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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SHIU LUNG LEUNG Defendant.	Case No. 09-CR-0110 SI DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR JUDGEMENT OF ACQUITTAL, OR IN THE ALTERNATIVE, FOR NEW TRIAL Date: April 29, 2013 Judge: The Honorable Susan Illston

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INTRODUCTION

The defendant was originally charged and tried along with six other defendants in this case. Pre-trial motions were briefed and argued. A jury trial was held in January of 2012, at the end of which two co-defendants were acquitted and four co-defendants were convicted. The convicted defendants have continuing post-trial appeals. As to the defendant here, the jury in the first trial was unable to reach a verdict and a mis-trial was declared. A second trial was held beginning in November of 2012, which lasted about four weeks. After less than four hours of deliberation, the defendant was ultimately convicted. Before the second trial, and before the co-defendants were sentenced, the defendant attempted to resolve the case with a magistrate. The government originally agreed to participate in a settlement conference, however after the co-defendants were sentenced, the government declined to engage in a settlement conference with the defendant here and the second jury trial commenced. The defense has discover that during that trial more than one juror committed misconduct. In addition, a combination of several erroneous rulings, and acts of misconduct by the prosecution have served to deprive the defendant of his constitutional right to due process and he is now moving for a new trial.

In addition, during the pendency of the proceedings, several legal arguments were made that addressed new and novel areas of the law. The court has read memorandums and heard arguments concerning these legal issues, and the defendant still vigorously maintains the correctness of his position on these arguments. However, for purposes of these motions, the defendant will not reiterate in detail each and every argument made previously, but will instead incorporate by reference memorandums filed earlier by the co-defendants which the defendant had joined with, and which are still valid for this second trial. The defendant wishes to preserve his right to appeal on each of these issues, but understands the court has previously ruled on them.

I. THE DEFENDANT HAS BEEN DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY DUE TO MISCONDUCT BY ONE OR MORE JURORS AND IS ENTITLED TO A NEW TRIAL

A criminal defendant has a Sixth Amendment right to a "fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.) (en banc), *cert. denied*, 525 U.S. 1033, 119 S.Ct. 575, 142 L.Ed.2d 479 (1998). If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel. *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.), *cert. denied*, 434 U.S. 818, 98 S.Ct. 58, 54 L.Ed.2d 74 (1977); *Dyer*, 151 F.3d at 973. If a court is "confronted with a colorable claim of juror bias (it) must undertake an investigation of the relevant facts and circumstances." *Dyer*, 151 F.3d at 974.

"The Ninth Circuit takes the spectre of jury bias very seriously. We have emphasized that "even a single partial juror violates a defendant's constitutional right to fair trial." *United States v. Angulo*, 4 F.3d 843, 848 (9th Cir.1993). We have also admonished that "[a] court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances." *Dyer v. Calderon*, 151 F.3d 970, 974 (9th Cir.1998) (en banc). Were we to assume that premature deliberations occurred, such an exchange, though not necessarily proper, is not as serious as "private communication, contact, or tampering ... with a juror during a trial [or] ... influence of the press upon the jury," nor does "every incident of juror misconduct require[ ] a new trial." *United States v. Klee*, 494 F.2d 394, 396 (9th Cir.1974) (internal citations and quotation marks omitted). What is crucial is "not that jurors keep silent with each other about the case ***but that each juror keep an open mind until the case has been submitted to the jury***." Id. " *Davis v. Woodford*, 384 F.3d 628 (9th Cir. 2003) (Emphasis added).

In this case, the defense was approached after the verdict by a juror who was concerned about the manner in which the verdict was reached. This juror, Ms. Loretta Simms, personally overheard conversations by other jurors, during the trial, and before the defense case. These conversations were primarily led by Juror Burchard. Ms. Burchard plainly and unequivocally stated she had formed an opinion of guilt early on in the case and nothing presented would be able to change her mind.

Ms. Simms overheard several such conversations between Ms. Burchard and at least two other female jurors in which such statements were made. Ms. Simms also overheard conversations during which the facts of the case were being discussed, in direct violation of the court's instructions. (Attached is Ms. Simms' affidavit outlining the misconduct).

"Jurors may testify regarding extraneous prejudicial information or improper outside influences. They may not be questioned about the deliberative process or subjective effects of extraneous information, nor can such information be considered by the trial or appellate courts."; *Rushen v. Spain*, 464 U.S. 114, 121 n. 5, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *Mattox v. United States*, 146 U.S. 140, 149, 13 S.Ct. 50, 36 L.Ed. 917 (1892). In this case, the affidavit of Ms. Simms outlines conduct that was independent of the deliberative process, and which was clearly improper and which deprived the defendant of his right to a trial by twelve open minded jurors.

During the trial, from beginning to end, the court instructed the jurors that they were not to discuss the case with anyone, and they were not to make up their minds before all the evidence was presented. (RT 158, 159, 324, 360, 402, 433, 505, 577, 621, 547, 715, 782, 833, 877, 922, 954, 985, 1056, 1090, 1119, 1141, 1187, 1223, 1260, 1270, 1336, 1416, 1516, 1564, 1593, 1613, 1662, 1694, 1726, 1772, 1807, 1847, 1887, 1907, 1949, 2036, 2062). Despite this, several juror failed to follow these instructions. The conversations overheard by Ms. Simms indicate that several jurors prejudged the case, expressing clear opinions of guilt before all the evidence had been presented. The conversations made it clear that nothing the defense could present would be considered, and minds were made up and closed to any possible defense. This prejudgment was in violation of this court's instructions and constitutes prejudicial misconduct. The defendant is entitled to have all twelve jurors keep an open mind and that did not happen here. This constitutes prejudicial misconduct, and as such a new trial should be granted.

In support of Ms. Simms' revelation is the fact that the jury deliberated a very short time in this case, less than four hours. In the first trial, the jury deliberated for several days and yet were unable to reach a verdict as to the defendant Steven Leung. While we cannot know exactly what the jury in the

first case discussed, several of the jurors in that first trial gave interviews to the press in which they indicated that they reached verdicts on the other defendants rather quickly, but were deliberating for four days on the issue of Steven Leung's innocence or guilt. (See Exhibit A). While the court cannot consider the mental processes of the jurors in either trial, the speed with which this jury reached a verdict does tend to support the contention that at least one of the jurors did not keep an open mind during the entire trial, but instead made a decision in the midst of the trial. This deprived the defendant of his right to a jury of twelve open minded jurors, who considered all the evidence before reaching a decision.

Based on the attached affidavit, the defendant requests this court order a new trial, or at the very least, hold a hearing to determine whether or not the defendant was deprived of his right to have twelve fair and open minded jurors decide his case.

II. DUE TO A CUMULATION OF ERROR AND MISCONDUCT, DEFENDANT STEVEN LEUNG HAS BEEN DEPRIVED OF DUE PROCESS AND IS ENTITLED TO A NEW TRIAL

1. The Defense Was Erroneously Prevented From Presenting Relevant, Crucial Evidence Of The Instructions Given to Crystal Meeting Attendees By Their Supervisor Co-Defendant Dr. Hsiung.

During the trial, the defense attempted to introduce, through two different witnesses, the instructions that co-defendant Dr. Hsuing, aka Kuma, had given to AUO employees before attending the Crystal Meetings. These witnesses, Hubert Lee and James CP Chen, had both attended Crystal Meetings themselves. Hubert Lee attended several meetings along with the defendant, and he had an almost identical position in the company and held identical authority for price setting. Both Hubert Lee and James CP Chen were prepared to testify that before attending Crystal Meetings they were instructed by their supervisor Dr. Hsiung to take notes of what was said at the meeting, to gather any market intelligence available, and to give incorrect pricing information to the other participants. They were not to make any agreements at the meetings. (See Cashman Affidavit)

The court sustained objections to this testimony from Hubert Lee, (RT 1508: 3-25, 1509:1-9), and struck similar testimony from James CP Chen. (RT 1822:10-25, 1823, 1824), During side bar discussions, the court indicated that the testimony could only come in through Kuma, an unavailable witness, or in the alternative allowing it in would open the door to the introduction of the prior guilty verdicts from the first trial. (RT 1823:22-25). This ruling was error and prevented the defendant from presenting a crucial aspect of his defense.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." (citation omitted). The right to present a defense arises under the Fifth and Fourteenth Amendment right to due process and the Sixth Amendment right to compulsory process. *Richmond v. Embry*, 122 F.3d 866, 871 (10th Cir.1997).

The defense in this case wanted to present the statement by Dr. Hsiung as circumstantial evidence of defendant's state of mind at the time he attended the meetings. By considering evidence of instructions given to two other meeting attendees, who both worked under Dr. Hsiung, and who had similar positions in the company, the jury could have reasonable inferred the defendant also received these instructions and could have then determined he did not have the requisite guilty intent to fix prices. It was and has been the defense position that Steven Leung believed he was attending the meetings for the purpose of gathering market intelligence, which his supervisors would use in deciding on the price range set for products. It is irrelevant whether or not his supervisors actually used this information to fix prices. If Steven Leung did not have the requisite intent he is not guilty, but the jury was deprived of crucial information that could have persuaded them on that point.

The statement was not hearsay for several reasons. First of all, it was not offered for the truth but to show the effect it had on the hearer's state of mind, and by reasonable inference, the impact it had on the defendant's mind. "Hearsay is an out-of-court statement offered for the truth of the matter asserted. Fed.R.Evid. 801(c). An out-of-court statement that is offered to show its effect on the hearer's state of mind is not hearsay under Rule 801(c).

(*See* United States v. Baird, 29 F.3d 647, 653,(D.C.Cir. (1994) (district court improperly excluded evidence bearing on officer's state of mind as hearsay); *United States v. Detrich*, 865 F.2d 17, 21 (2d Cir.1988) (exclusion of evidence of defendant's state of mind as hearsay reversible error)". *US v Thompson* 279 F.3d 1043, 1047 (D.C.Cir.2002).

In the Thompson case, the defendant was found in possession of a cup that contained cocaine. He introduced the statement of the person who gave him the cup. This person told him the cup contained nothing more than money and instructed him to deliver the cup to a person in a Lexus automobile. The trial court and the reviewing court both held that this statement was properly introduced as it was not hearsay and was relevant to the defendant's state of mind. The court noted that the jury could infer that due to the instructions the defendant was given he may have had no knowledge of the illegal contents of the cup, but believed he was simply performing an innocent act.

"Regardless of the actual contents of the closed cup, the jury might have been able to draw from Douglas's statements an inference as to Thompson's guilty knowledge *vel non* of the cup's contents. If Thompson offered Douglas's post-transaction statements only as they might tend to bear on his state of mind, the testimony would not have been hearsay". *US v Thompson* 279 F.3d 1043, 1047 (D.C.Cir.2002).

In this case defendant's state of mind was a crucial element of the defense. The argument that he did not intend to agree to any price fixing scheme would have been greatly enhanced with evidence from which it could be inferred that he was given instructions to perform what he believed was an innocent act, obtaining market intelligence from the meetings. The defense attempted to prove that the defendant was simply following his orders to take notes from the meetings and return the information to his supervisors. Evidence of the instructions that were given regarding these meetings was crucial to show his innocent state of mind.

The evidence was clear that the defendant did not participate in the original meetings during which the purpose of the meetings was made clear. Indeed, it was several months before the defendant attended any meetings, and then it was with other employees of higher or equal rank to him.

If the jury had been informed of Dr. Hsiung's instructions, it would have been entirely reasonable for them to conclude that, like the government witness Stanley Park, Steven was only taking notes and sending them on to his supervisors. And it would be reasonable to conclude, also like Stanley Park, that Steven did not know what his supervisors were doing with that information.

During the side bar discussions the defense attempted to explain the relevance of this evidence, but the court indicated the only way for the information to come in was to call Dr. Hsiung.. (RT 1823) However, Dr. Hsiung had a Fifth Amendment Privilege not to testify and it was clear to everyone he would invoke it. *U.S. v. Antelope* 395 F.3d 1128, 1132 (9th Cir. 2005). (Dr, Hsiung invoked this privilege with the probation officer). This unavailability of Dr. Hsiung provides yet another basis for the introduction of this statement, as a declaration against interest pursuant to Federal Rule of Evidence 804(3)(b). Dr. Hsiung was convicted of price fixing, and made this statement during the time of the conspiracy. It was clear that he was directing others to participate in the meetings, which were the basis for the criminal conspiracy charges. Regardless of the guilt of the underlings attending the meetings, a statement by a supervisor giving instructions to his underlings to attend the illegal meetings would tend to expose him to criminal liability, and since he was unavailable, would be a non-hearsay statement against interest. The relevance of the statements is clear, as argued above.

"It is clearly established federal law, as determined by the Supreme Court, that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation. *Chambers*, 410 U.S. at 302, 93 S.Ct. 1038. 'The Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense.' *DePetris v. Kuykendall*, 239 F.3d 1057, 1062 (9th Cir.2001) (citing *Chambers*, 410 U.S. at 294, 93 S.Ct. 1038). *Chia v. Cambra* 360 F.3d 997 (9th Cir. 2004).

In this case, the exclusion of Dr. Hsiung's statement violated the defendant's right to a fair trial, especially when taken together with the other erroneous rulings and misconduct that occurred in this case.

2. The Defense Was Erroneously Prevented From Presenting Evidence Of The Inadequacy Of The Government's Investigation

As stated above, a crucial aspect of the defense was the individual state of mind of Steven Leung. His attendance at the Crystal Meetings was not disputed, however his role there was very much in dispute. The defense, through cross examination, successfully demonstrated that the government percipient witnesses had an inability to independently recall any specific incriminating words and actions taken by the defendant at the meeting, or indeed any specific details from the meetings. (RT 403: 5-11, 404, 405:1-4, 456:1-5, 987:17-19, 993:10-13, 1130:23-25, 1131:1-6) Through discovery, the defense was aware that the government had been approached by Samsung months before any government investigation was done, and informed of the alleged conspiracy. Despite the knowledge that meetings were ongoing, as far as the defense is aware, the government did nothing to investigate or collect evidence until the search warrants were served in December of 2006. Samsung had self-reported in January of 2006, and signed a cooperation agreement in April of 2006, yet no effort was made to use Samsung employees to gather evidence at meetings or from individual defendants, nor were any agents used to attend meetings under cover, or make pre-text phone calls. The defense attempted in several ways to present this lack of investigation to the jury, but were erroneously prevented from doing so. (RT 1615-1621).

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas* 388 U.S. 1487 (S.Ct. 1967).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The right[ ] ... to call witnesses in one's own behalf ha[s] long been recognized as essential to due process." *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *see also Crane v. Kentucky,*476 U.S. 683, 690, 106 S.Ct. 2142,

90 L.Ed.2d 636 (1986) (holding that "an essential component of procedural fairness is an opportunity to be heard"); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) ("The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."). *Alcal v. Woodford* 334 F.3d 862 (9th Cir. 2003).

In the case of *US v Crosby* 75 F.3d 1343, (9th Cir. 1996), the court reviewed whether it was error to exclude certain evidence, which mainly concerned third party culpability. However, part of the defense theory of admission in that case was to show the inadequacy of the police investigation. The reviewing court held that this was a legitimate defense theory that they should have been allowed to develop. In this case the defense attempted to present evidence of not just the inadequacy, but the complete lack of investigation in this case. The defense attempted to subpoena the assigned FBI case agents so they could question them about what if any investigation was done from the time the government learned of the crime, but the subpoena was quashed. The defense offered a stipulation to the effect that the government knew about the conspiracy as early as January 2006 yet did no investigation until December 2006. However that stipulation was not accepted. The defense attempted to introduce the Samsung Cooperation Agreements, to show that the government had the knowledge of the crime early on, and had the agreement that Samsung would cooperate. The defense could have then argued that the government had the ability to use Samsung employees to make pre-text phone calls, to send in FBI agents with Samsung employees, or done a host of other investigative tactics to produce specific details of the defendant's statements or actions that would have settled the issue of his state of mind conclusively. However, the ruling was that if the Samsung agreement came in, the guilty verdicts would then come in. Faced with this Hobson Choice once again, and understanding the reasoning behind the host of cases that exclude guilty verdicts for any reason but impeachment of the guilty witness, the defense made the only decision it could and did not open the door to the prejudicial evidence of the guilty verdicts. (RT 1615-1621).

"[T]he Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.' " *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984))." The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers*, 410 U.S. at 294, 93 S.Ct. 1038. " 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence....' " *Id.* (quoting *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948)).

If the government had pursued any investigative tactics early on, then the defendant's state of mind could have been conclusively proven, and the hazy, sparse memories of the witnesses would not have been the only thing the jury had to rely on. By preventing the defense from proving the lack of investigation in the case, the defense was prevented from arguing this to the jury. The defendant was not allowed to present a complete defense in violation of his constitutional rights. This is especially true when taken together with the other errors and misconduct that occurred.

3. The Defense Was Prevented From A Meaningful Cross Examination Of Government Witness Brian Lee

During both trials, the government presented witness Brian Lee, who attended many Crystal Meetings. Mr. Lee was extensively cross examined during the first trial by attorney Brian Berson. He was also cross-examined by the defendant's attorney, in a much more pointed and direct manner. During this trial, Mr. Lee's testimony concerning the defendant and his role at the meetings changed drastically from the first trial. During the cross examination, the defense attempted to demonstrate this point through impeachment of the witness with his earlier testimony. However, the defense was shut down on several instances from the thorough impeachment and cross examination that was required and which was the defendant's right. (RT 1128-1129, 1133, 1152-1153, 1166-1171).

"The Confrontation Clause of the Sixth Amendment secures a defendant's right to cross-examine government witnesses**.** *See Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Evans v. Lewis*, 855 F.2d 631, 633-34 (9th Cir.1988). Although the Confrontation Clause "does not guarantee unbounded scope in cross-examination," *United States v. Lo*, 231 F.3d 471, 482 (9th Cir.2000), it does guarantee "an *opportunity* for effective cross-examination." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)) Central to the Confrontation Clause is the right of a defendant to examine a witness's credibility. *See Davis*, 415 U.S. at 316, 94 S.Ct. 1105; *see also Boggs v. Collins*, 226 F.3d 728, 736 (6th Cir.2000) ("At the core of the Confrontation Clause is the right of every defendant to test the credibility of witnesses through cross-examination."). When exploring the credibility of a government witness who testifies against a criminal defendant at trial, it is axiomatic that the defendant may employ the witness's prior inconsistent statements in order to impeach the credibility of the witness. *See United States v. Hale*, 422 U.S. 171, 176, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975); *United States v. Bao*, 189 F.3d 860, 865-66 (9th Cir.1999); *United States v. Monroe*, 943 F.2d 1007, 1012 (9th Cir. 1991); *United States v. McLaughlin*, 663 F.2d 949, 952 (9th Cir.1981). "A prior inconsistent statement is admissible to raise the suggestion that if a witness makes inconsistent statements, then his entire testimony may not be credible." *Bao*, 189 F.3d at 866. Similarly, witnesses may be impeached "by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." *Jenkins v. Anderson*, 447 U.S. 231, 239, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980); *see also United States v. Sheffield*, 992 F.2d 1164, 1168-69 (11th Cir.1993); *United States v. Leach*, 613 F.2d 1295, 1305 (5th Cir.1980). *US v. Adamson* 291 F.3d 606, 612 (9th Cir. 2002).

The Adamson case dealt with a situation where a witness sat silent during an interview, at a time when most people would have interjected and/or volunteered information that disputed what was being said. In this case, Mr. Lee also in essence sat silent when questioned during the first trial regarding

Steven's role and actions at the meetings, despite having been given ample opportunity to provide specific information. He was being questioned by Steven's attorneys, and the focus of the questioning was clearly on Steven's role at the meetings, yet in the first trial he never provided any of the detailed information he gave at this trial. The fact that the government was not focusing on Steven's role in the first trial but was in this trial, does not in any way diminish the fact that Brian Lee's testimony in this trial was inconsistent with his testimony in the first trial. In fact, that provides an even stronger argument for the importance of allowing in the impeachment, as it supports the argument that Brian Lee tailored and manufactured his testimony in the trial against Steven Leung alone, in order to obtain the guilty verdict against him that the government was unable to secure in the first trial.

The justification for disallowing the impeachment, that the witness had been cross examined at length by another defense attorney before the questioning at issue, is also erroneous. The prior cross-examination by other defense attorneys focused on a wide range of issues of the trial. (1st Trial RT:1537-1825). In contrast, the cross examination of Brian Lee by defendant's counsel was short, to the point and clearly focused on one issue, the defendant's role and actions at the meeting. (1st Trial RT:1854-1868) Brian Lee's answers to those questions were also to the point and unequivocal, in complete contrast to his answers to questions by the prior cross examiner. The contrast between Brian Lee's testimony regarding Steven Leung from the first trial and the second was stark and compelling. (1st Trial RT 1854-1868; RT 1128-1129, 1133, 1152-1153, 1166-1171) When one reads the two transcripts of the testimony from the same witness, there is a clear implication of bias and untruthfulness. By not allowing the defense to make this contrast clear to the jury, the defendant was deprived of his constitutional right to confrontation.

4. The Defense Was Erroneously Prevented From Establishing That Witness Michael Wong Was Not A Conspirator

During the trial, a witness from AUOA, Michael Wong, testified for the government. During the cross examination of this witness, the defense attempted to elicit testimony from Mr. Wong that he personally did not participate in any price fixing. This question was asked and answered in the first

Trial, (1st Trial RT 10617-20). However, in this trial the question was objected to and the objection sustained. In a side bar the court found that since AUOA was convicted in the first trial, and Michael Wong was the only witness from AUOA who testified in that trial, the question could not be asked without allowing in the guilty verdicts from the first trial, (RT 829-831). This once again placed the defense in an untenable position, and was error.

In making its ruling, the court seemed to come to the conclusion that by convicting AUOA the first jury somehow made a finding as to Michael Wong's guilt. However, this is not supported by any evidence and even if it was true should not be relevant to this defendant's trial. During the first trial, Michael Wong testified for the government. He stated unequivocally he did not participate in price fixing. That testimony was undisputed during the trial. During the first trial the government did present evidence that Dr. Hsiung was the President of AUOA. It also presented evidence that Michael Wong worked under Dr. Hsiung. Of course no one can know why or how the first jury came to its conclusions about the guilt of AUOA. They could have found that since they believed Dr. Hsiung was guilty, and he was president of AUOA, then AUOA was also guilty. The issue here is that whatever the reason for their finding, it was a different jury in a different trial. The verdicts of that jury should in no way prevent the defense in this trial from cross examining government witnesses without fear of prejudicial evidence being presented.

The question of Michael Wong's position as a conspirator was highly relevant in this case. The government was required to prove venue again in this trial. In an attempt to bolster their lack of facts to support venue in the first trial, the government spent some time questioning Michael Wong about acts relative to AUOA business he did in the Northern District. However, in order for the jury to find venue, the government must prove there was an act committed in the district by a *conspirator*. *United States v. Svoboda*, 347 F.3d. 471, 483 (2nd.Cir. 2003). The defense attempted to show that Michael Wong was not a conspirator and therefore that acts committed by him could not support venue, but were shut down from this argument by the court's ruling. Considering the almost complete lack of evidence of venue besides Mr. Wong's testimony, his position as a conspirator or not was

crucial. The court's ruling essentially excluded this evidence and was in error.

By finding AUOA guilty, the jury in the first trial in no way answered the question of Michael Wong's position as a conspirator or not. That question was never presented to them. The jury in this case, if presented with Michael Wong's testimony, could have reasonable concluded he was one of hundreds of innocent employees of AUO and AUOA who were not involved in the conspiracy. Thus they could have concluded the government failed to prove venue as they failed to prove an act by any *conspirator* in the northern district. By preventing the defense from proving Michael Wong's non-involvement in the conspiracy without incurring the irreparable prejudice of introduction of the guilty verdicts, the court erred and when taken with all the other errors the defendant's constitutional due process rights were violated.

5. The Government Committed Misconduct During The Cross Examination of Dr. Chen

During the defense case, the defendant's direct supervisor, Dr. LJ Chen, was called to the stand. Dr. Chen had been originally charged in this case and had been represented by Brian Getz. Dr. Chen was, however, acquitted. During this trial, Dr. Chen's former attorney attended the trial on a nearly daily basis. As this court is now aware, Brian Getz is currently representing a different defendant charged in this indictment, Richard Bai. Mr. Getz was attending this trial in preparation for Mr. Bai's possible trial. Mr. Getz and Dr. Chen became friendly during the pendency of the first trial, but did not have a current attorney client relationship (Getz Declaration).

While Dr. Chen was on the stand testifying, the government improperly, and without a good faith basis, asked a question the following questions:

> Q. When you met with Mr. Leung's lawyers over the weekend, you learned that your lawyer, Brian Getz, has been in this courtroom since the first day of trial. Is that right? (RT 1979:21-23)

> Q. Dr. Chen, at some point did you learn if your lawyer, Brian Getz, has been assisting Steven Leung's lawyers in their defense in this case? (RT 1980:3-5)

These questions were improper as they assumed facts that were not in evidence and untrue and they left an impression that the defense team, Mr. Getz and the witness were in collusion, and working together. This was simply untrue and served only to prejudice the jury against Dr. Chen and to dilute the impact of his testimony for the defendant.

What made this even more egregious was the fact that the attorney for the government was well aware that Dr. Chen had been acquitted, and no longer had an attorney/client relationship with the witness. In addition, she made no attempt at all to determine if Mr. Getz' presence in the court was related to the defense team. "No attorney may ask a question if he doesn't have a good-faith basis to ask it; that is, attorneys cannot take a shot-in-the-dark approach to their questions. *Taylor*, 522 F.3d at 736." *US v Beck* 625 F.3d 410, 418 (7th Cir. 2010). Ms. Tewksbury could have easily asked Mr. Getz, or either of the defendant's attorneys about a possible connection before asking the prejudicial question in front of the jury, but she made no effort to do so. While it is true that the false impression the questions fostered was never confirmed, the bell could not be unrung and the jury was left with a wrong and harmful impression of collusion.

During this same cross examination, the government attorney asked another improper question. Before trial the court made pre-trial rulings concerning the admissibility of the convictions of the co-defendants. As of the time of Dr. Chen's testimony, the ruling excluding these convictions we still very much in effect. Despite this, the prosecution posed the following question:

> **Q**. Dr. Chen, do you believe that, if one of AUO's executives is convicted of price-fixing, that could be used by those civil plaintiffs in those lawsuits against AUO?" (RT 1972: 232-24, 1973 1, Volume 13).

The question was objected to and after a lengthy sidebar the government ultimately asked a different question. However, the misconduct lay in the asking of the improper question, not whether it was ultimately answered. During the entire trial the government attempted time after time to get before the jury the fact that AUO and some executives had already been convicted. As pointed out above, the defense vigorously opposed this at every turn. This question, however, was designed to get

the information in by an indirect manner. Dr. Chen was aware that in fact some executives had already been convicted. So to ask if he believed that a conviction of an executive would affect a civil suit, was to almost certainly elicit the fact of the convictions that had already taken place. For any non-attorney witness the logical way to answer the question would be with some form of "Since they had already been convicted I know it would or would not affect the civil suit". Clearly that is the response the government was angling for and that was improper.

While neither if these instances of misconduct would rise to the level of necessitating a new trial by themselves, when taken together with all of the errors discussed above, a new trial is required.

6. The Cumulative Effects of Errors and Misconduct Require A New Trial

"The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. *Chambers*, 410 U.S. at 298, 302-03, 93 S.Ct. 1038 (combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"). The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. *Chambers*, 410 U.S. at 290 n. 3, 93 S.Ct. 1038." *Parle v. Runnels* 505 F.3d 922, 927 (9th Cir. 2007). "(W)here the combined effect of individually harmless errors renders a criminal defense "far less persuasive than it might [otherwise] have been," the resulting conviction violates due process." *Chambers v. Mississippi*, 410 U.S. at 294, 302-03, 93 S.Ct. 1038.

In the case at bar, the numerous errors, combined with the government's misconduct in the cross examination of Dr. L J Chen, had the cumulative effect of depriving the defendant of due process and a new trial must be granted.

III. BECAUSE THE EVIDENCE FAILED TO ESTABLISH ANY COMMERCE UNDER EITHER FTAIA EXCLUSION BEYOND A REASONABLE DOUBT, ACQUITTAL, OR ALTERNATIVELY, A NEW TRIAL IS REQUIRED

The defense embraces and hereby incorporates by reference all the arguments and case law cited in Document #878, 879, 901,& 909 . The defense realizes that the court has already considered these arguments and there has been no substantial change in the history of the case. The defense wishes to preserve all these arguments for appeal, however unless requested to do so otherwise by the court, would submit these issues on the above referenced document.

IV. SINCE FOREIGN-BASED CONDUCT IS EVALUATED PURSUANT TO THE RULE OF REASON IN THE NINTH CIRCUIT, THE DEFENDANT IS ENTITLED TO A NEW TRIAL

The defense embraces and hereby incorporates by reference all the arguments and case law cited in Documents #878, 879, 901,& 909 . The defense realizes that the court has already considered these arguments and there has been no substantial change in the history of the case. The defense wishes to preserve all these arguments for appeal, however unless requested to do so otherwise by the court, would submit these issues on the above referenced document. [1]

[1] Defendant Steven Leung also renews and preserves his request for a judgment of acquittal on all conceivable grounds.

CONCLUSION

For the reasons stated, the Court should grant the defendant an acquittal under Rule 29 and/or should order a new trial under Rule 33.

DATED: April 13, 2013

Respectfully Submitted,

/s/ Dara Cashman

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