86-1506,
87-1013

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– against –

CHANG AN-LO, a/k/a "WHITE WOLF", SHIANG BAO-JING, a/k/a "CRIPPLE", GEORGE QI LOU, PETER YANG, LAM TSO, a/k/a "SAMMY LAM", JOHN KIRKPATRICK. AH MIN, JACK MA, a/k/a "JACK LI", TUNG KUEI-SEN. CHEN CHIH YI, a/k/a "YELLO BIRD",

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR APPELLANT TUNG KUEI-SEN

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UNITED STATE OF AMERICA,

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- against -

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BRIEF FOR APPELLANT TUNG KUEI-SEN
Docket No. 87-1013

PRELIMINARY STATEMENT

Appellant Tung Kuei-Sen appeals from a judgment of conviction after jury trial held in the United States Distict Court for the Southern District of New York (Carter, J.), rendered on December 17, 1986, convicting him of violating Title 21 U.S.C. §§846 and 963 (conspiracy to import and distribute heroin); and acquitting him of violations of Title 18 U.S.C. §§1962(d) and 2 (RICO conspiracy), and Title 18 U.S.C. §§1962(c) and 2 (substantive RICO).

The appellant was sentenced on December 17, 1986 to a term of 20 years imprisonment (the maximum allowable) and fined $50.

Appellant is incarcerated pending appeal.

QUESTIONS PRESENTED

1. Did the trial court err in admitting a purported duplicate of a hotel's telephone log when the supporting witness admitted that he had not seen or compared the alleged duplicate with the original? This question appears to be a case of first impression in the Federal Courts of Appeals.

2. Did the trial court err in its Geaney finding which allowed into evidence co-conpirators' statements regarding the alleged heroin conspiracy against the defendant?

3. Are the inconsistent verdicts reached by the jury on identical charges grounds for reversal of Tung's conviction?

4. Did the trial court err in failing to place the burden of proof on the government to substantiate totally undocumented claims of horrifying prior criminal conduct made in the presentence report, in failing to order a hearing on those claims, and in failing to make the determinations regarding these claims which are required by Fed R. Crim. P. 32(c)(3)(D)?

5. Did any of the issues raised by the other appellants in this case, which are applicable to the appellant, warrant reversal of his conviction?

STATEMENT OF FACTS

Appellant Tung Kuei-Sen (hereinafter "Tung") was indicted on January 28, 1986, along with thirteen other defendants in a fourteen count indictment alleging violations of RICO, the Travel Law, and Federal drug laws, among other things. Tung was indicted under Counts One, Two and Ten, but, after jury trial held from July 29 to September 22, 1986, he was acquitted by the jury of all but Count Ten. The charges were as follows:

COUNT ONE: RICO conspiracy with participation in three racketeering acts, 18 U.S.C. §§1962(c) and 2

(1) Act One: murder of Henry Liu
(2) Act Nine: conspiracy to import and distribute heroin
(3) Act Ten: violation of Travel Act

COUNT TWO: substantive RICO with participation in three racketeering acts, 18 U.S.C. §§1962(c) and 2

(1) Act One: murder of Henry Liu
(2) Act Nine: conspiracy to import and distribute heroin
(3) Act Ten: violation of Travel Act

COUNT TEN: conspiracy to import and distribute heroin, 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 952(a), 960(b)(1)(A)

COUNT TEN corresponds to Act of Racketeering Nine (tr. 5635).

Tung was also named as an unindicted co-conspirator under COUNT ELEVEN, unlawful gambling business, 18 U.S.C. §§1952 and 2, as to which a mistrial was declared for all charged defendants after the jury could not reach a verdict (tr. 5762).

The Indictment alleged that the defendants were associated with a criminal enterprise called the "United Bamboo" or Bamboo Union", an international Chinese gang founded in Taiwan some 28

years before; that it developed by organizing and operating local groups called "Tongs" that functioned in New York and other cities in the United States and elsewhere; and that its purposes included its establishment and advancement in the United States, dealing in narcotic drugs, facilitating the formation and operation of illegal gambling and prostitution, extorting individuals and businesses, and murdering the journalist Henry Liu. (Ind. 1-4).

With regard to COUNT TEN the indictment charged that from the beginning of June, 1985 until the indictment was filed, the defendant and others conspired to import into the United States, distribute and possess with intent to distribute approximately 300 kilograms of heroin. (Ind. 27-8).

Testimony of Tung

Tung testified at the trial (tr. 4778-4906)[1], admitting to his having been associated with the United Bamboo (tr. 4785). He also admitted to having participated in the killing of Henry Liu[2] (tr. 4831) on the direction of the Taiwanese government (tr. 4815-16), but said that the killing was not part of any United Bamboo plan (4851).

After the killing, he went to Taiwan in October, 1984 (tr. 4826), and after about one month, went to the Phillipines (tr.

---

[1]"tr" refers to the trial transcript; "A-TKS" refers to this defendant's Appendix annexed hereto.

[2]There are pending murder charges against Tung in California.

4829). He stayed in the Phillipines about one month (tr. 4830), during which time he was in touch with defendant Chang An-lo by telephone (tr. 4831-32), and was provided money by defendant Chen Chi Yi (tr. 4832-3). (A question asked by defendant's counsel as to the purpose of the money was not allowed to be answered by the court (tr. 4833)). He left the Phillipines for Singapore about 10 days after New Years, 1985 (tr. 4834), and after a month went to Thailand (tr. 4835). In Thailand he stayed with Ah Di, An Gee, and Kao Kar, with whom he was with in Brazil (tr. 4838).

Tung testified that he met defendant Ah Min for the first time when he was in Thailand during this period at a restaurant he frequented (tr. 4837), but that he never discussed drugs with Ah Min (tr. 4838).

Tung also testified that Chen Chi Yi came to Thailand during this period to help him financially and to discuss Tung's surrender to United States authorities for the Henry Liu murder (tr. 4838-39). Chen Chi Yi was introduced to Ah Min by Tung when he was in Thailand but they did not discuss drugs in the presence of Tung (tr. 4840).

During Tung's four months in Thailand, he stayed in touch with defendant Chang An-Lo regarding a surrender to United States authorities (tr. 4843). (Government witness, Martin Murray, Deputy District Attorney for San Mateo County, California (tr. 4161), also testified that he had discussions with defendant Chang An-Lo in January, 1985 regarding the desire of Tung to surrender to the authorities (tr. 4162 et seq.)).

From Thailand Tung went to Brazil where he stayed at the Hotel OK in Rio de Janeiro, occupying rooms 1507 and 1509 with his three companions (tr. 4843, 3146). He was there for about two months (tr. 3145) until his arrest on September 20, 1985 by Brazilian authorities (tr. 3119-20) because of an extradition request by the United States (tr. 3128).

Tung testified that he called Taiwan when in Brazil and that he called Chen Chi Yi in the United States (tr. 4844-45). He said that he did not speak to Ah Min when in Brazil (tr. 4847) although Ah Min had given Tung his telephone number at the gas station he worked at. (tr. 4908).

The Government's Case Against Tung on Count Ten

Assistant United States Attorney Little, during trial, summarized the government's case against Tung regarding the conspiracy to import and distribute 300 kilos of heroin as follows (tr. 1841-42):

> "The government expects to prove through the tapes, the transcripts which are not yet in but are coming in, that Chen Chih-Yi, Yellow Bird, was using Tung Kuei-Sen as a connection to get the 300 Kilos of heroin and what he did was, even before he met our undercover, he traveled to Thailand, and there are references on the tape to "I went to Thailand to make the connection."
>
> "There are later references to "This is through Little Tung or Choi Tao, Turnip," and the connection is Ah Min, the man in Thailand.
>
> "Tung Kuei-Sen stayed in a hotel in Rio. In his room, which room has telephone calls charged to it to the same number in Thailand that Chen Chih-Yi used to contact Ah Min. That is the common connection.
>
> "So in essence Tung Kuei-Sen was the middleman through his acquaintance with Ah Min to get the heroin."
>
> "....Our evidence on his involvement with the heroin deal is to a large extent circumstantial, and it is also based on co-conspirator statements..."

Government witness Steven Wong testified that Tung was not present at any of the discussions or negotiations that Wong knew of (tr. 3377), and government witness David Chung testified that he had never spoken to Tung (tr. 928).

There are tape recordings of conversations made by the government's undercover agent during which conversations hearsay references are made to Tung by his alleged co-conspirators. (See, e.g., Gov.Ex. #191, Sept. 13, 1985, Vista Hotel, New York City). Among these tape recorded hearsay statements is one side of a telephone call made by Chen Chih-Yi in which he asks to speak to a "Robert Chou" in room 1507. (Gov.Ex #183, pp.4-5, Aug. 21, 1985). Government witness and undercover agent, Steven Wong, testified that he knew Tung as "Robert" (tr. 1484, 2082), but Tung himself denied on cross-examination ever having used the name "Robert Chou", (tr. 4857), though he did admit to having used other aliases.

Also admitted into evidence - over defendant's objections - was a purported copy of the telephone log of the Hotel OK (Gov.Ex. #s 86, 87, 88; tr. 3147-53; A-TKS, 9a-59a). That log indicates a total of thirty (30) long distance telephone calls made from rooms 1507 and 1509 between July 22 and September 20, 1985; two (2) to Singapore, twenty (20) to the United States (one of which has a line through it), four (4) to Thailand (telephone no. 214-2493), three (3) to Taiwan, and one (1) to a place for which the name is unintelligible. Government witness and undercover agent Steven Wong testified that the telephone number for the heroin source in Thailand was 0166 214 2493.

(tr. 2100). The names listed by the operator in relation to the four calls to Thailand were "Pohong CoTong" (8/13/85), "Azn Kih Chuan" (8/14/85), "Banokok" (8/15/85), and "Sengak" (8/23/85). In one call to the United States (8/12/85) "Rob." or "Rab." is the name listed by the operator.

Other evidence consisted of a trip by Chen Chih Yi to Thailand (tr. 4838-39) where he met with Tung and Ah Min (tr. 4840), and of a trip by Chen Chih Yi to Rio de Janeiro in August, 1985. (tr. 407-11; Gov.Ex. #160, p.4).

Evidence Counter to Government's Case

As to Chen Chih Yi's trip to Thailand, Tung testified that its purpose was to help him financially and to discuss Tung's possible surrender to United States authorities. (tr. 4838-39).

Government witness Leung Chan, a New York City detective, testified that defendant Chang An-Lo had asked Chen Chih-Yi to assist in getting money to Tung. Government witness Steven Wong testified that money was being taken to Tung so that he could live. (tr. 1393).

Government witnesses Chan and Wong testified that there was talk about and efforts to get Tung into the United States (tr. 1191-92, 1268, 1542, 2208, 2517, 2588)

Geaney Finding

Appellant had a standing objection throughout the trial to the admission into evidence of the statements of his alleged co-conspirators, the objection being that there was insufficient independent evidence to warrant their admission (see,

e.g., tr. 364). After the government and the defendants had rested, the trial court made its Geaney findings:

> "...I do find that the government has established that there was a conspiracy to distribute and possess heroin and cocaine, a conspiracy to possess and distribute in excess of 50 pounds of marijuana, a conspiracy to murder Henry Liu, and I think the fourth one is a conspiracy to forge passports, and a conspiracy to import and possess and distribute 300 kilos of heroin.
>
> "...On the conspiracy to import, possess and distribute 300 kilos of heroin, it [the government] has established that Mr. Chen, Mr. Tung, Jack Ma, Au Min [sic] and Peter Yang are members of that conspiracy.
>
> * * *
>
> "...But there is another one, and on that, that is as to Count 1, a conspiracy to violate RICO, and on that I do find that the government has established that there was a conspiracy to violate RICO and that Chang An-Lo, Shiang Bao-Jing, Lam Tso, Tony Wong, Mr. Chen, Tung Kuei-Sen, Peter Yang, and Jack Ma were members of the conspiracy to do so."

(tr. 4971-72, 5028-29).

Defendant filed a post-judgment motion challenging the court's Geaney ruling, but the motion was denied in the Opinion of Judge Robert Carter, dated November 19, 1986, p. 4.

Allegations of Other Criminal Conduct in The Presentence Report

The government's presentence report contained unsupported allegations of criminal conduct outside of the charges made in this case. These allegations which are detailed in the argument, were challenged by appellant's counsel in a letter dated December 16, 1986 (Def. Sent. Ex. A, p. 2; A-TKS, 67a), in which he stated that:

> "There are supposed reports of indictments in Taiwan as to a murder in Taiwan which apparently took place on February 5, 1985 and two murders in the Philippines which supposedly took place of[sic] February 3, 1985. In addition, there is an alleged unlawful possession of weapons charge taking place on March 4,

> 1984, when Mr. TUNG fled to the Philippines after the round-up in Taiwan due to pressures from the international community over the death of HENRY LIU. These first three charges are total slander and creation of the Taiwan Government, if the charges in fact exist in actual legal documents. It should be noted that Mr. TUNG fled from the roundup in November of 1984, and the first three charges related to February and March of 1985. At that time Mr. TUNG was either in the Philippines or Thailand. The first and third of those charges supposedly took place in Taiwan when Mr. TUNG was clearly not there."

At the sentencing held on December 17, 1986, appellant was one of the defendants who asked for a hearing because of his objections to the presentence report. (sent. tr. 7). Tung's counsel objected that there was no proof or documentation of the existence of the Taiwanese accusations or indictments and that the burden of proof was unfairly being put on Tung. (sent. tr. 11-12, 15; A-TKS, 61a-62a, 65a).

Government counsel countered that she had official reports of the existence of indictments from the Taiwanese government (sent. tr. 14; A-TKS, 64a), although proof of these reports was never offered, and that:

> "Taiwan has a law where they can indict any Taiwanese citizen for a crime committed anywhere at any time. As long as the individual who purportedly committed the crime is a Taiwanese citizen, Taiwan claims jurisdiction to indict a person." (tr. 13).

In failing to grant appellant's request for a hearing to determine the accuracy of the presentence report, Judge Carter indicated his belief that the burden of proof was on the defendant, not on the government. (sent. tr. 12; A-TKS, 62a). He made no finding as to the alleged inaccuracies. Nor did he state that the controverted matter would not be taken into account in sentencing.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE PURPORTED DUPLICATES OF THE TELEPHONE LOG FROM THE HOTEL OK WHICH WERE NOT COMPARED WITH THE ORIGINAL BY THE SUPPORTING WITNESS

This issue presents an evidentiary matter which appears to be one of first impression in the Federal Courts of Appeals.

The government presented for admission into evidence purported duplicates of the telephone logs of the Hotel OK located in Rio de Janeiro. (Gov. Exs. 86, 87, 88; A-TKS, 9a et seq.). The purported duplicates listed long distance calls made to Thailand and elsewhere, coming from the two rooms occupied by Tung and his three companions. The supporting witness for the documents was the deputy manager of the hotel. He admitted to not having compared the purported duplicates with the original. Appellant's counsel objected to their admission as not being properly authenticated but the objection was overruled. (tr. 3111, 3149-53; A-TKS, 54a-58a).

Fed R. Evid. 1003 allows duplicates of documents to be admitted into evidence to the same extent as originals. But the proponent of the purported duplicate must first lay an appropriate foundation qualifying it as a duplicate. "When a duplicate is offered without proper foundation to authenticate

and verify it, it will be inadmissible in evidence." 5 Weinstein's Evidence 1003-12 (1983).

In the case at bar the appropriate foundation was not laid with regard to the telephone log of the Hotel OK. The essential flaw in the government's attempt to qualify these documents as duplicates is that the witness testifying to the nature and contents of the purported duplicates, the deputy manager of the hotel (tr.3141), did not see them until the day he testified (tr. 3149; A-TKS, 54a), and never compared them with the originals (tr. 3150; A-TKS, 55a).

It is basic that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Fed. R. Evid. 602. With regard to authentication, Rule 901(a) requires "evidence sufficient to support a finding that the matter in question is what its proponent claims, and illustration in Rule 901(b)(1), "Testimony of witness with knowledge", gives as an example of satisfactory authentication "[t]estimony that a matter is what it is claimed to be." This test for authentication, which is identical with the requirement of personal knowledge of Rule 602, 5 Weinstein's Evidence 901-24 n.1 (1983), Louisell and Mueller, 5 Federal Evidence 25-6 n.30 (1981), was not met in the case at bar.

As stated by Wigmore,

> "...a person who proposes to testify to the contents of a document, either by copy or otherwise, must have read it. He may not describe its contents merely on the credit of what another has told him it contains, even though his informant purports to have read it aloud in his presence."

Wigmore, Evidence (Chadbourn rev.) §1278 (1972). See, Deakyne v. Lewes Anglers, Inc., 204 F. Supp. 415 (D.Del. 1962) (quoting Wigmore). Wigmore himself cites older authority:

> "CHIEF BARON GILBERT, Evidence 96 (ca. 1726): A copy of the deed must be proved by a witness that compared it with the original; for there is no proof of the truth of the copy, or that it hath any relation to the deed, unless there be somebody to prove its comparison with the original."

Wigmore, supra, §1277.

Applying this rule, the government plainly failed to meet its burden of adequately qualifying the purported duplicates. There is no evidence that the witness read the original or compared the purported copy with it. He did testify that he recognized the printed form on which the purported duplicate appeared as being of the same kind used at his hotel for recording telephone calls, and that he recognized the room numbers and names and handwriting of the telephone operators (tr. 3148). But recognition of a mere form is not a sufficient substitute for the witness having compared the original with the duplicate. Without a witness having made this comparison, there is no assurance that a blank or partially blank form was not used to create a fraudulent or forged duplicate. For example, the original could have been photocopied, the relevant portions whited out, fraudulent and forged information inserted, and the altered copy then recopied. There is no assurance that the proffered document is actually a duplicate of what it purports to be.

Similarly with regard to the employees' handwriting. The witness was not testifying as to the authenticity of the original signatures but merely looking at purported photocopies of those signatures. A handwriting expert may compare a handwriting sample with photographic specimens in the process of offering an opinion. But in the instant case there is merely a lay witness who was not only not shown to be competent to compare signatures as an expert, but admits that he has not compared the purported copies of those signatures with genuine specimens. The signatures may look familiar to him but the possibilities of admitting into evidence forged documents would obviously be enhanced if authentication were to be allowed solely from a photocopy by someone not a handwriting expert.

Furthermore, during voir dire, when asked to identify the signatures, the witnes only looked at the first page of the log. (tr. 3152-53; A-TKS, 57a-58a). There is no evidence which signatures he identified or that he identified any of the signatures in the particular entries listing the rooms occupied by Tung and his companions. Hence, the attempt at verifying the purported duplicates through the signatures totally fails.

As for the witness testifying that he recognized the room numbers, that is hardly worthy of comment. How many hotels in the world have the same room numbers?

The issue at bar should not be confused with the common objection raised that a witness supporting the admission of a business record did not himself prepare the document or have knowledge of the source of information contained therein. Fed.

R. Evid. 803(6) allows the admission of "records of regularly conducted activity" upon the proper foundational testimony of a "custodian or other qualified witness" who need not have personally prepared them or have personal knowledge of the source of information. However, the business records exception to the hearsay rule does not eliminate the requirement that the witness have compared a proffered duplicate of the business record with its original. The hearsay exception carved out by Rule 803(6) does not override the underlying requirement of Rules 901(b)(1) and 602, that is, personal acquaintance of the witness with the original and his actual comparison of it with the duplicate.

The government might argue that the telephone logs were self-authenticated by the certification of the United States Consul attached to the exhibits. However, self-authentication, which is permissible for some categories of documents, Fed. R. Evid. 902, does not apply to business records. A foreign public document certified by the Consul would be admissible without extrinsic evidence of authenticity, Fed R. Evid. 902(3), but hotel telephone logs are not public documents.

There is one reported case in which a foreign hotel registration form, certified by a United States Vice Consul, was held admissible, United States v. Leal, 509 F.2d 122, 127-28 (9th Cir. 1975), but there are a number of essential differences between that case and the instant one. First, the proferred document in Leal was the original, not a duplicate.

Second, the assistant manager of the hotel, which was in Hong Kong,

> "...gave a sworn statement before the United States Consul in Hong Kong explaining that he chose not to go to Guam to testify; describing the contents of the attached original hotel records; attesting that he was the official custodian thereof and that hte documents [the originals] had been prepared or witnessed by himself or by persons under his authority and had constantly been in the Park Hotel under his supervisory control; and stating that they constituted records prepared in the normal course of business of the hotel."

509 F.2d at 127 (emphasis added). There is no evidence that such a statement was given to the Consul in the instant case. Indeed, there is no proof that the document shown to the Consul actually was the original telephone log from the hotel. Nor is there any evidence as to who presented the documents to him. Thus the trustworthiness requirement of Rule 1003 could not have been shown to be satisfied.

Third, the Lealcourt found that the hotel registration forms were themselves a species of official records, since they were required under Hong Kong law. 509 F.2d at 127. In the instant case the proffered documents are telephone logs, not registration forms, and there is no evidence that Brazilian law requires the keeping of such logs.

Finally, the Leal court held that the action of obtaining the sworn affidavit before the Vice Consul was justified under the circumstances because "none of the hotel employees could be subpoenaed to testify." 509 F.2d at 127. In sharp contrast, in the case at bar the deputy hotel manager chose to come to New York to testify.

The purported duplicates of the Hotel OK's telephone logs clearly do not meet the requirements for self-authentication. If this court were to hold otherwise, it would lead to the paradoxical result that foreign business records would be self-authenticating upon mere certification whereas domestic business records would require a witness to authenticate them. In criminal cases it would raise the issue of the deprivation of a defendant's Sixth Amendment right to confrontation.

Common sense calls for strict adherence to the rule that the duplicate of a document be authenticated by a witness who has personally examined the original and compared it with the duplicate. Only the very narrow exceptions noted by Wigmore, supra, §§1279-80, which do not apply in the case at bar, should be permitted. To do otherwise would be to openly invite fraud and forgery, if not in this case, then in future applications of the court's ruling.

The erroneous admission of the purported duplicates into evidence was highly prejudicial to the defendant and constitutes a ground for reversal. Even with all the flaws concerning the worth of the telephone register, as discussed in the next point, the records of these telephone calls was <u>the</u> key piece of evidence outside the statements of Tung's alleged co-conspirators tending to implicate Tung in the heroin conspiracy. Indeed, these calls were twice singled out for attention by the prosecuting attorneys. First, in colloquy when Mr. Little summarized the case against Tung by saying:

"There are later references to "This is through Little Tung or Choi Tao, Turnip," and the connection is Ah Min, the man in Thailand.

"Tung Kuei-Sen stayed in a hotel in Rio. In his room, which room has telephone calls charged to it to the same number in Thailand that Chen Chih-Yi used to contact Ah Min. That is the common connection.

"So in essence Tung Kuei-Sen was the middleman through his acquaintance with Ah Min to get the heroin."

(tr. 1841). Second, during Mr. Little's summation where he said

"...that the telephone records from Brazil show call after call from Room 1507 to Thailand. And when do they show these calls? On August 13, August 14, August 15, August 23, and you can look at those records if you want to check. Just look down at the side as the manager from the Hotel O.K. explained and you can see that number, and that number is Ah Min's number.

"The significant thing about the dates is, that's the very same time when Yellow Bird went down to Brazil. He flew down to Brazil to work out the passport arrangement to get Little Tung into the country. And before he went, he told the undercovers, Ah Tung hooked up this deal. He is the connection to Ah Min, the man from Thailand."

(tr. 5538-39). Clearly, the evidence of the telephone calls contained in the logs were extremely damaging to the defendant.

Furthermore, although there is no explicit statement of the basis for the trial court's Geaney finding admitting the statements of Tung's alleged co-conspirators, the telephone logs presumably constituted a primary element for that finding. See, United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028.

For these reasons, the admission of the purported duplicates of the telephone logs were highly prejudicial to the defendant and did not constitute harmless error.

POINT II

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE THE HEARSAY STATEMENTS OF DEFENDANT'S ALLEGED CO-CONSPIRATORS CONCERNING THE ALLEGED HEROIN CONSPIRACY, AS THERE WAS INSUFFICIENT INDEPENDENT NON-HEARSAY EVIDENCE TO ESTABLISH DEFENDANT'S PARTICIPATION IN THE ALLEGED CONSPIRACY

The trial court made independent Geaney findings on each separate alleged conspiracy which was charged in the indictment. The court found that there was a conspiracy to import and distribute 300 kilos of heroin and that Tung was a member of that conspiracy, (tr. 4971 72), and a conspiracy to violate RICO of which Tung was a member (tr. 5028), and admitted into evidence the statements of his alleged co-conspirators.

Tung was subsequently acquitted on all counts except the heroin conspiracy. Contrary to the court's finding, on this count there was insufficient non-hearsay evidence upon which to admit co-conspirators' hearsay statements which might implicate Tung in the heroin conspiracy.

The theory of the government's case against Tung was that he was the middleman - the connection between Chen Chih-Yi and Thailand to get the 300 kilos of heroin, and that this was accomplished through telephone calls Tung made when he was in Brazil. (tr. 1841-2).

The evidence showed that Tung was out of the country during the entire period of the alleged conspiracy. He left

the United States in October, 1984, well before the heroin conspiracy is alleged to have begun in June, 1985.

In all the massive quantity of taped conversations, meetings and telephone calls admitted into evidence by the government, not once is Tung present or heard. Any references to him are the hearsay statements of his alleged co-conspirators and those of the government's agents.

This hearsay includes a telephone call defendant Chen Chih-Yi made to Brazil on August 21, 1985 in which he asked for a Robert Chou. (Gov. Ex. 183, p. 4) Government agent Steven Wong claimed this name to be an alias used by Tung, but Tung denied it on cross-examination. This was the only reference to a Robert Chou in any of the conversations. In any case, Chou was not in when the telephone call was placed, so that no conversation took place with him. The comments made by Chen Chih-Yi during the call are hearsay as to Tung.

The Hotel OK telephone logs (which should not have been admitted into evidence, argued in Point I above) indicate that someone named "Rob" or "Rab" made a telephone call to the United States on that same day. Whether or not the telephone log was admissible, the notations in the log as to who made calls are inadmissible hearsay of the truth of the matter. Nevertheless, that entry is the only one out of 30 calls made from the two rooms that Tung and his three companions occupied, which was ascribed to a "Rob" or "Rab" by the telephone operator. Nothing is known of the contents of that call and "Rob" or "Rab", who only appears on this one day during the

entire period in question, could as easily have been a guest of the four companions as any one of the four.

Tung admitted to being in contact with defendant Chang An-Lo in late 1984 and early 1985 regarding his possible surrender to United States authorities for the murder of Henry Liu. He also admitted to receiving money to live on from defendant Chen Chih-Yi during this period. But this all occurred before the alleged drug conspiracy began.

Chen Chih-Yi went to Thailand before June, 1985 where he saw Tung and was introduced to defendant Ah Min by Tung. This, too, was before the heroin conspiracy is alleged to have begun, and Tung testified that they only met socially.

Chen Chih-Yi also went to Brazil in August, 1985, where he saw Tung. However, there is no evidence outside any statements of Tung's alleged co-conspirators that this trip had anything to do with the heroin deal. Indeed, its stated purpose was to get Tung to sign the back of some photographs to use for passports to enable him to enter the United States. This purpose was never connected to the heroin conspiracy in the evidence.

Finally there are the contested telephone logs from the Hotel OK in Rio de Janeiro which, assuming them admissible for the sake of the argument, at most show that long distance calls were made from the two rooms occupied by Tung and his three companions to various countries, including four to Ah Min's number in Thailand and several to Chen Chih-Yi's number in the United States. But there is no evidence of the content of

these calls, who made them or who answered on the other end. The names of the alleged callers entered in the telephone log constitute inadmissible hearsay as to whom among the four companions or any other guests actually made any of those calls.

The foregoing summarizes the evidence upon which a Geaney finding could possibly be based.

The Second Circuit in United States v. Terry, 702 F.2d 299, 319 (1983), cert. denied, 461 U.S. 931 and 464 U.S. 992, has succinctly laid out the basic principles relevant to evaluating the Geaney finding in this case:

> "Before a jury may consider against a defendant a conspiracy count that rests in part on the hearsay statements of an alleged co-conspirator, the trial judge must be safisfied by a preponderance of the independent non-hearsay evidence that the defendant was in fact a member of the conspiracy. United States v. Cicale, 702 F.2d 299 (2d Cir. 1983); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028, 90 S.Ct 1276, 25 L.Ed 539 (1970). Without the requirement of independent non-hearsay corrobation, co-conspirator hearsay "would lift itself by its own bootstraps to the level of competent evidence." Glasser v. United States, 315 U.S. 60, 74-75, 62 S.Ct. 457, 467, 86 L.Ed 680 (1942), and thus assume the conclusion to be proven...
>
> "The standard for Independent proof of partipation in the conspiracy is not as high as that needed to submit a charge of conspiracy to a jury. United States v. Alvarez-Porras, 643 F.2d 54, 57 (2d Cir.), cert. denied, 454 U.S. 839, 102 S.Ct 146, 70 L.Ed.2d 121 (1981). Proof may be "totally circumstantial", United States v. Ragland, 375 F.2d 471, 477 (2d Cir. 1967), cert. denied, 390 U.S. 925, 88 S.Ct. 860, 19 L.Ed. 2d 987 (1968), and the court must view the evidence as a whole rather than consider individual items in isolation. United States v. Di Palermo, 606 F.2d 17, 22 (2d Cir. 1979), cert. denied, 445 U.S. 915, 100 S.Ct 1274, 63 L.Ed2d 599 (1980). Once a conspiracy has been proved to exist, the evidence needed "to link another defendant with it need not be

overwhelming." United States v. Provenzano, 615 F.2d 37, 45 (2d Cir.), cert. denied, 446 U.S. 953, 100 S.Ct. 2921, 64 L.Ed. 2d (1980)....

"Notwithstanding this lower standard the government must nonetheless show a "likelihood of an illicit association between the declarant and the defendant." United States v. Ragland, supra, 375 F.2d at 477 (emphasis added). Mere familiarity with a drug dealer does not make one a member of his conspiracy; nor does association with a conspirator provide a sufficient basis for the admissibility fo hearsay statement of an alleged co-conspirator. United States v. Steinberg, 525 F.2d 1126, 1134 (2d Cir. 1975), cert. denied, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976); United States v. Fantuzzi, 463 F.2d 683, 690 (2d Cir. 1972); United States v. Ragland, supra, 375 F.2d at 477."

In the case at bar the trial judge did not have a reasonable evidentiary foundation independant of the hearsay declarations of Tung's alleged co-conspirators to be satisfied of Tung's participation in the conspiracy to import and distribute 300 kilos of heroin. The only independant non-hearsay evidence offered by the Government was (1) the inadmissible telephone logs of the Hotel OK showing calls to Thailand and elsewhere, and (2) the two trips by Chen Chih-Yi to Brazil and Thailand, the latter occuring before the conspiracy is alleged to have begun.

The key piece of evidence relied upon by the government to establish its case against Tung were the hotel telephone logs. The government especially singled out the importance of this evidence during summation to the jury and in colloquy with the court. See, pp. 16-17, supra. As argued in Point I above, these logs should not have been admitted into evidence. Without them, the non-hearsay evidence is truly insignificant. Nevertheless, assuming the logs admissible for the sake of the

argument, they add little and at best show no more than a conjectural and speculative connection of Tung to the alleged heroin deal.

The telephone logs show four calls made to defendant Ah Min's number in Thailand. In the logs, under the heading "Nome", the following entries were made by the telephone operator in connection with the calls to Thailand: 1) "Pohong CoTong", 2) "Azn Kih Chuan", 3) "Banokok", and 4) "Sengak". Who or what these enties refer to are not at all clear. The first one, "Pohong CoTong", seems to refer to Tung since he was using the alias "Phang Sae Tang" when in Brazil. "Banokok" would presumably refer to Bangkok, Thailand rather than a person, and the other two entries may refer to companions of Tung.

But, aside from the unreliabiity of the entries, they are hearsay and cannot be used to show the identities of the callers. See, United States v. Garcia-Duarte, 718 F.2d 42 (2d Cir. 1983); United States v. Lieberman, 637 F.2d 95 (2d Cir. 1980).

In Lieberman, a hotel registration card was held admissible as a business record exception and found competent to establish the name of the hotel, the date and time of registration, and the room assigned to the registrant. But the court concluded that it was not properly admitted to show the identity of the registrant. 637 F.2d at 101. In the case at bar, even more so should the names entered in the telephone log be held inadmissible to show the identity of who made the calls

to Thailand or anywhere else. At best there is evidence that Brazilian telephone operators hurriedly took down in a garbled manner names given by unknown (and presumably Chinese) callers who happened to use those particular names. Even if the operators had been offered by the government as witnesses, their testimony that someone on the telephone identified him or herself as "Pohong CoTong" would be inadmissible hearsay. See, United States v. Hyatt, 565 F.2d 229, 232 (2d Cir. 1977).

Who actually made those calls is unknown. In contrast to Lieberman, where only one person checked into the hotel and later made a telephone call tying him into the conspiracy, in this case four people were sharing the two rooms. One chance in four that Tung made any of the four telephone calls surely does not meet the Geaney standard of a "fair preponderance of the evidence."

Furthermore, even if it were assumed that Tung made perhaps even one of the calls to Thailand, there is no evidence of the contents of that call, or whom he spoke to. It might have been Ah Min. But it might not have. And, viewing the call without taking account of co-conspirators' hearsay statements, if the recipient of the call was Ah Min, there is still nothing to link the conversation with the heroin conspiracy. Ah Min and Tung were acquaintances, having met frequently in Thailand before Tung went to Brazil. It is pure speculation as to what the content of the call might have been.

In United States v. Terry, supra, defendant's actual statements made during a telephone conversation were in

evidence. But neither these statements nor the other connections with the other conspirator was considered by the court to be sufficient non-hearsay evidence of the defendant's participation in the conspiracy. In the case at bar there is no evidence of any statements, incriminating or otherwise, made by Tung during any of the telephone calls from Brazil which might be imputed to him. And of those calls, any of four persons could have made them.

This court stated in Terry that:

> "When evidence used to satisfy Geaney is 'as consistent with innocence as with guilt,' additional evidence linking the defendant to the conspiracy assumes 'pivotal importance.' Alvarez-Porras, supra, 643 F.2d at 57-58."

702 F.2d at 321. Here, as in Terry, the evidence is as consistent with innocence as with guilt, and "that all-important other evidence is totally lacking." 702 F.2d at 321.

The government may point to Tung's connection with the United Bamboo and with Chen Chih-Yi and Ah Min. But these associations involved a variety of matters, such as the Henry Liu murder, having nothing to do with the heroin conspiracy.

> "Mere familiarity with a drug dealer does not make one a member of his conspiracy; nor does association with a conspirator provide a sufficient basis for the admissibility of hearsay statements of an alleged co-conspirator."

United States v. Terry, 702 F.2d at 320. See, United States v. Steinberg, 525 F.2d 1126 (2d Cir. 1975), cert. denied, 425 U.S. 971, in which the court reversed a conspiracy conviction

against a defendant who was a friend and fellow drug user of another defendant whose conviction stood. The court held that

> Association with a conspirator, without more, is insufficient to establish the requisite degree of participation in a conspiracy...; nor does it provide a sufficient basis for the admission of hearsay statements of co-conspirators."

525 F.2d at 1134 (citations omitted).

The visits that Chen Chih-Yi made to Brazil and Thailand show nothing more than an association with Tung. In United States v. Fantuzzi, 463 F.2d 683 (2d Cir. 1972), the government's case relied upon the defendant's "two or three visits" to the apartment of other conspirators in which comments about drug transactions were made in the defendant's presence. The court held "that the government has proved little more that association between Bruno and the conspirators", and found that his participation in the conspiracy was not established. 463 F.2d at 689-90.

In the case at bar, there were also two visits. But, in contrast to Fantuzzi, there is no non-hearsay evidence showing that the heroin deal or drugs was in any way a subject of discussion during those visits. Hence, the evidence is less substantial here that in Fantuzzi.

At bottom, the hotel records of telephone calls (which were not admissible at all, and of speculaive connection to Tung) and visits by Chen Chih-Yi add up to showing nothing more than friendship and association with Tung. This association had its criminal content. It was connected to the Henry Liu murder, and the subsequent efforts of members of the United

Bamboo to protect Tung, provide him with money to live on, and to mediate his efforts to negotiate a return to this country to face charges for the murder. But association for one kind of criminal activity does not make an individual guilty of the other crimes of his associates for which there is insufficient proof of his participation.

Viewing in a light most favorable to the government the entirety of the non-hearsay evidence of Tung's association with his alleged co-conspirators, there is not a shred of evidence that links him to the heroin conspiracy or shows that he had a "stake in the venture." United States v. Cianchetti, 315 F.2d 584, 588 (2d Cir. 1963). Any inference to be drawn from the de minimis non-hearsay evidence, unembellished by hearsay, is so tenuous and speculative as to hardly leave even a suspicion of guilt. The jury should not have been allowed to consider the hearsay statements of Tung's alleged co-conspirators. The charges against him should have been dismissed because of insufficient proof.

* * * *

The government, in its letter dated September 10, 1986, and in its memorandum of law dated October 29, 1986, both in opposition to defendant's motion for acquittal, contends that sufficient independent evidence of the heroin conspiracy was unnecessary because it constituted a predicate act of the RICO conspiracy alleged in Count One and there was sufficient independent evidence of Tung's membership in the RICO conspiracy.

This argument completely overlooks the fact that the issue concerns, not the RICO conspiracy, of which Tung was acquitted, but the separate narcotics conspiracy alleged in Count Ten. The trial court made independent Geaney findings on these two separate conspiracies. Whether or not alleged co-conspirators' hearsay statements regarding the heroin conspiracy would be admissible to prove the RICO conspiracy, they should not have been held admissible to prove the independent narcotics conspiracy of Count Ten.

As stated by the Court in United States v. Boldin, 772 F.2d 719 (11th Cir. 1985),

> "A RICO conspiracy charge requires proof of at least two elements that sections 963 and 846 do not: (1) the existence of an "enterprise" as defined by 18 U.S.C.A. 1961(4), and (2) a "pattern of racketeering activity," encompassing enumerated acts of "racketeering activity" both defined by section 1961. Further, the RICO conspiracy charge requires proof of a different objective of the conspiratorial agreement. The object of the agreement contemplated by the RICO conspiracy statute is involvement in an enterprise which receives benefits from engaging in unlawful activity. The objects of the agreements in 963 and 846 charges are the achievement of unlawful activity: the importation of a controlled substance in 963 charges and possession with intent to distribute a controlled substance in 846 charges."

772 F.2d at 727 (emphasis added). See also, United States v. Thomas, 757 F.2d 1359, 1371 (2d Cir. 1985).

What the government's argument essentially amounts to is that independent non-hearsay evidence of a predicate act or separate conspiracy is not required to bring in hearsay statements to prove that predicate act or separate conspiracy once there is sufficient non-hearsay evidence of membership in the RICO conspiracy. The case cited by the government in

opposition to defendant's motion, United States v. Hewes, 729 F.2d 1302 (11th Cir. 1984) is inapposite, as it does not address this point.

The consequence of the government's position would be a complete erosion of both the requirement of sufficient proof of each predicate act alleged in a RICO conspiracy, and of sufficient proof of separate non-RICO conspiracies alleged in separate counts of an indictment. This would circumvent the requirement of independent non-hearsay corrobation, allowing co-conspirator hearsay to "lift itself by its own bootstraps to the level of competent evidence." Glasser v. United States, 315 U.S. 74-75, 62 S.Ct. 457, 467 (1942).

On the fragile fulcrum of proof of membership in a RICO conspiracy, the government would have it that co-conspirator hearsay relating to matters other than that membership should be admissible to prove not only all predicate acts of the conspiracy, but all independently charged conspiracies, thus assuming the conclusion to be proven. This would totally undermine a defendant's Sixth Amendment right of confrontation in conspiracy cases and should not be countenanced by the court.

In the case at bar the trial court made separate Geaney findings as to RICO and the heroin conspiracy. The RICO finding is moot since Tung was acquitted on the count, and the finding as to the heroin conspiracy of Count Ten was in error as heretofore argued. Therefore, the defendant's conviction should be reversed and the indictment against him dismissed.

POINT III

THE JURY RENDERED LOGICALLY INCONSISTENT VERDICTS AGAINST THE DEFENDANT REQUIRING REVERSAL OF HIS CONVICTION

Although the general rule is that consistency in jury verdicts is not required, United States v. Powell, 469 U.S. 57, 105 S.Ct.471 (1984), Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189 (1932), United States v. Zane, 495 F.2d 683 (2nd Cir. 1974), the Supreme Court has left open the possibility that in cases in which verdicts are strictly logically incompatible, reversal might be warranted. United States v. Powell, 469 U.S. 57 at , 105 S.Ct. 471 at 479. The defendant submits that his situation is such a case.

The charges contained in Racketeering Acts Nine of Counts One and Two are identical with the counterpart charges of Counts Ten. They each involved precisely the same events, are based upon precisely the same facts offered in evidence, and they each cite violations of precisely the same laws. Yet the jury came to differing conclusions. This inconsistency - contradictory verdicts on identical charges - is plainly a logical absurdity.

The general rule against overturning inconsistent verdicts, "justified as a check on the 'excessive zeal of prosecutors,' ...should not be converted into an inflexible shield for the overzealous and irrational behavior of a jury." United States v. Bethea, 483 F.2d 1024 (4th Cir. 1973).

There should be some bounds on the determinations of the jury. Their scope of decision should not be absolute. Verdicts which are superficially inconsistent may be allowed to stand. But the leeway given juries to render inconsistent verdicts shouldn't be allowed to cross the frontier of logic. Otherwise truly anomalous and paradoxical verdicts are likely to occur, raising difficult questions as to whether the basic purposes of criminal sanctions are being accomplished. What will be the effect of punishment on an individual where the verdicts are logically inconsistent? Such an instance cries out as an injustice and demonstrates that juries can go too far astray of the responsibilities assigned to them. Fundamental fairness demands that logically inconsistent verdicts be reversed.

The absurd inconsistencies in the instant case certainly fall outside the bounds of logic and hence are grounds for reversing the guilty verdict against the defendant on Count Ten.

POINT IV

THE PRESENTENCE REPORT CONTAINED UNSUPPORTED AND UNPROVEN ALLEGATIONS OF CRIMINAL CONDUCT BY THE DEFENDNAT AND THUS CONSTITUTED AN IMPROPER BASIS FOR SENTENCING OF THE DEFENDANT.

A. The Trial Court Erred in Failing to Order a Hearing for Substantiation of the Allegations of Criminal Conduct by the Defendant Contained in the Presentence Report.

Sentencing judges have broad discretion as to the kind of information they can consider and the source from whence it comes. United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589 (1972). The mere fact that a presentence report contains unsworn hearsay statements does not compel its exclusion. Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079 (1949). Nevertheless, appellate courts have invalidated sentences where a defendant is sentenced on the basis of materially false information about his criminal record, Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970).

"Additionally, a significant possibility of misinformation justifies the sentencing court in requiring the Government to verify the information." United States v. Fatico, 579 F.2d 707 at 713 (2d Cir. 1978) (Fatico I). See also, United States v. Fatico, 603 F.2d 1053 (2d Cir. 1979) (Fatico II); United States v. Bass, 535 F.2d 110, 121 (D.C. Cir. 1976); United States v. Needles, 472 F. 2d 652 (2d Cir. 1973); United States v. Weston,

448 F.2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061, 92 S.Ct. 748 (1972). As stated in Fatico I, "the reliability of evidence that is difficult to challenge must be ensured through cross-examination or otherwise, by demanding certain guarantees of reliability." 579 F.2d at 713.

Tung's defense counsel, along with other defendants' attorneys, asked for hearings at the sentencing because of objections to the presentence report. (Defense counsel had only been informed a day and a half previously that the report was available for inspection). (sent. tr. 7, def. sent. ex. A, p. 1; A-TKS, 59a). The request for hearings was not granted, and in denying the request for hearings, the Court took the erroneous position that the burden was on the defendant to prove the allegations contained in the presentence report to be wrong. (sent. tr. 10, 11, 12; A-TKS, 60a, 61a, 63a).

In the instant case challenge of the disputed allegations of criminal conduct was limited to a short colloquy at the sentencing proceeding. The prosecurtor made vague reference to "reports" of undocumented criminal indictments of the defendant by the Taiwanese government. This does not even come close to meeting the standards of substantiation and reliability laid out in the preceding line of cases. Indeed, internal inconsistencies, confusions and biased characterizations raise serious doubts as to the reliability of the presentence report. Among these are:

(1) The presentence report alleges that Tung was arrested in Tai Pei on March 4, 1985 of the unlawful possession of

weapons. (PR, 3). In fact, Tung was not even in Taiwan on March 4, 1985 (tr. 4835, 4838) so that it was physically impossible for him to be arrested in Tai Pei. Nor was he arrested anywhere else on or about that date.

(2) The evaluation in the presentence report (PR, 7) repeats the unsupported allegation contained in the Probation Department's Investigation (I, 13) that "Taiwan wanted him as a suspect in a murder in Taiwan..." Not only is it highly improper to put information in a presentence report regarding a crime for which the defendant is only a mere suspect and has apparently not even been arrested or indicted, but there is not a scintilla of evidence as to the nature of this alleged murder. The so-called "Prior Record" section of the Presentence Report makes no mention of this alleged crime.

(3) With regard to the alleged double homicide in the Phillipines on February 3, 1985, not only are the alleged indictments in Taiwan unsubstantiated, but these homicides are gratuitously labelled "extermination killings" in the "Prior Record" section of the Presentence Report (PR, 3). Later in the "Evaluation" the Presentence Report states that "The Phillipines also wanted him as a suspect in a mass murder in that country", and further on states that "Our subject...has allegedly been involved in numerous gang related acts of violence including mass murder." (PR, 7) (emphasis added).

Is the alleged "mass murder" the same as the alleged double homicide in the Phillipines or some other homicide? Has the Phillipines issued an arrest warrant or indicted Tung, or

is he again merely a "suspect"? What are these alleged "numerous gang related acts of violence"? Such unsupported and unproven allegations are clearly extremely unfair and damaging claims to put before the sentencing judge.

Perhaps most disturbing is that these exaggereated, vague, inconsistent and unsubstantiated reports come, not from an independent investigation by the Probation Department, but from information provided by one of the Assistant United States Attorneys who prosecuted the case. (I, 13, PR, 3). Indeed, it would appear that the prosecutor was carrying on a personal vendetta against the defendant.

What substantiation did the prosecutor provide during the colloquy at sentencing? - her merely unsworn statement that she had official reports of indictments from the Taiwanese government received through "official channels". (sent. tr. 13-14; A-TKS, 63a-64a). Whether the "official reports" were oral or written; who they came from; what the contents of those reports were; what were the official channels; what were the bases for the alleged indictments; were never revealed. When defense counsel challenged the validity of these "reports" asserting that there was no documentation and that the United States has no official relations with Taiwan, the court abruptly cut him off with a "That's ridiculous." (sent. tr. 15; A-TKS, 65a).

In Weston, supra, cited approvingly in Fatico I, supra, the district judge took a similar position as did the court in the instant case, declaring that the court would reconsider its sentence if counsel could present facts contradicting the

presentence report. the Ninth Circuit reversed, holding it impermissible to place the burden of refutation on defendants:

> "This will not do. It is tantamount to saying that once a defendant has been convicted of offense A, narcotics agents can say to the probation officer, and the probation officer can say to the judge, 'we think that she is guilty of much more serious offense B, although all we have to go on is an informer's report,' and the judge can then way to the defendant, 'You say it isn't so; prove that to me!' In addition to the difficulty of 'proving a negative,' we think it is a great miscarriage of justice to expect Weston or her attorney to assume the burden and expense of proving to the court that she is not the large scale dealer that the anonymous informant says that she is.
>
> "In Townsend v. Burke, supra, the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process."

448 F.2d at 634.

As in Weston, the allegations made by the prosecuting attorney as in the presentence report in the instant case were highly damaging, went far beyond what was proved at trial, and were most difficult to refute. Here there are unsubstantiated allegations of one or more mass murders, of a double murder in the Phillipines, a further murder in Taiwan, and of numerous other unnamed violent crimes for which there was not even a scintilla of evidence that arrests had ever been made or indictments issued. In Fatico II the primary issue turned on whether or not the government would be required to disclose the name of an informer who needed protection in order to verify claims of alleged criminal conduct. In this case, not even the specific nature of the crimes or whether or not there were

arrests or indictments was revealed. And there was no need to protect any informers.

Furthermore, all the alleged criminal activities occurred in foreign countries. There is no indication that even minimal due process standards were met in any of the alleged actions taken by those countries. With regard to the Phillipines, it is baldly alleged that he was a mere suspect. Allegations of criminal activity should not be allowed to be used as evidence against a defendant in sentencing on the basis of mere suspicion. With regard to the alleged Taiwanese murder indictment, it related to crimes allegedly committed in the Phillipines, raising serious questions as to whether the most minimal due process standards were met. Furthermore, any actions taken by Taiwan against Tung, if proven, must be viewed as highly suspect, since the Taiwanese government had strong reasons, due to the political considerations surrounding the Henry Liu murder, to "smear" Tung.

Defendant submits that allegations of criminal indictments issuing in Taiwan, even if substantiated, should not be allowed to be used absent proof by the government that that foreign jurisdiction has met due process standards in issuing the indictments, particularly since our government has no relations with that jurisdiction, as is the case with Taiwan. See, People v. Wallach, 312 N.W.2d 387 (Mich. 1981), People v. Braithwaite, 240 N.W.2d 293 (Mich. 1976).

In short the presentence report's unsubstantiated allegations of criminal conduct by Tung were allowed by the court to

stand without scrutiny in flagrant and outrageous violation of the standards and tests for reliability set by this and other circuits.

B. The Sentencing Court Failed to Either Make Findings With Regard to the Challenged Inaccuracies in the Presentence Report or to State that the Contested Matters Were Not Considered in the Determinations of Tung's Sentence, in Disregard of Fed. R. Crim. P. 32(c)(3)(D).

Fed R. Crim. P. 32(c)(3)(D) provides that:

> "If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing..."

The sentencing court made neither the finding nor the determination required by this rule which has been held to be mandatory. United States v. Bradley, No. 86-1123 (2d Cir. Feb. 23, 1987); United States v. Ursillo, 786 F.2d 66, 68-9, 71 (2d Cir. 1986). In Bradley the court remanded even though it found the alleged inaccuracies to be "virtually de minimis. In the case at bar the inaccuracies are damaging to the defendant in the highest degree. It is fair to assume that the sentencing court took into account the unsubstantiated allegations of criminal conduct since it imposed the maximum sentence allowed under the law.

The sentence must be vacated and the matter remanded for a hearing on the allegations contained in the presentence report and for resentencing

POINT V

THE APPELLANT TUNG KUEI-SEN HEREBY JOINS IN ALL ARGUMENTS SEPARATELY BRIEFED BY CO-COUNSEL TO THE EXTENT APPLICABLE TO HIM.

CONCLUSION

For the reasons discussed above, appellant Tung Kuei-Sen's conviction should be reversed and the indictment dismissed or, alternatively, a new trial ordered, or the sentence vacated and the matter remanded for resentencing.

Dated: April, 1987

Respectfully submitted,

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