

JUL - 9 2004

For The Northern Mariana Islands
By _____
(Deputy Clerk) 

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,)
)
Plaintiff)
)
v.)
)
EDWARD MENDIOLA)
FLEMING and HUANG, Zhong,)
)
Defendants)
_____)

Criminal No. 04-00022

ORDER DENYING MOTION
TO DISMISS COUNT II OF
THE INDICTMENT

THIS MATTER came before the court on Thursday, July 8, 2004, for hearing of defendant Fleming's motion to dismiss count II of the indictment. Defendant Huang joined in the motion. Plaintiff appeared by and through its attorney, Assistant U.S. Attorney Jamie D. Bowers; defendant Fleming appeared personally and by and through his attorney, Bruce Berline; defendant

1 Huang appeared personally and by and through his attorney, Perry B. Inos.

2 THE COURT, having considered the written and oral arguments of
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4 counsel, denies defendants' motion for the following reasons.

5 Defendants moved to dismiss count II of the indictment, which alleges
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7 attempted alien smuggling for financial gain in violation of 8 U.S.C. §§
8 1324(a)(1)(A)(I), 1324(a)(1)(B)(ii), and 1324(a)(1)(A)(v)(ii). Defendants argue that
9
10 they cannot be found guilty of attempted alien smuggling because the
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12 indictment failed to allege an essential element: that the boat on which they
13
14 were traveling entered United States territorial waters; i.e. the waters of the U.S.
15 Territory of Guam.¹ In support of their position, defendants argue the
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17 continuing vitality of Yenkichi Ito v. United States, 64 F.2d 73 (9th Cir.), *cert.*
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19 *denied*, 289 U.S. 762, 53 S.Ct. 796, 77 L.Ed. 1505 (1933). There, the Ninth
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21 Circuit held that defendant could not be convicted of attempted alien smuggling
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23 because he had been seized outside U.S. territorial waters and no illegal activity

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25 If the court properly understood defendants during oral argument, their
26 position is that the crime of alien smuggling cannot be committed until an alien
steps onto American soil. They also seemed to argue that the crime of
attempted alien smuggling is committed once an alien enters United States
territorial waters and ends once the alien steps ashore. No support was offered
for this interpretation of the law and current case law would seem to reject
defendants' position. See United States v. Liang, *infra*.

1 had occurred within the jurisdiction of the United States. As discussed below,
2 the court does not find Yenkichi Ito binding on these facts.

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4 The indictment alleges that defendants entered into a conspiracy to
5 smuggle, and attempted to smuggle, four Chinese nationals from the
6 Commonwealth of the Northern Mariana Islands to the U.S. Territory of
7 Guam.² There is no dispute that the boat upon which they were traveling never
8 entered Guam's (and hence the United States') territorial waters. Plaintiff
9 responds that actual physical entry into the United States is unnecessary to
10 obtain a conviction for attempted alien smuggling for financial gain and that
11 evidence showing that defendants took a substantial step³ toward completing the
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17 The Commonwealth of the Northern Mariana Islands controls its own
18 immigration pursuant to the Covenant. See "Covenant to Establish a
19 Commonwealth of the Northern Mariana Islands in Political Union with the
20 United States of America," Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat.
21 263 (codified as amended at 48 U.S.C. § 1801 (2000)) (hereinafter "Covenant").
22 Presumably, because it would be extremely difficult for the Chinese nationals to
23 seek asylum or other protections offered by United States immigration laws
24 while in the Commonwealth, they were allegedly attempting to enter the
25 nearest U.S. Territory---Guam---to avail themselves of the U.S. immigration and
26 naturalization process.

3

25 An attempt conviction requires evidence that the defendant
26 intended to violate the statute, and that he took a substantial step
toward completing the violation. See United States v. Acuna, 9 F.3d

1 crime of alien smuggling would be sufficient to obtain a conviction for attempt.

2 The court agrees.

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4 A plain reading of the current version of the statutes which defendants
5 challenge supports the view that actual, physical entry into the United States is
6 not an element of the crime of attempted alien smuggling for financial gain.
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8 Ninth Circuit case law since the 1986 amendments to these statutes is in accord.
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10 In United States v. Gonzales-Torres, 309 F.3d 594, 599 (9th Cir. 2002), the court
11 stated that entry is not an element of the crime of smuggling aliens to the
12 United States. The court noted that Congress, expressly to overrule case law
13 that required entry to sustain a smuggling conviction, amended the law to
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17 1442, 1447 (9th Cir. 1993). To constitute a substantial step, the
18 defendant's actions must go beyond mere preparation, and must
19 corroborate strongly the firmness of defendant's criminal intent. *Id.*
20 "The conduct must be necessary to the consummation of the crime
21 and of such a nature that a reasonable observer, viewing it in
22 context, could conclude beyond a reasonable doubt that it was
23 undertaken in accordance with a design to violate the statute." *Id.*
24 * * * Even when the defendant's intent is clear, his actions must
25 "cross the line between preparation and attempt" by unequivocally
26 demonstrating that the crime will take place unless interrupted by
independent circumstances. United States v. Still, 850 F.2d 607, 609
(9th Cir. 1988), *cert. denied*, 489 U.S. 1060, 109 S.Ct. 1330, 103
L.Ed.2d 598 (1989).

United States v. Nelson, 66 F.3d 1036, 1042 (9th Cir. 1995).

1 require only that an alien be “[brought] to” the United States, rather than be
2 “[brought] into” the United States. *Id.* For this reason—the change in the law—
3 the court finds Yenkichi Ito inapplicable.⁴ It is clear that, today, the attempt
4 and the illegal acts can occur outside the United States. In United States v.
5 Liang, 224 F.3d 1057, 1059-60 (9th Cir. 2000), the court in *dicta* stated:
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8 The Government argues that Zhou began to commit the offense of
9 attempted alien smuggling upon leaving China, and continued to
10 commit it until his apprehension off the coast of Guam. Zhou
11 argues that he could not have committed the offense of alien
12 smuggling until he actually reached Guam[.] * * *

13 The Government’s position is the better one. There is substantial
14 support in more recent Ninth Circuit case law and elsewhere that
15 the offense of attempted alien smuggling can be committed extra-
16 territorially and continue into Guam.

17 Analogizing to the facts alleged in the instant proceeding, the better view
18 is that defendants began to commit the offense of attempted alien smuggling
19 while in the Commonwealth when they began substantial preparations and then
20 left Tinian and the crime continued until their trip was “interrupted by
21 independent circumstances,” i.e. the storm at sea. See United States v. Still,

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25 Although Yenkichi Ito has never been expressly overruled, the court finds
26 it significant that it has found no case after the law was amended in 1986 which
relies on Yenkichi Ito v. United States.

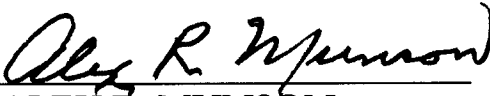
1 *supra.* As alleged, and if proved, substantial steps amounting to an attempt
2 occurred on land and within the territorial waters of the Northern Marianas.
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4 Accordingly, the court rules that plaintiff need not prove actual, physical
5 entry into Guam as an element of the crime of attempted alien smuggling for
6 financial gain.
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8 FOR THE FOREGOING REASONS, defendant's motion to dismiss
9 count II is denied.
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11 IT IS SO ORDERED.

12 DATED this 9th day of July, 2004.
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19 ALEX R. MUNSON
20 Judge
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