

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE SUSAN ILLSTON, JUDGE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CR 09-0110 SI
	)	
SHIU LUNG LEUNG,	)	
	)	San Francisco, California
Defendant.	)	Friday,
	)	August 30, 2013
	)	11:18 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:	UNITED STATES DEPARTMENT OF JUSTICE
	Antitrust Division
	450 Golden Gate Avenue
	San Francisco, California 94102
BY:	HEATHER TEWKSBURY, ESQ.

For Defendant:	CASHMAN LAW OFFICES
	Pier 9
	Suite 100
	San Francisco, California 94111
BY:	DARA LUCILLE CASHMAN, ESQ.
	DENNIS ROSS CASHMAN, ESQ.
	and
	RIORDAN & HORGAN
	523 Octavia Street
	San Francisco, California 94102
BY:	DONALD M. HORGAN, ESQ.

Reported by BELLE BALL, CSR 8785, CRR, RDR  
Official Reporter, U.S. District Court

1 **FRIDAY, AUGUST 30, 2013**

**11:18 A.M.**

2 **P R O C E E D I N G S**

3 **THE CLERK:** Calling Criminal 09-110, United States  
4 versus Leung.

5 **MS. TEWSKBURY:** Good morning, Your Honor. Heather  
6 Tewksbury for the United States.

7 **THE COURT:** Good morning.

8 **MR. HORGAN:** Good morning, Your Honor. Donald Horgan  
9 here for Mr. Leung, who is here today, Your Honor.

10 **THE COURT:** Good morning.

11 **MS. CASHMAN:** Good morning, Your Honor. Dara  
12 Cashman, also here with Mr. Leung.

13 **THE COURT:** Good morning.

14 **MR. CASHMAN:** Dennis Cashman here as well,  
15 Your Honor.

16 **THE COURT:** Good morning. This is Mr. Leung's motion  
17 for release on bail, pending appeal.

18 I must tell you, I'm inclined to deny the motion. The  
19 issues raised are -- well, the first issue made by the  
20 Government is that it's untimely.

21 I -- I did rule on the new trial motion, when it was  
22 ultimately filed. So, I did not avoid making a merits  
23 decision based on that issue, nor will I do so here. And I'll  
24 leave to the Court of Appeals to figure out if I was barred  
25 from making those decisions on account of untimeliness,

1 because it was, as I noted then and will note again, late.  
2 But, I did -- I did decide it on the merits. So I'll go ahead  
3 and decide this one.

4 I do not find that the issues being raised concerning the  
5 juror -- jury testimony would warrant bail, pending appeal.

6 And then, there was one other point made, which is:  
7 "well, if you won't do that, would you at least put it off  
8 until the argument on appeal in the other case," which is set,  
9 I guess, in October.

10 I'm going to deny that, too, but I'll -- I will note that  
11 yesterday, I got a notice from the Court of Appeals saying  
12 that your request to extend the briefing on Mr. Leung's appeal  
13 was granted. And your explanation for the need for the extra  
14 time was because you were really busy writing other kinds of  
15 motions, including this motion, which was listed in the list  
16 of things that you had to do before you could do that. So, it  
17 seems to me that the appellate dates are moving targets, to a  
18 certain extent in your own control.

19 But at this time, I do not find that it's appropriate to  
20 allow bail pending appeal. And I'll -- I know you will want  
21 to visit that question anew with the Court of Appeal --

22 **MR. HORGAN:** Yes, Your Honor.

23 **THE COURT:** -- and you may do so. And I'll get you  
24 an order today or Monday -- Tuesday, so that you can do that.

25 But, I'll be happy to hear anything you want to add to

1 your papers that wasn't in it already.

2 **MR. HORGAN:** Very briefly, Your Honor, understanding  
3 your ruling, I -- I just initially want to emphasize that I  
4 think Mr. Leung has made a clear and convincing case that he's  
5 not a flight risk, nor a danger to the community.

6 **THE COURT:** I -- I don't disagree with you.

7 **MR. HORGAN:** Okay. And as to the  
8 substantial-question issue, Your Honor, I just want to  
9 emphasize that under *Handy*, the Ninth Circuit has said that a  
10 substantial question can be one as to which the scope and  
11 meaning of a U.S. Supreme Court decision hasn't been fully  
12 settled.

13 And I would submit that the scope of 606(b) has not been  
14 conclusively settled, at least where, as in this case, there's  
15 evidence of juror misconduct that is, if it's -- if the  
16 allegations are to be believed, demonstrates a direct defiance  
17 of this Court's instructions, which was not the case in  
18 *Tanner*; or where the issue is one of juror bias. That's one  
19 issue I think that raises a substantial question.

20 Another being whether or not the Court can inquire into  
21 disobedience of its own instructions, without getting into  
22 mental processes at all. In other words, just verifying that  
23 discussions prior to deliberations in violation of the Court's  
24 order did occur, again, in connection with the bias claim.

25 And finally, whether or not the jurors identified in the

1 allegation -- in the affidavit, whether their responses on  
2 voir dire were honest with the Court, or, to the contrary,  
3 deceitful enough to bring them outside of the scope. So,  
4 those are -- I just wanted to frame the issues that I think  
5 are substantial, for the record.

6 **THE COURT:** All right, thank you.

7 **MS. TEWSKBURY:** Your Honor, I just briefly respond  
8 that *U.S. v. Tanner*, Supreme Court case, is in on all fours  
9 with this case. The only way that the defense is able to  
10 distinguish it is by saying that the jurors in that case  
11 weren't specifically instructed to essentially not imbibe  
12 alcohol and have cocaine during trial proceedings. So, I  
13 don't think jurors would need such an instruction in order for  
14 -- for us to be able to distinguish that case here.

15 Moreover, the voir-dire cases that the Defendant cites go  
16 directly to demonstrable bias that both of those cases --  
17 those prospective jurors had during the voir dire process.

18 The first was an explicit question about racial bias,  
19 where the prospective juror answered that he no racial bias,  
20 which he clearly throughout the course of the trial  
21 demonstrated that he did, through racial slurs.

22 The other one, going to a prospective juror who had a  
23 relationship -- an employment relationship with the defendant,  
24 and yet disclaiming any knowledge of that particular party.

25 Both of those go not only to expressly at the time, during

1 the voir dire process, being untruthful, but also it goes  
2 directly to the bias question.

3 Whereas here, the instruction that Your Honor gave at the  
4 beginning of -- during the voir-dire process that the jurors  
5 responded to that they could follow the instruction was to not  
6 pre-deliberate. And there's nothing in Ms. Simms' declaration  
7 that could establish the state of mind of the jurors when they  
8 answered affirmatively to your voir dire question at that  
9 point.

10 So, again, I don't think that the -- the way to  
11 distinguish *Tanner* is -- holds any water, considering the now  
12 newly-raised argument that being untruthful during voir dire  
13 is somehow basis to say that Rule 606(b) isn't inapplicable to  
14 the jury process.

15 **THE COURT:** All right, thank you.

16 **MR. HORGAN:** I have a response, but it is in our  
17 brief, Your Honor.

18 **THE COURT:** All right, thank you. All right.

19 Well, I will deny the motion. I'll get you something in  
20 writing on that, and it will be either today or Tuesday.

21 **MR. HORGAN:** Thank you, Your Honor.

22 **MS. TEWSKBURY:** Thank you, Your Honor.

23 **MS. CASHMAN:** Thank you, Your Honor.

24 (Conclusion of Proceedings)

25

**CERTIFICATE OF REPORTER**

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball 

Thursday, September 5, 2013

Belle Ball, CSR 8785, CRR, RDR