IN THE UNITED STATES DISTRICT COURT

FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA, Plaintiff, vs. JEREMIAH SANTOS ISEZAKI, Defendant.	CRIMINAL CASE NO. 12-00025 **ORDER**

Before the court is Defendant's Motion for Mistrial, or in the Alternative, Motion for New Trial. *See* ECF No. 59. For the reasons discussed more fully herein, the court sets forth the bases for its decision in **DENYING** said motion.

I. FACTS

On June 14, 2012, the court received a note from the jury at 9:40 a.m., indicating that they have reached a verdict. *See* Transcript, ECF No. 56 at 4. At 10:14 a.m., the court went on record and the verdict was read. *Id.* The jury found the Defendant guilty of Count 1, felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). *Id.* at 5. At the request of the Defendant, the jury was polled. *Id.* Each juror answered in the affirmative when asked, "Is this your verdict as read," in open court. *Id.* at 5-7. After the twelfth juror assented to the guilty verdict, the verdict was declared unanimous. *Id.* at 7.

The court then thanked the jury for their service and indicated that it will speak with them

after the proceeding to find out if they would like to meet with the attorneys for feedback. *Id.* at 7-9. Thereafter, the jury left the presence of the court. *Id.* at 10. After the jury left the courtroom, the court then proceeded to address administrative matters. *Id.* at 10-11. The court went off the record after that. *Id.* at 11.

Thirty-three minutes after going off the record, the court reconvened and informed the parties of the conversation that transpired between the jurors and the court and the court's law clerk. *Id.* The court informed the parties that while conversing with the jurors, some jurors expressed uncertainty over the guilty verdict. *See generally id.* at 11-13. One juror asked, "[j]udge, what if the verdict – when you did the polling, because we were nervous about the polling and you had the microphone up, what if it wasn't what we said it was?" *Id.* at 11. Another one asked, "[w]ell, what if some of us – what if there was a group that made the decision but not all of us?" *Id.* at 12. Some expressed how difficult and emotional it is to be a juror. *Id.*

As a result of the conversation with the jurors, the court subsequently conducted an evidentiary hearing pursuant to Fed. R. Evid. 606(b). *See generally id.* at 15-68. Each juror was asked the following questions: (1) has there been any extraneous prejudicial information that was brought to your attention; (2) has there been any outside influence that was improperly put upon you as a juror; and (3) has there been any mistake made on the verdict form. *Id.*

All jurors responded "no" to the first two questions. *Id.* Juror No. 3 went back and forth between "yes" and "no" to Question No. 3 but eventually settled on "no" and apologized to the court for her "mixed feelings." *Id.* at 32-34, and 45-46. Juror No. 9 responded "yes" to Question No. 3 and stated that the mistake was that the verdict was not unanimous. *Id.* at 53, 59-60.

II. DISCUSSION

Defendant contends that a mistrial or a new trial should be granted because the verdict

lacked unanimity and is therefore invalid. This argument is based on Juror No. 9's statement to the court during the evidentiary hearing[1] after the jury was discharged.

a. Unanimity, Polling and Finality

It is well settled black law that a verdict must be unanimous. Fed. R. Crim. P. 31(a) requires that "[t]he jury must return its verdict to a judge in open court. The verdict must be unanimous." Fed. R. Crim. P. 31(d) provides in its entirety: "[a]fter a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury."

Long before Fed. R. Crim. P. 31(d) was codified into law, the U.S. Supreme Court in 1899 has held that the objective of polling the jury "is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Humphries v. District of Columbia*, 174 U.S. 190, 194

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[1] The Government contends that it was improper for the court to conduct an evidentiary hearing. The court agrees with the Government's contention but at the time it conducted the hearing, the court was erring on the side of caution. Nonetheless, the court's action did not and does not affect the fact that after a jury is polled and discharged, the jury's verdict cannot be impeached.

A jury's verdict cannot be impeached pursuant to Fed. R. Evid. 606(b), although it provides the following exceptions: "(A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form." *See* Fed. R. Evid. 606(b)(2). The Advisory Committee Notes show that Fed. R. Evid. 606(b)(2)(C) was added to allow juror testimony on whether there was a mistake in entering the verdict *onto* the verdict form. The amendment was in response to case law that has established an exception for proof of clerical errors. In adopting the exception, the Committee noted that "the exception established by the amendment is limited to cases such as 'where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty.'" *See* Advisory Committee Notes for 2006 Amendments, Fed. R. Evid. 606.

The Defendant contends that there was a mistake on the verdict form based on Juror No. 9's responses to the court's inquiry during the evidentiary hearing. *See* Motion, ECF No. 59 at 10. The Defendant also cites to the post-verdict conversation that occurred between the jurors and the court and the court's law clerk, wherein some jurors expressed uncertainty over their verdict. *See id.* at 11.

Juror No. 9's response to the court's inquiry has nothing to do with correcting a clerical mistake. Additionally, Fed. R. Evid. 606(b)(1) states that "a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."

(1899). To this day, the same purpose of jury polling remains. In accord with the U.S. Supreme Court, the Ninth Circuit noted that polling in open court allows the jurors to be free of jury-room coercion. *See United States v. Williams*, 990 F.2d 507, 512 (9th Cir. 1993).

Because polling the jury guarantees that the verdict is unanimous and was not coerced, the Ninth Circuit has held that once the jury is polled in open court and has been discharged, the verdict is final. In *Williams*, after the jury's verdict of conviction was read, the trial court polled each juror and each assented to the guilty verdict. *Id.* The following day after trial, one of the jurors contacted the court and the counsels, and stated that she did not believe the defendant was guilty. *Id.* As such, the defendant argued that the verdict was not unanimous as provided by Fed. R. Crim. P. 31(d). *Id.* Citing *United States v. Schroeder*, 433 F.2d 846 (8th Cir. 1970), *cert. denied*, 401 U.S. 943 (1971), the Ninth Circuit held that "[a]fter a jury has given its verdict, has been polled in open court and has been discharged, an individual juror's change of mind or claim that he was mistaken or unwilling in his assent to the verdict comes too late." *Id.* at 513. Once a verdict has been returned, generally it is no longer impeachable for lack of unanimity. *Id.*

In *United States v. Weiner*, after a verdict of guilty was returned, each juror was polled and each assented to the verdict of guilty. 578 F.2d 757, 764 (9th Cir. 1978). The verdicts were then received and the jury was discharged. *Id.* Thereafter, one juror indicated to the court that she had never voted "guilty" but rather "guilty with reservation" during the jury's deliberation. *Id.* The juror explained that she "was confused by the events in the courtroom when she responded affirmatively that the verdict rendered was her verdict." *Id.* The Ninth Circuit noted the established law that jurors may not impeach their verdict. *Id.* In addition, the Ninth Circuit explained that the juror answered in the affirmative when asked if "guilty" was her verdict when polled. *Id.* A defendant would have a valid objection if a juror expresses some uncertainty as to the verdict at the time of the poll, not after the jurors had been excused and subjected to out-of-

court cultivation. *See id.* at n.2.

Similar to *Williams* and *Weiner*, the jury in this case returned a verdict of guilty, and upon a poll of each juror in open court, each juror assented to the verdict of guilty. *See* Transcript, ECF No. 56, at 5-7. None of the jurors at the time of the polling expressed any uncertainty as to the verdict as read. *See id.* The verdict was unanimous. *Id.* "Once a verdict has been delivered and accepted in open court, and the jury is polled and discharged, jurors may not claim that their assent was mistaken or unwilling." *Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980). *See also United States v. Marinari*, 32 F.3d 1209, 1213 (7th Cir. 1994) (Once a poll is taken, the verdict becomes final and "recorded," when the twelfth juror's assent to that verdict is made on the record). The verdict is not subject to review after the jury has been discharged. *Id.* at 1214.

b. Jury Discharge

The question now becomes whether or not the jury was discharged after they were polled and left the presence of the court.

The Defendant argues that the jury was not discharged. The Defendant's argument is based on the court's statement after the jury was polled but before leaving the courtroom. The court stated in part the following: "[s]o I'm going to ask you to go back *before I discharge you* and see if, amongst yourself, you would like to meet with the lawyers separately, and if you do, let me know." *See* Transcript, ECF No. 56 at 9 (emphasis added).

The Defendant also cites to *Summers v. United States*, 11 F.2d 583 (4th Cir. 1926), and other cases from other jurisdictions which cited to *Summers*, wherein the courts have held that "as long as the jury 'remains an undispersed unit, within control of the court,' the jury had not been finally discharged. As long as the jury has had no opportunity to mingle with or discuss the case with others outside the sterility of the court's control then no discharge has occurred." *See*

Reply, ECF No. 63 at 2. The Defendant stated that in this case, "[t]he record is clear that the jury remained as an undispersed unit within the control of the court and with no opportunity to mingle with or discuss the case with others. Therefore, the jury remained undischarged and subject to recall." *Id.*

In *Summers*, the facts of the case are as follows: the judge told the jury that they "are now discharged." 11 F.2d at 585. Prior to the jury leaving the courtroom, counsel moved to set aside the verdict because the defendant was not present at the time the additional charge was given by the court. *Id.* at 586. Because of the inadvertence of the court, the court decided to "again charge the jury as he had already charged them, so that they could go back to their room and reconsider the verdict." *Id.* The trial court stated, "[g]entlemen, I did say to this jury, I remember now, that they were discharged as to their duty here; but I find the jury is still not dispersed, and organized and constituted . . . I hold that the jury was not discharged. *They remained in their seats, have spoken to no one, and no one has spoken to them.*" *Id.* (emphasis added).

The Fourth Circuit acknowledged the general rule that once a verdict has been rendered and the jury, after being discharged, had separated, the jury cannot be recalled to amend its verdict. *Id.* The Fourth Circuit found that the jury remained undischarged even though "discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here, the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any other business." *Id.* To support its reasoning, the Fourth Circuit cited to *Brister et al. v. State*, 26 Ala. 132 (Sup. Ct. Ala. 1855) ("[T]he jury started out of the court-room, but had not gone out of the bar."), and *Levells v. State*, 32 Ark. 585 (Sup. Ct. Ark. 1877) ("[T]he jurors arose from their seats in the jury box, and began to pass out from the box . . . the others still standing about where they arose, and all in full

view of the judge and under his control."). In both cases, the facts are similar to *Summers*, wherein the jury has not left the courtroom and has not separated, and as a body was still in the presence of the court.

Summers and the two cases cited by *Summers* are distinguishable from the present case. Unlike these three cases, the jury in this case had separated and was no longer in the presence of the court. After the jury was polled and each juror assented to the verdict of guilty, the court stated in part the following: "[s]o I'm going to ask you to go back before I discharge you and see if, amongst yourself, you would like to meet with the lawyers separately and if you do, let me know. I'll speak with all of you after these – these proceedings. . . so I will speak to you shortly. Just see amongst yourselves if you would like to speak to the attorneys. They'll speak to you for about ten minutes each and then that's about it. Okay. All right. Please rise for the jury." *See* Transcript, ECF No. 56 at 9. Immediately after that, the jury left the courtroom at 10:23 a.m. *See id.* at 10.

After the jury was no longer in the presence of the court, the court addressed administrative matters such as asking the attorneys if they wished to speak to the jurors; setting the Defendant's sentencing hearing date; and stating that the "defendant can go ahead and be taken back." *See id.* at 10-11. Unlike *Summers*, "the very case upon which it [the jury] has been impaneled" was no longer under discussion. *See* 11 F.2d at 586.

Two minutes after handling the administrative matters, the court went off the record at 10:25 a.m. The court and the court's law clerk then went to see the jurors to speak with them about their experience at the court and see if they wished to speak with the attorneys. Unlike *Summers* and the two cases cited by *Summers*, wherein the jurors have spoken to no one and no one has spoken to them, the jurors in this case did speak with non-jury members. Had the jury not been discharged, (1) the court and its law clerk would not have engaged in a conversation

with the jurors outside of courtroom and off the record[2]; and (2) the court would not have presented an opportunity for the jurors to have an interaction with the attorneys outside of courtroom and off the record. *See Summers,* 11 F.2d at 586 (Discharge of the jury becomes final if the jurors are allowed to disperse and mingle with others, with time and opportunity, for discussion of the case, *whether such discussion be had or not*) (emphasis added). Clearly, although the court did not explicitly say that the jury was discharged, its actions show otherwise. *See id.* ("It is not so much what is said in passing as what is actually done and acted upon that determines the question of discharge").

The Defendant cited to four other cases that cite to *Summers*: *Quesinberry v. Taylor*, 162 F.3d 273 (4th Cir. 1998); *United States v. Figueroa*, 683 F.3d 69 (3rd Cir. 2012); *United States v. Marinari*, 32 F.3d 1209 (7th Cir. 1994); and *State of Washington v. Edwards*, 15 Wash. App. 848, 552 P.2d 1095 (1976). These cases are distinguishable from the present case.

In *Quesinberry,* the proceeding was bifurcated. 162 F.3d at 277. When the jury returned its verdict of guilt in the first phase of the trial, the judge told them to go to lunch in the custody of the sheriff but not before admonishing them. *Id.* The judge reminded the jury that "*[b]ecause the case is still going on and there are other matters of such severity that you must consider*, do not talk among yourselves; do not let anybody talk to you; do not let anybody approach you; do not respond to any comments; try to avoid what would be inadvertent communication from anyone of any source." *Id.* (emphasis added). Unlike the jury in *Quesinberry* wherein its duty has not ended because there is still the second phase of the trial, the jury's duty in this case has clearly ended. There were no additional matters for the jury to consider after it rendered its verdict of guilty on Count 1.

[2] Jury Instruction No. 22 prohibits communication between the court and the jury during deliberation, unless such communication is in writing. Fed. R. Crim. P. 43 "affords the defendant the right to be present at all stages of his trial, including presence during communication between court and deliberating jury." *See United States v. Benavides*, 549 F.2d 392, 393 (5th Cir. 1977).

Also, unlike the jurors in *Figueroa*, *Edwards*, and *Marinari*, wherein the jurors did not have a discussion with nonmembers of the jury, the present case involved a discussion between the jury and the court and its law clerk. The discussion involved a variety of issues, such as the juror's experience in the district court, whether or not they wished to speak with the attorneys, and the difficulty of their job as a juror. *See* Transcript, ECF No. 56 at 11-12. The pivotal inquiry in determining jury discharge is whether the jurors became susceptible to outside influences. *Figueroa*, 683 F.3d at 73. *See also Harrison v. Gillespie*, 596 F.3d 551, 574 (9th Cir. 2010) (The court noted the holdings in *Marinari* that the jury continues to exist as a judicial body if they "had not dispersed and . . . remained untainted by any outside contact."). Although the court and its law clerk did not discuss with the jury the details of the case, the fact that there was a discussion that occurred places the jurors to a position susceptible to outside influences. As stated in *Edwards*, if jurors mingled with outsiders, "contamination is presumed even though the jurors may not have taken advantage of the opportunity to discuss the case." 15 Wash. App. at 850-51, 552 P.2d at 1097.

III. CONCLUSION

The law is clear. Once a jury is polled and discharged, the verdict is final. A jury's verdict cannot be impeached thereafter, unless it involves one of the exceptions provided by Fed. R. Evid. 606(b)(2), none of which are present in this case.

Accordingly, based on the discussion above, the Defendant's Motion for Mistrial, or in the Alternative, Motion for New Trial, is hereby **DENIED**.

SO ORDERED.

/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Aug 16, 2012