Respectfully submitted,

Dennis P. Riordan
Donald M. Horgan

RIORDAN & HORGAN

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

Attorneys for Defendant
STEVEN LEUNG