

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
4

5 -----
6
7 August Term, 2006
8

9 (Argued: November 15, 2006 Decided: January 30, 2007)

10 Docket No. 06-1048-cr
11

12 ----- X
13

14 UNITED STATES OF AMERICA,
15

16 Appellee,
17

18 - against -
19

20 TIN YAT CHIN,
21

22 Defendant-Appellant.
23

24 ----- X
25

26 Before: McLAUGHLIN and SACK, Circuit Judges, and
27 RAKOFF, District Judge.
28

29
30 Appeal from a judgment of the United States District Court
31 for the Eastern District of New York (Block, J.) convicting the
32 defendant, following a jury trial, of one count of impersonating
33 an employee of the United States and three counts of tax evasion,
34 and sentencing him, inter alia, to 135 months' imprisonment and
35 payment of \$989,567 in restitution.
36

37 AFFIRMED.
38

39 MARGO K. BRODIE, Assistant United States
40 Attorney (Roslynn R. Mauskopf, United
41 States Attorney for the Eastern District
42 of New York, Peter A. Norling, Assistant
43 United States Attorney, on the brief),
44 Brooklyn, New York, for Appellee.
45

46 DIARMUID WHITE, White & White, New York, New

* The Honorable Jed S. Rakoff, United States District Judge
for the Southern District of New York, sitting by designation.

1 York (Brendan White on the brief), for
2 Defendant-Appellant.

3 RAKOFF, District Judge.

4 The Government alleged that Tin Yat Chin, using the names
5 Mok Wah and Tan C. Dau, defrauded Chinese Americans of more than
6 a million dollars by posing as an employee of the agency once
7 known as the Immigration and Naturalization Service ("INS") who
8 could, for a fee, obtain work visas authorizing relatives living
9 in China to immigrate to the United States. On this basis, a
10 grand jury charged Chin with one count of impersonating a federal
11 employee in violation of 18 U.S.C. § 912, and, because Chin
12 failed to report the proceeds of the fraud, with three counts of
13 tax evasion in violation of 26 U.S.C. § 7201. Chin, for his
14 part, maintained that this was a case of mistaken identity, that
15 he had no involvement in the fraud, and that he realized no
16 income therefrom.

17 In January 2003, a jury convicted Chin of all four counts.
18 On appeal, this Court reversed on the ground that the district
19 court erred in refusing to allow Chin to introduce in evidence
20 certain credit card receipts that tended to show that Chin was in
21 New York during a period when the Government alleged that
22 defendant was in China effecting the fraud. See United States v.
23 Tin Yat Chin, 371 F.3d 31 (2d Cir. 2004). On retrial, the
24 Government called multiple witnesses who testified, inter alia,
25 that they met Chin in China during the period in question, where

1 he was posing under assumed names as a corrupt INS employee. As
2 part of the defense case, Chin introduced the New York credit
3 card receipts that had been excluded from the first trial, as
4 well as the testimony of a handwriting expert, Roger Rubin, who
5 opined that the signatures on the credit card receipts were
6 Chin's. Over objection, the Government was then permitted to
7 present on rebuttal the testimony of its own handwriting expert,
8 John Sang, who opined that many of the receipts were probably not
9 signed by Chin. The jury returned a verdict of guilty on all
10 four counts.

11 On this appeal from the second conviction, Chin's most
12 colorable claim concerns the Government's failure to disclose its
13 intent to call Sang, and anything about his expert testimony,
14 until the day before the defense concluded its case. Well before
15 the start of the second trial, the defense had indicated its
16 intent to call Rubin as its handwriting expert and had made the
17 disclosures regarding his testimony required by Rule 16(b)(1)(C)
18 of the Fed. R. Crim. P. The Government, for its part, had
19 already retained Sang as its expert and had obtained from him an
20 opinion challenging the authenticity of Chin's signatures on the
21 credit card receipts. Yet, knowing full well that the
22 authenticity of these signatures would be a hotly contested issue
23 in the case, the Government chose to remain entirely silent,
24 until one day before the end of the defense case, both as to the

1 fact that it had retained a handwriting expert and as to the
2 testimony he was expected to give.

3 At a minimum, this was a sharp practice, unworthy of a
4 representative of the United States. The Government seeks to
5 justify its surprise move by noting that Rule 16 only requires it
6 to make pre-trial disclosures with respect to expert testimony
7 that it intends to elicit in "its case-in-chief," Rule 16
8 (a)(1)(G) Fed. R. Crim. P. See, e.g., United States v. Frazier,
9 387 F.3d 1244, 1269 (11th Cir. 2004). But it does not follow
10 that the Government has carte blanche in every case to spring a
11 surprise expert witness on an unsuspecting defendant who has long
12 since disclosed his own expert's prospective testimony. For no
13 defense counsel, no matter how experienced, can fairly be asked
14 to cross-examine on a moment's notice a witness who comes clothed
15 with all the impressive credentials and specialized training of
16 an expert and whose opinions and methods with respect to the case
17 at hand have been subject to no prior scrutiny. In an
18 appropriate case, such an ambush might well violate due process.
19 Cf. Wardius v. Oregon, 412 U.S. 470, 476 (1973) ("It is
20 fundamentally unfair to require a defendant to divulge the
21 details of his own case while at the same time subjecting him to
22 the hazard of surprise concerning refutation of the very pieces
23 of evidence which he disclosed to the State.").

24 Here, however, the Government's nondisclosure, though

1 regrettable, did not rise to a due process violation. For the
2 able district court, although overruling Chin's objection to the
3 Government's calling Sang on rebuttal, then gave defense counsel
4 what he needed: time to prepare to cross-examine Sang.
5 Specifically, the district court granted the defense a one-day
6 continuance for this purpose. Although Chin now claims he needed
7 more than one day, he made no claim at the time that one day was
8 insufficient to prepare his cross-examination.¹ Furthermore, the
9 district court could reasonably infer that defense counsel, in
10 preparing his own handwriting expert to testify, had sufficiently
11 immersed himself in the technicalities of handwriting analysis
12 that he could adequately evaluate and prepare to combat Sang's
13 testimony over the one-day break. Indeed, even on this appeal,
14 Chin has proved unable to specify with any particularity how he
15 was prejudiced by not receiving a longer continuance.
16 Accordingly, we conclude that, thanks to the prudence of the
17 district court in granting the continuance, Chin was not deprived
18 of due process.

19 Chin's other points on this appeal may be disposed of
20 briefly. Chin's claim that the evidence showed only that Chin
21 purported to be a former INS employee (which he was), rather than

¹Chin did request more time to call still another expert to testify that handwriting analysis was not an exact science, but the district court properly denied this vague and untimely request as not likely to be helpful to the jury.

1 a present INS employee (which he was not)² is directly
2 contradicted by the testimony of Li Zhen Zeng, who testified that
3 Chin showed her a badge and stated that he "currently" worked at
4 INS. Further, several witnesses testified that Chin simply told
5 them that he "worked" at the INS, thereby implying that he
6 currently worked at the INS.

7 Chin also claims that his sentence of 135 months'
8 imprisonment -- 15 more months than that imposed by the different
9 district judge who conducted the first trial -- was "vindictive."
10 It is well settled that due process of law "requires that
11 vindictiveness against a defendant for having successfully
12 attacked his first conviction must play no part in the sentence he
13 receives after a new trial." North Carolina v. Pearce, 395 U.S.
14 711, 725 (1969). The goal of the principles established in
15 Pearce, however, "is to prevent the evil of vindictiveness of a
16 sentencing judge, and not simply enlarged sentences after a new
17 trial." United States v. Atehorvta, 69 F.3d 679, 683 (2d Cir.
18 1995) (internal quotation marks omitted). A second judge seems an
19 unlikely candidate for a charge of vindictiveness based on the

² 18 U.S.C. § 912 only applies to persons impersonating a present government employee. Specifically it provides that: "Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both."

1 overturning on appeal of a judgment previously entered by another
2 judge. Id. But in any event, when a new trial is held before a
3 different judge, he or she is of course expected to exercise
4 discretion entirely independently from the judge who conducted the
5 first trial. The fact that the second judge did so here is,
6 alone, no indication that he was improperly motivated in
7 determining the sentence. Moreover, the district judge at the
8 second trial specifically found that Chin had solicited false
9 trial testimony at the second trial from his wife and brother, and
10 thereby attempted to obstruct justice, warranting a two-point
11 enhancement. This added factor, which was amply warranted by the
12 evidence, more than justified the increased sentence.

13 Finally, Chin's claim that the district court's determination
14 of the restitution amount under the Mandatory Victim Restitution
15 Act, 18 U.S.C. §§ 3663A et seq., violates his alleged
16 constitutional right to have this determination made by a jury is
17 foreclosed by our holding to the contrary in United States v.
18 Reifler, 446 F.3d 65, 118 (2d Cir. 2006) ("[T]he Booker-Blakely
19 principle that jury findings, or admissions by the defendant,
20 establish the 'maximum' authorized punishment has no application
21 to [Mandatory Victim Restitution Act] orders of restitution.").

22 Accordingly, the judgment of the district court is hereby
23 affirmed in all respects.