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9 Attorneys for Raymond Chan

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12

13 UNITED STATES OF AMERICA,
14 Plaintiff,
15 v.
16 RAYMOND SHE WAH CHAN,
17 Defendant.
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Case No. 20CR-00326-JFW

**REPLY IN SUPPORT OF
MOTION FOR MISTRIAL DUE
TO JURY MISCONDUCT OR,
IN THE ALTERNATIVE, AN
EVIDENTIARY HEARING**

Hearing Date: May 3, 2024
Hearing Time: 8:00 a.m.
Location: Courtroom of the
Honorable John F. Walter

1 Raymond Chan, by and through his counsel of record, John Hanusz and
2 Michael G. Freedman, hereby files his reply in support of his motion for a
3 mistrial based on evidence that jurors, including the foreperson, committed
4 misconduct by prematurely deliberating on the outcome of the case and by
5 deliberating outside the presence of other jurors, or, in the alternative, to hold an
6 evidentiary hearing pursuant to Rule 26.3 of the Federal Rules of Criminal
7 Procedure to determine the extent of the jurors' misconduct and its deprivation of
8 Mr. Chan's constitutional rights.

9 This reply is based on the attached Memorandum of Points and
10 Authorities in support, the Memorandum of Points and Authorities in support
11 Mr. Chan's motion (Dkt. 1405), all matters of which the Court may take judicial
12 notice, and such other and further argument and evidence as may be presented to
13 the Court at the hearing of this matter.

14 Dated: April 22, 2024 Respectfully submitted,

15
16 */s/ John Hanusz*
17 JOHN HANUSZ

18 */s/ Michael G. Freedman*
19 MICHAEL G. FREEDMAN

20 Attorneys for Raymond Chan
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In its opposition, the government focuses unduly on the juror's comment,
4 applying its own interpretation to argue that the comment was innocuous and not
5 prejudicial. But the government ignores Mr. Chan's argument that a hearing is
6 required so the Court can inquire of the jurors to determine if they regularly
7 discussed the case outside of the jury room or were influenced by at least one
8 juror's stated wish for a quick verdict. The government's interpretation is just
9 one of many. By contrast, another interpretation is that the juror's comments
10 indicate that a longer, more prejudicial conversation took place. The critical
11 point is that, without having heard from the jurors directly, the Court cannot
12 resolve the issue and so should hold an evidentiary hearing.

13 **II. ARGUMENT**

14 The government's opposition incorrectly assumes that there is only one
15 way to interpret the juror's comments to other jurors as innocuous. Contrary to
16 the government's argument, however, one interpretation of the juror's comment
17 about reaching a quick verdict is that several jurors, including the foreperson,
18 were impermissibly discussing the case together outside the jury room. Such
19 conversations outside of the deliberative process require a mistrial. *See United*
20 *States v. Resko*, 3 F.3d 684, 688 (3rd Cir. 1993) ("It is a generally accepted
21 principle of trial administration that jurors must not engage in discussions of a
22 case before they have heard both the evidence and the court's legal instructions
23 and have begun formally deliberating as a collective body.").

24 The government also mischaracterizes the comment here as outcome
25 neutral. (Govt. Opp. at 1, 10). But the comment, as related to the Court, plainly
26 pertains to the verdict, *i.e.*, the outcome of the case. The government's argument
27 that the juror did not explicitly state that that the juror desired a type of outcome,
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1 but rather simply desired a quick outcome, is based on the government's own
2 interpretation of the comment. However, neither of the parties was present for
3 the Court's interview of the courtroom deputy (CRD) who overheard the
4 comment, so it is impossible to determine definitively what the juror meant or
5 how the CRD interpreted the comment. Notably, though, the CRD felt the
6 comment was concerning enough to report it to the Court.

7 Further context is necessary for the Court to assess the prejudicial effect of
8 the jurors' discussions outside of the deliberative process. The government
9 spends many pages isolating the juror's comment and arguing that it was not
10 prejudicial to Mr. Chan. (Govt. Opp. at 8-16). But the government ignores the
11 fact that this comment, even in isolation, is evidence that the jurors did not
12 adhere to the Court's clear and repeated admonition that they could not discuss
13 the case outside of the deliberative process. Based on that evidence, the Court
14 has an obligation to determine from the jurors what more was said if anything, or
15 whether any extraneous prejudicial information reached the jury. *Resko*, 3 F.3d
16 at 689-91. The Third Circuit's reasoning in *Resko* applies equally here:

17 [T]here is no way to know the extent of the discussions—whether
18 they had been occurring throughout the trial, or whether they were
19 only a few, brief conversations. This lack of information concerns us
20 for two reasons. First, as we have noted, the district court's ability to
21 evaluate the situation was necessarily diminished by the dearth of
22 information about the jury's misconduct. Even taking into consideration
23 the discretion enjoyed by the district court as well as the court's general
24 observance of the jury, we do not see how the district court could have
25 had enough information to make a reasoned determination that the
26 defendants would suffer no prejudice due to the jury misconduct or to
27 fashion an appropriate cautionary instruction. Second, our own ability
28 to review the district court's determination that there was no prejudice
to the defendants is hampered by this absence of information in the
record.

Id. at 691.

Nor does this type of inquiry run afoul of the prohibition on speaking to
jurors about their deliberations or mental processes of reaching a verdict under

1 Federal Rules of Evidence Rule 606(b). As the government acknowledges, an
2 inquiry into whether any further discussions between jurors *outside of*
3 *deliberations* took place is allowed. (Govt. Opp. at 18) (stating that any inquiry is
4 limited to “whether extraneous prejudicial information or outside influences were
5 present, but not how any such information impacted the jury’s deliberations.”).

6 The government’s own citations demonstrate that the Court must hear
7 from the jurors themselves before the Court can assess any prejudicial effect of
8 any jury misconduct. For example, the government relies extensively on *United*
9 *States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981) and *United States v. Klee*,
10 494 F.2d 394, 396 (9th Cir. 1974) for the argument that any misconduct here is
11 not prejudicial. (Govt. Opp. at 14-16). However, in *Bagnariol*, the trial court
12 conducted an extensive evidentiary hearing, where it interviewed each juror
13 individually. 665 F.2d at 884. And in *Klee*, the court examined an affidavit from
14 a juror describing the extent of the misconduct. 494 F.2d at 396.

15 Similarly, in *United States v. Armstrong*, 909 F.2d 1238, 1244 (9th Cir.
16 1990), “the district court conducted two evidentiary hearings, extensively
17 questioning the jurors and an alternate juror about every aspect of the alleged
18 misconduct and its possible effect on each juror's deliberations and decision.”
19 By contrast, in *United States v. Halbert*, 712 F.2d 388, 389 (9th Cir. 1983),
20 which the government cites, the Ninth Circuit affirmed the district court’s refusal
21 to hold an evidentiary hearing based on the fact that, unlike here, the district
22 court “knew the exact scope and nature of the newspaper article and the
23 extraneous information.”

24 Here, the Court does not know the exact scope and nature of the
25 misconduct at issue; it knows that the jurors ignored the Court’s admonitions not
26 to speak about the case outside of the jury room. That is enough to warrant an
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1 evidentiary hearing to determine if further discussions took place and the nature
2 of those discussions.

3 The government argues that the overwhelming evidence of Mr. Chan's
4 guilt means that any misconduct is not likely to be prejudicial. If anything, this
5 underscores Mr. Chan's argument. The complexity of the case and the jury
6 instructions, combined with the amount of evidence and way that evidence was
7 presented, casts doubt on the the jury's ability to reach such a quick decision. As
8 the government itself notes, there were multiple schemes at issue here, and
9 separate evidence was used for each different count. Moreover, Mr. Chan
10 repeatedly exposed factual inconsistencies and substantial credibility issues in
11 the testimony of virtually every key government witness.

12 Properly considering this information would have taken longer than the
13 jury took to reach its decision. Given the non-linear nature of the government's
14 presentation of evidence, the number of counts and the complexity of the verdict
15 form and jury instructions, the jury's quick verdict appears to have been
16 prematurely made, as wished for by at least one of the jurors and in the presence
17 of the foreperson. Furthermore, given that some jurors plainly failed to respect
18 the Court's prohibition on discussing the case outside of the deliberative process,
19 it is also possible the jurors failed to adhere to the Court's other instructions as
20 well.

21 It is rare that the Court and the parties become aware of the jurors'
22 discussions outside of the jury room. But when evidence of such discussion is
23 discovered, a proper investigation into the context of such discussions is
24 required. The Court, at a minimum, must question the jurors to clarify that
25 context.

1 **IV. CONCLUSION**

2 For all the foregoing reasons, Mr. Chan respectfully requests that the Court
3 grant a mistrial based on juror misconduct and/or hold an evidentiary hearing to
4 determine the scope of juror misconduct.

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