

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 15 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KWOK CHEUNG CHOW, AKA Shrimp
Boy, AKA Raymond Chow, AKA Ha Jai,

Defendant-Appellant.

No. 16-10348

D.C. No.

3:14-cr-00196-CRB-1

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KWOK CHEUNG CHOW, AKA Raymond
Chow, AKA Ha Jai, AKA Shrimp Boy,

Defendant-Appellant.

No. 17-10246

D.C. No.

3:14-cr-00196-CRB-1

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted April 19, 2019
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: BEA and N.R. SMITH, Circuit Judges, and MÁRQUEZ,** District Judge.

Defendant Kwok Cheung Chow—also known as “Raymond Chow” or “Shrimp Boy” (hereinafter “Chow”)—was found guilty of racketeering, murder in aid of racketeering, conspiracy to commit murder in aid of racketeering, money laundering, and conspiracy to sell stolen liquor and cigarettes across state lines. For these crimes, Chow was sentenced to life in prison. Because the parties are familiar with the facts of this case, we recite them only as necessary to explain our decision. Chow raises four distinct challenges on appeal, we take each in turn.

I.

Chow argues that the district court erred by withholding the identities of two undercover FBI agents who testified against him at trial. “The decision to deny disclosure of an informant’s identity is reviewed for abuse of discretion.” *United States v. Gil*, 58 F.3d 1414, 1421 (9th Cir. 1995).

In this case, the undercover FBI agents’ identities are classified, and the government has put forward evidence (which we reviewed in camera) strongly suggesting that disclosure of the agents’ identities would threaten their safety. Balancing this concern against Chow’s interest in discovering the agents’ identities,

** The Honorable Rosemary Márquez, United States District Judge for the District of Arizona, sitting by designation.

we hold that the district court did not abuse its discretion by ordering the agents' identities withheld.

Chow also argues that the district court erred by partially closing the courtroom during the undercover agents' testimony. The Sixth Amendment provides that in a criminal prosecution, the accused shall enjoy a public trial. U.S. Const. amend. VI. But the right to a public trial "is not absolute," *United States v. Yazzie*, 743 F.3d 1278, 1286 (9th Cir. 2014), and a judge may order a partial courtroom closure if: (1) there is a substantial reason for the partial closure, and (2) the closure is "narrowly tailored to exclude spectators only to the extent necessary to satisfy the purpose for which it was ordered." *United States v. Sherlock*, 962 F.2d 1349, 1357 (9th Cir. 1989). The government had a substantial reason for preventing public disclosure of the undercover agents' identities (discussed above), and the district court's partial courtroom closure during their testimony was narrowly tailored to serve that substantial interest, while preserving the public's right of access to the trial by viewing a live video of the agents' testimony (with their faces obscured) from another room. Chow's Sixth Amendment right to a public trial was not violated.

II.

Chow next argues that the district court erred by not granting him a new trial due to the government's improper use of his prior statements against him at trial.

Because Chow did not object to the admission of these statements, we review for plain error. *United States v. Larsen*, 596 F.2d 347, 348 (9th Cir. 1979) (per curiam).

Pursuant to a plea agreement in a prior criminal case, Chow admitted that he was involved in ordering several murders. The government promised not to use these statements against Chow, so long as he testified truthfully at all future proceedings and trials. But in this case, Chow chose to take the stand and testify falsely that he had never participated in any murders. This was a breach of the plea agreement, which allowed the government to impeach Chow with his prior statements regarding his involvement in murders. We refuse to adopt an interpretation of Chow's plea agreement that would allow him to testify falsely at his criminal trial without fear of impeachment. *Cf. Harris v. New York*, 401 U.S. 222, 225 (1971). Chow argues that even if he *did* breach the plea agreement, his breach should be excused because the government breached first by questioning him about prior murders (which elicited his false testimony). Not so. The government did not use any of Chow's prior statements against him until *after* he testified falsely that he had never ordered any murders. Chow's counsel opened the door to the government's general questions about prior murders by representing that Chow had never ordered anyone's murder during his opening statement, and by questioning Chow on direct examination about his not having participated in any prior murders

while living in Hong Kong. The district court did not err in denying Chow's request for a new trial on this ground.

III.

After Chow's conviction at trial, but before his sentencing, Chow's attorneys moved to withdraw, citing "irreconcilable differences" with Chow. Chow argues that the district court erred by not discharging attorneys Serra and Smith at that time. Smith was appointed to represent Chow under the Criminal Justice Act (CJA). 18 U.S.C. § 3006A(c). Chow was therefore entitled to discharge him only if he could show a complete breakdown in their communication. *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010). The district court determined that no such breakdown had occurred, and properly refused to discharge Smith. Serra, on the other hand, was representing Chow on a retained pro bono basis. "[T]he Sixth Amendment right to counsel of choice means that a defendant has a right to fire his retained . . . lawyer . . . for any reason or [for] no reason." *United States v. Brown*, 785 F.3d 1337, 1344 (9th Cir.2015) (internal quotations and emphasis omitted). But "[t]he right to retained counsel of one's choice is not absolute." *Rivera-Corona*, 618 F.3d at 979. District courts still have "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (internal citations omitted). In this case, the district court was concerned about the inefficiency and

delay that would be caused by discharging Serra when reply briefs on pending post-trial motions, and a sentencing memorandum, were due shortly. The district court did not abuse its discretion by refusing to discharge Serra until the reply briefs and sentencing memorandum were filed. In any case, any error in not allowing Chow to discharge Serra for a temporary period between June 16 and July 19 was harmless. *See United States v. Maness*, 566 F.3d 894, 896 (9th Cir 2009) (per curiam).

Chow argues that the district court further erred when—after the district court eventually allowed Chow to replace Serra and Smith with new counsel—the court did not allow Chow’s new counsel to file a second motion for a new trial arguing ineffective assistance of counsel (“IAC”). But IAC claims are “generally inappropriate on direct appeal” or in post-trial motions, and “should be raised instead in habeas corpus proceedings.” *United States v. Steele*, 733 F.3d 894, 897 (9th Cir. 2013). Whether to address an IAC claim in a post-trial motion is entirely within the district court’s discretion. *Id.* at 898. Addressing Chow’s IAC claims during the post-trial stage in this case would have required significant prolongment of the post-trial process to develop the factual record surrounding the claims. Given these concerns, the district court did not abuse its discretion in not allowing Chow to file a replacement new trial motion.

IV.

Chow finally argues that the district court erred in ordering him to forfeit \$225,000 in property pursuant to two criminal forfeiture statutes, 18 U.S.C. § 1963 and 18 U.S.C. § 982(a)(1). This sum represents “the total amount of the proceeds obtained by the conspiracy as a whole,” not just the amount that Chow personally received by virtue of his involvement in the conspiracy.

In *United States v. Newman*, we held that “[f]or purposes of criminal forfeiture the ‘proceeds’ of [the defendant’s] crime equal the total amount of the [proceeds] obtained by the conspiracy as a whole.” 659 F.3d 1235, 1244 (9th Cir. 2011). But in 2017, the Supreme Court decided *Honeycutt v. United States*, which held that joint and several liability was incompatible with at least one commonly-used criminal forfeiture statute, 21 U.S.C. § 853. 137 S. Ct. 1626 (2017). *Honeycutt* therefore abrogated *Newman*’s holding about the *general* propriety of applying joint and several liability to criminal forfeiture statutes—after *Honeycutt*, courts must look to the specific provisions of the forfeiture statute at issue to determine if joint and several liability applies. *Id.*

We have not yet addressed whether *Honeycutt*’s reasoning extends to the criminal forfeiture statutes at issue in this case. Because the Supreme Court decided *Honeycutt* just one day before the district court filed its final order of forfeiture, and because *Honeycutt* was not brought to the court’s attention by either party in a Statement of Recent Decision, the district court did not consider *Honeycutt*. We

therefore reverse and remand for the district court to consider the impact of *Honeycutt* on the forfeiture amount in this case in the first instance.

AFFIRMED in part; REVERSED AND REMANDED in part.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

UNITED STATES OF AMERICA,)

Plaintiff,)

VS.)

NO. CR 14-00196 CRB

KWOK CHEUNG CHOW also known as)

HA JAI also known as RAYMOND)

CHOW also known as SHRIMP BOY,)

Defendant.)

San Francisco, California

Friday, November 13, 2015

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

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ASSISTANT UNITED STATES ATTORNEYS**

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Lydia Zinn, CSR No. 9223, FCRR
Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporters

1 devices -- kept outside, or redirecting a screen, or anything
2 like that, or if we have to switch tables so that Mr. Chow can
3 sit over here so that he can have a direct view of the witness,
4 that's going to start looking odd, which is why I think the
5 most convenient and the most reasonable option is Option One,
6 which is: Everyone can still have access to the Media Room
7 downstairs. And the cameras will be on, just with the
8 exception that there will be no camera on the witness. I think
9 that minimizes any distraction for the jury. Mr. Chow gets his
10 confrontation rights. The public gets to hear and see almost
11 everything that's going on, but for the face of the undercover
12 agent.

13 **THE COURT:** My understanding is that justification
14 for this is that one or both -- maybe both -- of these
15 individuals are engaged in ongoing undercover operations. And
16 if their identity, either by name or by face, is known or
17 available to the public, that that will destroy their -- one,
18 it will destroy their effectiveness as an undercover agent; and
19 two, it may endanger their lives. That's the argument that the
20 Government has.

21 **MR. HASIB:** That is the precisely the argument. And
22 I think --

23 **THE COURT:** And so for that reason, I'm going to
24 allow -- I'm going to opt for Option Number One, which is
25 simply that the courtroom be closed, and the video as to the

1 witness be disconnected. The audio will proceed.

2 We have a room -- the Media Room -- which will be
3 available to the public and the media. And the identity of the
4 witness, both his true -- I assume it's a male -- his true
5 identity --

6 **MR. HASIB:** Yes.

7 **THE COURT:** -- will not be disclosed.

8 I think the jury should be admonished that, for reasons
9 not related to this case, but that these, you know -- that this
10 police officer is engaged in ongoing investigations not related
11 to this case; that we have chosen to exclude the public from
12 viewing this witness. And I'll work out the language. If
13 anybody has some proposed language, I'll certainly work it out.

14 But I think the Government has demonstrated a good and
15 sufficient cause to depart from the normal open courtroom so
16 that witnesses can be seen and heard. This way, with the
17 proper admonition to the jury, the jury will be able to fully
18 examine -- see the examination of the witness. The Defense
19 counsel all the parties defendant, and so forth, will --
20 nothing will be unusual about that process. Examination will
21 be just as full and complete as it can be, with the exception
22 I've just noted.

23 And we've got -- the jury will be given a specific
24 instruction as to why the public is not being admitted to this
25 proceeding, but I think it's important not to --

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

UNITED STATES OF AMERICA,)

Plaintiff,)

VS.)

NO. CR 14-00196 CRB

KWOK CHEUNG CHOW also known as)

HA JAI also known as RAYMOND)

CHOW also known as SHRIMP BOY,)

Defendant.)

San Francisco, California

Monday, November 23, 2015

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

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**BY: WILLIAM FRENTZEN
SUSAN E. BADGER
S. WAQAR HASIB
ASSISTANT UNITED STATES ATTORNEYS**

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Lydia Zinn, CSR No. 9223, FCRR
Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporters

1 Q. Any particular reason for that?

2 A. I enjoy being a Case Agent.

3 Q. Now, being a Case Agent's got to be kind of tough on you
4 tough on you. Correct?

5 Not as tough as me standing at this podium, apparently.

6 But being a Case Agent or undercover -- it's got to have
7 some tolls it takes. Is that right?

8 A. It depends on the investigation.

9 Q. The longer the investigation, the more susceptible the
10 agent is to psychological issues. Correct?

11 A. You're talking Case Agent in an undercover capacity or --

12 Q. Yes. Yes. Yes.

13 A. Sir, I'm referring to "Case Agent" meaning investigating
14 cases. That is to say --

15 Q. I see.

16 A. I work on a violent crime squad. I do bank robberies. I
17 do --

18 Q. I see.

19 A. -- kidnappings when they come around. I have the
20 occasional homicides when they have a federal nexus.

21 So that's what I talk about when I say a "Case Agent."

22 Q. So are you a Case Agent now?

23 A. Currently?

24 Q. Yes.

25 A. Yes.

1 Q. You're not undercover now?

2 A. No.

3 MR. BRIGGS: Your Honor, may we approach?

4 THE COURT: Well, maybe we'll take a recess. Ladies
5 and gentlemen, let's take a recess. We'll be in recess until
6 2:15. Remember the admonitions given to you. Don't discuss
7 the case; allow anyone to discuss it with you; form or express
8 any opinion.

9 (Proceedings were heard outside the presence of the jury:)

10 THE COURT: Okay. Let the record reflect the jurors
11 have left.

12 Mr. Briggs.

13 MR. BRIGGS: Yes, Your Honor. I just wanted to bring
14 an issue to the Court's attention. This witness just testified
15 he's not undercover.

16 THE COURT: Right.

17 MR. BRIGGS: And we were --

18 THE COURT: He's not engaged -- presently engaged in
19 an undercover operation.

20 MR. BRIGGS: Right, but we were deprived of the
21 opportunity to know his identity or to do any background check
22 on him, because -- our understanding was it is because he was
23 still undercover.

24 THE COURT: Fine. Well, okay. Mr. Frentzen.

25 MR. FRENTZEN: Your Honor, I'm not sure --

1 We've filed something about this. I think the Court
2 understands the current situation, if that makes sense.

3 **THE COURT:** Well, I'd have to review it, because I
4 just don't have it in mind.

5 **MR. FRENTZEN:** May I have a moment, Your Honor?
6 Because I didn't file that stuff, I want to make sure I get it
7 right.

8 **THE WITNESS:** I can clarify if you need me to.

9 **THE COURT:** Let's wait one second and see what we --

10 **THE WITNESS:** Okay.

11 **MR. FRENTZEN:** I mean there's the present, and
12 there's the future, Your Honor.

13 **THE COURT:** I think my understanding is that he is
14 used from time to time to engage in undercover operations. So
15 he doesn't want to destroy his effectiveness today by
16 disclosing his true identity. That's what I based it on.

17 **MR. BRIGGS:** My understanding --

18 And I have to look for the document. And we did want to
19 put up a significant fight over this.

20 -- is that he was involved in that now, and that we were
21 deprived of the --

22 I mean, is it just going to be policy in the future that
23 because an agent may go back into an undercover capacity --

24 **THE COURT:** Well, I don't know if it's a policy in
25 the future. The policy is, as far as I understand it, a person

1 who has been -- yeah -- who has been engaged in an undercover
2 operation, and is currently employed by the Federal Bureau of
3 Investigation, and it is the intention of the Bureau sometime
4 in the future to use him again as an undercover officer, that
5 his identity should not be disclosed -- his true identity.

6 Based upon that, I ruled that his true identity shouldn't
7 be disclosed. Anyway, that's the ruling. I mean, that was the
8 ruling. So are you asking me to reconsider the ruling?

9 And I'm not going to change it based upon the argument
10 that he is not presently engaged in an undercover operation.
11 Based upon that, I'm not going to change my ruling.

12 **MR. BRIGGS:** I'd like an opportunity to brief it.

13 **THE COURT:** Brief it. Of course, you can brief it.

14 **MR. BRIGGS:** There's a substantial prejudice here.

15 **THE COURT:** Well, just brief it. If you want to
16 brief it more, you can brief it more. Okay.

17 **MR. FRENTZEN:** Thank you, Your Honor.

18 **THE COURT:** All right. Thank you.

19 (Recess taken from 2:06 p.m. until 2:19 p.m.)

20 (Proceedings were heard out of the presence of the jury:)

21 **THE COURT:** Please bring the jury in.

22 **THE CLERK:** Okay, Your Honor.

23 **MR. BRIGGS:** Your Honor?

24 **THE COURT:** Well, wait a minute. Wait.

25 **MR. BRIGGS:** If I could just make a record.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 19 2019

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UNITED STATES OF AMERICA,

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KWOK CHEUNG CHOW, AKA Raymond
Chow, AKA Ha Jai, AKA Shrimp Boy,

Defendant-Appellant.

Nos. 16-10348, 17-10246

D.C. No.

3:14-cr-00196-CRB-1

Northern District of California,
San Francisco

ORDER

Before: BEA and N.R. SMITH, Circuit Judges, and MÁRQUEZ,* District Judge.

The panel has voted unanimously to deny the petition for panel rehearing.

Judge Bea has voted to deny the petition for rehearing en banc, and Judges Smith and Marquez have so recommended. The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc (Dkt. No. 57) is therefore **DENIED**.

* The Honorable Rosemary Márquez, United States District Judge for the District of Arizona, sitting by designation.