IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

REPORT AND RECOMMENDATION

RYU XIONG,

Defendant.

06-CR-72-S

REPORT

The grand jury has charged defendant Ryu Xiong in a two-count indictment with conspiracy unlawfully to import a protected raptor in violation of 18 U.S.C. § 545, and with unlawfully causing importation of wildlife from a foreign country in violation of 16 U.S.C. § 1538(c)(1) and § 1540.[1] Before the court is Xiong's motion to dismiss Count 1 of the indictment on two grounds. First, Xiong claims that the government has "pled itself out of court" by alleging facts in the indictment that show there is no conspiracy. Xiong also labels Count 1 "multiplicitous," although his real challenge is more arcane than simple multiplicity. The government disputes both contentions. For the reasons stated below, I conclude that, although Xiong makes some valid points, he is not entitled to pretrial dismissal of Count 1.

I. The Indictment

In this case the government filed a much more detailed "speaking" indictment than is its practice. A copy of the indictment is attached to this report for the reader's

[1] The conspiracy charge is a felony, the importation charge is a misdemeanor.

convenience. The charging paragraph of Count 1 alleges that in November and December of 2005, Xiong knowingly conspired with another person (identified as "Individual A") to import a Harris' Hawk into the United States without a valid foreign export permit as required by applicable CFR sections.

The government alleges that Xiong, who lives in Stevens Point, Wisconsin, saw that Individual A, in England, had listed for sale on eBay a mounted male Harris' Hawk. On November 23, 2005, Xiong won the on-line auction for the Hawk. That same evening Individual A contacted Xiong via e-mail to arrange payment. On November 29, 2005, Xiong sent Individual A £250 via Paypal and asked Individual A to ship the hawk to Xiong's residence. Individual A boxed the hawk and labeled it a "Table Decoration" with a value of £250. On the United Kingdom's customs declaration Individual A reported that the box contained a "Table Decoration" with a value of £280.

On December 1, 2005, Xiong e-mailed Individual A to ask for the shipment's tracking number. Individual A provided the number on December 2, 2005 and explained "I have put on the description Table Decoration . . .." On December 5, 2005, the hawk arrived at O'Hare Airport's International Mail Facility where the government began its investigation.[2]

Count 1 lists the overt acts in support of the conspiracy as Xiong's placing of the winning bid on November 23, 2005, Xiong's payment for the hawk on November 29, 2005

[2] Customs agents x-rayed the box, opened it, and showed the hawk to Fish and Wildlife Service agents, who obtained an anticipatory search warrant conditioned upon delivery of the Harris' Hawk to Xiong's home. *See* search warrant and affidavit issued in Case No. 05-137M-X.

(which included his request that the hawk be sent to him in Stevens Point), Xiong's e-mail to Individual A on November 29, 2005, confirming payment, and Xiong's e-mail on December 1, 2005, asking for a tracking number.

II. Adequacy of the Conspiracy Charge

Title 18 U.S.C. § 545 criminalizes the fraudulent and knowing importation of merchandise contrary to law. Section 545 also criminalizes the fraudulent and knowing receipt of unlawfully imported goods, and further provides that

> Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

But rather than charge Xiong under § 545's unlawful receipt provision, the government invoked § 371 and charged him with an importation conspiracy (with Individual A), an approach that often provokes judicial second-guessing. *See, e.g. United States v. Menting,* 166 F.3d 923, 927 (7th Cir. 1999); *United States v. Duff,* 76 F.3d 122, 124 (7th Cir. 1996).

Be that as it may, it does not appear that pretrial dismissal of the conspiracy charge is an option available to Xiong. Although F.R. Crim. Pro. 12(b)(3)(B) allows a defendant to challenge the indictment if it "fails to state an offense," Rule 12(b)(2) indicates that pretrial motions are limited to issues the court can determine without a trial of the general issue. Put another way, challenging the government's ability to prove its case is not a ground for pretrial dismissal of a charge because summary judgment does not exist in

criminal cases. *United States v. Thomas*, 150 F.3d 743, 747 (7th Cir. 1998)(Easterbrook, J., concurring); *United States v. Ladish Malting Co.,* 135 F.3d 484, 490-91 (7th Cir. 1998). As the court noted in *United States v. Yaska*, 884 F.2d 996,(7th Cir. 1989),

> [Rule] 12(b) permits pretrial motions to be raised which are capable of determination without trial of the general issue. A defense generally is capable of determination before trial if it involves questions of law rather than fact. If the pretrial claim is substantially intertwined with the evidence concerning the alleged offense, the motion to dismiss falls within the province of the ultimate finder of fact.

Id. at 1001, n.3, citations omitted. *See also United States v. Knox*, 396 U.S. 77, 83 n.7 (1969)(challenges to whether the government can prove the elements of the charge should be decided at trial, not in pretrial motions); *United States v. Apple*, 927 F. Supp. 1119, 1121 (N.D. Ill. 1996)(motion to dismiss not the vehicle for resolving whether the government can ultimately prove its case). *Cf. Costello v. United States*, 350 U.S. 359, 409 (1956)("An indictment returned by a legally constituted an unbiased grand jury . . . if valid on its face, is enough to call for trial of charge on the merits. The Fifth Amendment requires nothing more").[3]

Not so fast, counters Xiong: what if there is no set of circumstances under which the government can prove the charged conspiracy? What if, as Xiong contends, the government

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[3] An indictment is constitutionally sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charge against which he must defend, and enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *See Hamling v. United States*, 418 U.S. 87, 117 (1974). Fed. R. Crim. P. 7(c)(1) requires an indictment to "be a plain, concise and definite written statement of the essential facts constituting the offense charged." Obviously, Count 1 meets these thresholds. This alone might obviate the need for additional analysis, even though Xiong attacks the validity of the indictment from the opposite direction.

has pled itself out of court by alleging facts that, even if true, are nothing more than a buyer-seller relationship? Shouldn't Xiong not be spared the financial and emotional toll of trial, including the possibility of a conviction against the weight of the evidence? These are intriguing questions, but the answers, in this case, do not support dismissal.

Preliminarily, and favorable to Xiong, there is no doubt that the buyer-seller defense to a conspiracy charge is available in cases that do not involve drugs. *See, e.g., United States v. Shi,* 317 F.3d 715 (7th Cir. 2003)(purchaser of a counterfeit visa form charged with conspiracy). Second, a buyer and a seller engaged in an arm's length commercial transaction do not compose a "group" in the sense relevant to conspiracy law because they do not have a common aim. Absent a separate, common objective, there is no conspiracy. *Id.* at 717. If, however, there *is* an agreement to commit some other crime that is separate from the sale, even if related to it and derived from it, then there also could be an unlawful conspiracy. *Id.* at 718.

Clearly, Xiong's purchase of the hawk from Individual A, by itself, could not give rise to a conspiracy charge of any ilk. It could, however, constitute a set of overt acts in furtherance of some *other* conspiracy. Here, the government has charged that the conspiracy was to import the hawk without the required foreign export visa. Such a conspiracy could exist independently of the underlying sale. For example, had the sale occurred entirely within either the U.S. or the U.K., then there could be no conspiracy to import unlawfully; conversely, if Xiong and individual A were working together to sell the hawk to some third

party, then there could be a conspiracy without a sale. Neither the sale nor the alleged conspiracy are dependent on each other.

So there *could* be a conspiracy to import in addition to the arm's length commercial transaction. It will be the government's burden to prove it. *See, e.g, United States v. Meyer,* 157 F.3d, 1067, 1075 (7th Cir. 1998)("A conspiracy charge requires the government to prove agreement to commit a crime other than the crime that consists of the sale itself"). Xiong, of course, can rely on the presumption of his innocence and not defend at all.[4] Or, Xiong can pro-actively assert that his relationship with Individual A was limited to his purchase of the hawk and did not involve any agreement illegally to import it. In this circuit, asserting a mere buyer-seller relationship is deemed the assertion of a theory of defense. *See, e.g. United States v. Brack,* 188 F.3d 748, 760-61 (7th Cir. 1999); *Meyer,* 157 F.3d at 1074. Regardless whether this defense is characterized as a failure of proof by the government (like the good faith "defense" to a fraud charge), Xiong would not be entitled to a jury instruction on buyer/seller relationships unless he shows not only that the evidence supports the theory of defense, but also that the theory of defense is not already part of the charge. *Meyer,* 157 F. 3d at 1067.

In other words, regardless how one characterizes the substance of a buyer/seller defense, the process by which the claim is addressed is highly fact intensive and therefore

[4] "To sustain a conspiracy conviction, the government must prove that two or more persons joined together for the purpose of committing a criminal act and that the charged party knew of and intended to join the agreement." *United States v. Re,* 401 F.3d 828, 834 (7th Cir. 2005).

extraordinarily resistant to pretrial resolution without fact-finding by a jury. After all, "the line between a conspiracy and a mere buyer/seller relationship is difficult to discern." *United States v. Chavis,* 429 F.3d 662, 671-72 (7th Cir. 2005). *See also United States v. Blankenship*, 970 F.2d 283, 285-86 (7th Cir. 1992)(ruminating on what distinguishes buyers and sellers from coconspirators). Perhaps in the rarest of cases, with pellucid, one-dimensional facts, a court could dismiss a conspiracy charge pretrial on the ground urged by Xiong, but this case is not that *rara avis.* It would be inappropriate to dismiss Count 1 without allowing the government to present all of its facts to the jury.

III. "Multiplicity"

Xiong labels his second attack on Count One a multiplicity challenge, but it's really something different. Multiplicity occurs when the government charges a single offense in separate counts of an indictment. *United States v. Conley*, 291 F.3d 464, 469 n. 4 (7th Cir. 2002). To determine multiplicity, courts ask whether each count requires proof of a fact that the other does not. If one element is required to prove the offense in one count which is not required to prove the offense in the second count, then there is no multiplicity. *Id.* at 470. It is irrelevant whether the offenses arise out of the same course of conduct. *United States v. Hatchett*, 245 F.3d 625, 631 (7th Cir. 2001).

Here, Count 1 requires the government to prove an unlawful agreement but does not require it to prove Xiong's possession of the hawk, while Count 2 requires proof that Xiong

possessed the hawk but does not require proof of an agreement. Therefore, the charges are not multiplicitous.[5] The fact that the same regulatory scheme underlies both charges is a canard.

But Xiong's claim isn't really about the multiplicity of the charges actually filed, it's about the alleged unfairness of the government manipulating § 545 to charge him with a felony. Xiong contends that the government cannot use § 545, a generic anti-smuggling statute, to charge him with conspiracy to import wildlife in violation of a misdemeanor wildlife protection statute that prohibits exactly the same conduct. *See* Defendant's Brief in Support, dkt. 11, at 4-5. Xiong argues that the applicable CFR sections (Part 23 of 50 CFR) and statutes (Chapter 35 of 16 U.S.C.) were intended by Congress to form "a detailed, comprehensive treatment of a highly technical subject, and together, provide a very specific definition of, and punishment for, Xiong's offense." *Id.* at 7. According to Xiong, this tight, technical statutory scheme by virtue of its very existence must pre-empt any attempt to invoke the felony anti-smuggling statute, 18 U.S.C. § 545, which was enacted about 25 years before the Endangered Species Act. As a corollary to this, Xiong views the government's charging decision as impermissible bootstrapping: § 545 prohibits importation in violation of the law; here, the laws allegedly violated are regulations forbidding unlawful importation of protected wildlife.

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[5] If the government had charged this case as suggested *supra* at 3, then it would have been limited to a one-count indictment. It didn't, so it isn't. But even if it had, Xiong's actual fairness argument would apply to such a charge with equal force.

Xiong poses a valid question: if Congress's carefully constructed wildlife protection plan punishes illegal importation of a mounted hawk as a misdemeanor, then why should a federal prosecutor be allowed to transmogrify this conduct into a felony by invoking a generally applicable importation statute that relies on the underlying wildlife misdemeanor to establish criminality? Unfortunately for Xiong, the answer to this question appears to be: "because he can."

As the government notes, the only court to address the applicability of § 545 to wildlife smuggling breezed past it with the observation that

> It is well settled that no inherent difficulty exists in Congress' criminalizing the same conduct under two different statutes, one of which provides for misdemeanor and the other felony punishment. And, we can discern no significant difference between the two statutes which are independently violated by the same conduct and two statutes which are both violated because one statute serves as a predicate to the violation of the other.

United States v. Mitchell, 39 F.3d 465, 472 (4th Cir. 1994), citing *United States v. Batchelder*, 442 U.S. 114 (1979).

The court in *Mitchell* noted that there is a strong presumption against congressional repeal of a statue by implication. *Id.* The court then examined legislative history and compared the statutes to each other to conclude that the Endangered Species Act and the Agricultural statute did *not* repeal by implication the applicability of § 545 to defendant's importation of wildlife without the permits required by the CFR. *Id.* at 472-74.

Xiong characterizes this 2-1 panel decision as narrow-minded and short-sighted, although he does not adopt the dissent's argument that § 545 is ambiguous (*see* 39 F.3d at 476 (Murnaghan, J., dissenting). Xiong, however, has no other case law that directly supports his position, and the Supreme Court's decision in *Batchelder*, cited by the majority in *Mitchell,* does not help him.

In *Batchelder* the Court noted that Congress had enacted two redundant felon-with-a-gun statutes, one providing a five-year maximum sentence, the other providing a two-year maximum. The question was whether a defendant convicted of the offense carrying the greater penalty could be sentenced only under the more lenient provision when his conduct violated both statutes. The Court of Appeals for the Seventh Circuit had ruled that the later-enacted statute with the lighter penalty overrode the older, harsher statute; the Supreme Court reversed. Although the facts in *Batchelder* did not present the sort of bootstrapping of which Xiong complains here, the Court's holding provides him no support:

> That this particular conduct may violate both Titles does not detract from the notice afforded by each. Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater degree than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the due Process Clause are satisfied.
>
> The Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.

442 U.S. at 123-24.

The Court saw no impermissible usurpation by the Executive Branch of Congress's prerogatives, since Congress enacted both statutes, and found that a prosecutor's discretion in choosing which statute to charge did not, without more, violate either the Equal Protection or the Due Process Clause. *Id.* at 125-26.

To similar effect, in *United States v. Rietzke*, 279 F.3d 541 (7th Cir. 2002), the court rejected an argument like Xiong's made by a federally licensed firearms dealer. There, the defendant argued that 18 U.S.C. § 924(a)(3), a misdemeanor statute applicable only to dealers, was intended by Congress to punish dealers less severely than other defendants subject to § 924(a)(1)(A), which punished the same violations committed by other people as felonies. According to the defendant, the existence of the misdemeanor statute evinced Congress's intent to limit prosecutorial discretion in selecting under which provision of the statute to prosecute licensed firearms dealers. *Id.* at 544. The court rejected this argument, noting that it was not up to the defendant to choose the statute under which he would be charged, because when multiple criminal statutes apply, the prosecutor has discretion to choose how to proceed. *Id.* at 545-46.

Rietzke is not identical to Xiong's situation because the statute actually invoked by the government carried a higher level of *mens rea,* and because the court claimed to be able to discern the clear intentions of the drafters of the statute. *Id*. at 546. So, it is at least theoretically possible that the government has overreached in Xiong's case. But *United States v. Mitchell* has been on the books for almost twelve years and Congress has yet to close any

alleged loophole in its statutory scheme, while other courts have allowed § 545 prosecutions against wildlife importers to proceed without comment. *See, e.g., United States v. Koczuk*, 252 F.3d 2001 (2nd Cir. 2001); *United States v. Asper*, 2000 WL 821714 (N.D. Ill. 2000). Whatever equities of Xiong's argument, they do not appear to rise to a level that establishes unconstitutional overreaching by the government that would require this court to dismiss Count 1.

Finally, to the extent the equities are relevant at all to the analysis, I note that federal agents learned after executing their search warrant that Xiong has illegally imported mounted birds several times previously. The government's charging decision reflects a view that the available wildlife importation misdemeanors did not adequately capture the seriousness of Xiong's conduct. This is not a decision subject to judicial review.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Ryu Xiong's motion to dismiss Count 1.

Entered this 7th day of July, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

July 7, 2006

David Reinhard
Assistant U.S. Attorney
P.O. Box 1585
Madison, WI 53701-1585

Alan G. Habermehl
Kelly & Habermehl, S.C.
145 West Wilson Street
Madison, WI 53703

Re: United States v. Ryu Xiong
Case No. 06-CR-072-S

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before July 17, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 17, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable John C. Shabaz, District Judge