[ms-0494.009.005.004]

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF, VS. TELINK, INC., ET AL., DEFENDANTS.	NO. 84-0958-G SAN DIEGO, CALIFORNIA OCTOBER 6, 1988 9:15 O'CLOCK A.M.

TRANSCRIPT OF PROCEEDINGS

BEFORE HONORABLE EARL B. GILLIAM, JUDGE AND JURY

REPORTED BY: T. PAT STROBEL
CSR NO. 621
OFFICIAL REPORTER

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1 SAN DIEGO, CALIFORNIA, THURSDAY, OCTOBER 6, 1988, 9:15 A.M.
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3 THE CLERK: NO. 1 ON CALENDAR. FEDERAL CASE
4 NO. 84-0958-G, UNITED STATES OF AMERICA VS. BOBBY HENDRIX,
5 ET AL., FOR FURTHER PROCEEDINGS ON MOTIONS.
6 THE COURT: GOOD MORNING. GO THROUGH THE
7 APPEARANCES, PLEASE.
8 MR. SCHATZ: GOOD MORNING, YOUR HONOR. CHRIS
9 SCHATZ APPEARING ON BEHALF OF BOBBY HENDRIX, WHO IS NOT
10 BEFORE THE COURT. THERE IS A WAIVER ON FILE.
11 MR. BOISSEAU: GOOD MORNING, YOUR HONOR. GEORGE
12 BOISSEAU ON BEHALF OF MR. GONZALES, WHO IS ALSO NOT
13 PRESENT. THERE IS A WAIVER ON FILE.
14 ALSO, I'M MAKING A SPECIAL APPEARANCE FOR MR.
15 ANDREW STEIN, WHO REPRESENTS MR. PALMER. THERE IS A WAIVER
16 ON FILE FOR MR. PALMER. HE'S NOT PRESENT.
17 THE COURT: MR. MITCHELL, MR. CONTE REPRESENTING
18 HIM.
19 MR. CONTE: GOOD MORNING, YOUR HONOR. MARIO
20 CONTE, FEDERAL DEFENDERS, FOR ABRAHAM STEIN, WHO IS PRESENT
21 IN COURT.
22 I'LL MAKE A SPECIAL APPEARANCE FOR JOHN MITCHELL,
23 YOUR HONOR, ON BEHALF OF MR. JAMES LINDER. THERE IS A
24 WAIVER ON FILE FOR HIM.
25 THE COURT: MR. GREGORCICH.

1 MR. GREGORCICH: GOOD MORNING, YOUR HONOR. FRANK
2 GREGORCICH FOR HENRY RICHTER, WHO IS NOT PRESENT. THERE
3 IS A WAIVER ON FILE.
4 IT WILL BE NECESSARY FOR ME TO LEAVE BRIEFLY
5 THIS MORNING, YOUR HONOR. MR. BILL BEARD WILL BE APPEARING
6 ESPECIALLY FOR ME AT THAT TIME.
7 THE COURT: MR. RAGEN.
8 MR. RAGAN: FRANK RAGEN ON BEHALF OF JERRY
9 CAMPBELL. HE'S PERSONALLY PRESENT, YOUR HONOR.
10 THE COURT: MR. STEVEN HURST.
11 MR. HURST: YES, FOR MR. SCHREIBER, YOUR HONOR,
12 WHO IS NOT PRESENT. THERE IS A WAIVER ON FILE.
13 THE COURT: MR. VECCHIONE.
14 MR. VECCHIONE: FRANK VECCHIONE ON BEHALF OF
15 DON WOODAMAN, WHO IS PRESENT.
16 MR. BEARD: J. WILLIAM BEARD ON BEHALF OF MR.
17 SAGE. THERE IS A WAIVER ON FILE.
18 THE COURT: MR. SCHATZ, MR. VECCHIONE, DID YOU
19 HAVE ANYTHING ELSE YOU WISH TO OFFER RELATIVE TO THE MOTION?
20 I CALL IT THE MC NALLY THEORY.
21 MR. SCHATZ: NOTHING FURTHER, YOUR HONOR.
22 MR. VECCHIONE: NO, YOUR HONOR.
23 THE COURT: MR. LEWIS?
24 MR. LEWIS: NO, YOUR HONOR.
25 THE COURT: THE COURT GOES BACK, TO START WITH,

1 RULE 7 DEALING WITH THE INDICTMENT AND INFORMATION IN
2 THE FEDERAL CRIMINAL CODE.
3 RULE 7(C)(1) SETS FORTH:
4 "IN GENERAL. THE INDICTMENT OR THE INFORMATION
5 SHALL BE A PLAIN, CONCISE AND DEFINITE WRITTEN STATEMENT
6 OF THE ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED."
7 I GO TO RULE 7(E), AND THE ONLY PLACE IT SPEAKS
8 IN THAT SECTION ABOUT AN AMENDMENT IS:
9 "THE COURT MAY PERMIT AN INFORMATION TO BE AMENDED
10 AT ANY TIME BEFORE VERDICT..."
11 THE LAW DOES NOT ALLOW AN INDICTMENT TO BE AMENDED.
12 THE LAW IS CLEAR, FROM THE SUPREME COURT CASE
13 OF MC NALLY VS. U.S., THAT INTANGIBLE RIGHTS WILL NOT
14 BE PROTECTED BY THE FEDERAL LAW THAT DEALS WITH MAIL FRAUD
15 PER SE, AND THAT THERE MUST BE A PROPERTY RIGHT. I THINK
16 THAT'S QUITE CLEAR TO EVERYONE.
17 THE COURT HAS SEEN THE CASES SUBSEQUENT TO THAT,
18 INCLUDING CARPENTER, AND THE 9TH CIRCUIT RECENTLY SENT
19 OUT WITH A DECISION IN SEPTEMBER, 1988, INDICATING THAT
20 PROPERTY RIGHTS WILL BE PROTECTED PER THE MC NALLY DOCTRINE.
21 THE QUESTION IN THIS CASE IS WHETHER OR NOT
22 THE GOVERNMENT HAS ALLEGED IN ITS INDICTMENT, AS RE RULE
23 7 REQUIRES, A STATEMENT OF THE ESSENTIAL FACTS CONSTITUTING
24 THE OFFENSE OR OFFENSES OF THE CHARGE.
25 THE GOVERNMENT'S INDICTMENT MUST RISE OR FALL

1 ON BASICALLY THOSE ALLEGATIONS CONTAINED IN COUNTS 7 THROUGH
2 35. AND I GO THROUGH THE REDACTED INDICTMENT SUBMITTED
3 BY THE GOVERNMENT, AND MORE PRECISELY TO LINES 19 THROUGH
4 25. I WONDER IF ALL OF YOU HAVE THAT.
5 MR. CONTE: SORRY, YOUR HONOR.
6 THE COURT: THE REDACT INDICTMENT THAT THE
7 GOVERNMENT PRESENTED. PAGE 1, LINE 20 THROUGH 26, AND
8 I START AT LINE 18. THAT'S THE PARAGRAPH STARTING OUT
9 WITH "THE SCHEME."
10 THE WORDS THAT ARE IMPORTANT TO THE COURT,
11 STARTING ON LINE 19, "DEVISED AND INTENDED TO DEVISE A
12 SCHEME AND ARTIFICE TO DEFRAUD AND OBTAIN MONEY AND
13 PROPERTY AND DEPRIVE GOVERNMENTAL ENTITIES OF THE HONEST
14 AND FAITHFUL SERVICES OF EMPLOYEES, AGENTS AND CONSULTANTS
15 BY MEANS OF FALSE AND FRAULENT REPRESENTATIONS," ET CETERA.
16 NOW, IT GOES WITHOUT SAYING THAT AN ESSENTIAL
17 FACT THAT THE INDICTMENT SHOULD CONTAIN -- AND THE COURT
18 WOULD MAKE THIS FINDING, GOING WITH THE REASONING THAT
19 THE COURT FINDS TO BE SOUND REASONING -- IF I CAN FIND
20 THE NAME OF THE CASE HERE. MORE READILY REFERRED TO AS
21 ZAUBER, WHICH IS OUT OF THE DISTRICT COURT OF NEW JERSEY,
22 APRIL 13TH, 1988.
23 NOW, THE ESSENTIAL ELEMENTS OF THE ALLEGATION
24 WOULD BE THAT THE GOVERNMENT SUFFERED A LOSS OF MONEY
25 OR PROPERTY, AND THAT WOULD BE PER THE MC NALLY DECISION.

1 I MIGHT, IN TALKING ABOUT THE INDICTMENT -- DOES
2 IT GET WORSE, THAT ALLEGATION, EITHER PRECISELY, AND THE
3 ANSWER WOULD BE, NO.
4 DOES IT SET THAT OUT BY INNUENDO, AND I LOOKED
5 AT THE CASE OF ZAUBER, AND I GO, MORE PARTICULARLY, FOR
6 FURTHER GUIDANCE, TO WHAT MY CASE IS, PAGE 45 OF THAT
7 OPINION, AND THIS TYPE OF LANGUAGE SET FORTH AT D.
8 THE STATEMENT, BASICALLY, ABOUT THE MANNER AND
9 MEANS SET FORTH IN THE INDICTMENT OF HOW THE DEFRAUDING
10 TOOK PLACE, WHICH WAS ASCEPTIC OF THE MAIL FRAUD.
11 I GO TO MANNERS AND MEANS, AND THERE IS A LOWER
12 CASE A, B, C, D, AND I GO TO D.
13 THE "BACK-DATED LETTER, 'WAS THE FURTHER PART
14 OF THE CONSPIRACY THAT DEFENDANTS AND THE CO-CONSPIRATORS'
15 WOULD AND DID CAUSE OMNI TO ISSUE LOANS OF PENSION FUND
16 ASSETS IN EXCESS OF TEN PERCENT LENDING LIMIT WITHOUT
17 PRIOR APPROVAL FROM THE PENSION FUND. IN ORDER TO CONCEAL
18 SAID MISCONDUCT FROM THE 'TRUSTEES,' DURING APPROXIMATELY
19 JANUARY OF 1984, THE DEFENDANTS, FRIEDLAND AND ZAUBER,
20 AND THEIR CO-CONSPIRATOR WOULD AND DID FABRICATE A LETTER,
21 ON PENSION FUND LETTERHEAD, WHICH WOULD BE AND WAS BACK-
22 DATED TO 'DECEMBER 9, 1982.'"
23 IT GOES ON TO DESCRIBE OTHER THINGS.
24 THEN ON THE E PART IT SPEAKS IN TERMS OF "HOLD
25 BACK ACCOUNTS AND DELINQUENT LOANS." IT WAS A FURTHER

1 PART OF THAT CONSPIRACY THAT FRIEDLAND AND HIGGINS AIDED
2 AND ABETTED THE TRUSTEES, AND "WOULD AND DID CONCEAL THAT
3 MORTGAGE PAYMENTS ON VARIOUS LOANS OF PENSION FUND ASSETS
4 WERE DELINQUENT AND THAT SAID LOANS WERE IN DEFAULT AS
5 FOLLOWS:"
6 SO NOW, I MENTION THOSE PARAGRAPHS BECAUSE BY
7 INNUENDO THAT CONDUCT JEOPARDIZES THE PENSION FUND, OR
8 ITS SECURITY.
9 THIS COURT, IN CONSIDERING THAT, IS STILL IMPRESSED
10 BY THE FACT THAT THERE WAS NO ALLEGATION THAT THE PENSION
11 FUND SUFFERED A LOSS OF PROPERTY IN THE INDICTMENT.
12 AND I LOOKED AT THAT CASE FOR GUIDANCE, AND
13 I REFER, OR MAKE REFERENCE TO, IN THE OLD INDICTMENT,
14 THE ORIGINAL INDICTMENT. AT PAGE 41 THERE'S A PARAGRAPH
15 LABELED 91.
16 WHAT I WAS ENDEAVORING TO FIND WAS SOME LANGUAGE
17 THAT WOULD AMOUNT TO, OR BE TANTAMOUNT TO OR EQUAL TO
18 LANGUAGE THAT INDICATED THAT THE COUNTY SUFFERED A LOSS
19 OF PROPERTY OR MONEY.
20 PARAGRAPH 91 REFERS TO -- "ON OR ABOUT AUGUST
21 10, 1981, DEFENDANT SCHREIBER PREPARED A MEMORANDUM FOR
22 DISTRIBUTION TO DEFENDANTS RICHTER AND CAMPBELL AND THEREIN
23 EXPLAINED THAT DEFENDANT GONZALES HAD APPROVED INFLATING
24 A PROPOSED TCI CONTRACT WITH THE COUNTY OF SAN DIEGO
25 BY $27,900 IN ORDER TO PAY A "FINDER'S FEE' TO DEFENDANT

1 A.H. STEIN."

2 THE NEXT PARAGRAPH WOULD BE PARAGRAPH 97, AT

3 PAGE 42, AND THEREIN THE LANGUAGE IS AS FOLLOWS:

4 "ON OR ABOUT AUGUST 20TH, 1981, DEFENDANTS RICHTER,

5 CAMPBELL, WOODAMAN AND ST. PIERRE INFLATED THE $279,000

6 FEE TO BE CHARGED THE COUNTY OF SAN DIEGO FOR CONSULTING

7 WORK TO $378,000, AFTER LEARNING THAT THE COUNTY HAD

8 $378,000 AVAILABLE TO PAY FOR CONSULTING WORK."

9 IN THE REDACT INDICTMENT, I CALL YOUR ATTENTION

10 TO PARAGRAPH 35 ON PAGE 4, AND THE LANGUAGE IS THUS:

11 "DEFENDANT GONZALES, DIRECTOR OF GENERAL SERVICES,

12 CAUSED PUBLIC FUNDS OF THE COUNTY OF SAN DIEGO TO BE USED

13 TO MAKE SECRET PAYMENTS TO DEFENDANT A. H. STEIN IN

14 CONNECTION WITH THE AWARD OF TELECOMMUNICATION CONSULTING

15 PROCESS WITH THE COUNTY OF SAN DIEGO."

16 IF I MEASURED THE LANGUAGE OF THOSE THREE

17 SECTIONS, PARAGRAPHS 91, 97 AND 35, AS I HERETO REFERRED

18 TO, TO THOSE THAT I READ TO YOU FROM THE ZAUBER DECISION,

19 IT WOULD SEEM THAT THE LANGUAGE SHOULD BE APPROXIMATELY

20 THE SAME. THERE IS, POSSIBLY, AN INNUENDO THAT THE COUNTY

21 WOULD HAVE LOST SOME MONEY. BUT THIS CAN ONLY BE CONSTRUED

22 OR INTERPRETED BY WAY OF INNUENDO. THERE'S NOTHING IN

23 THE INDICTMENT TO INDICATE THAT THE GRAND JURY, AT THE

24 TIME THAT IT CAME BACK WITH ITS RULING AND FINDING, MADE

25 A FINDING, OR MADE AN ALLEGATION IN THE INDICTMENT THAT

1 THE COUNTY LOST PROPERTY OR MONEY.

2 IT'S FOR THOSE REASONS THAT THE COURT WOULD

3 FIND THAT THIS COURT DOES NOT HAVE JURISDICTION TO PROCEED

4 WITH THIS CASE UNDER THE MAIL FRAUD LAWS. THEREFORE,

5 THIS INDICTMENT IS DISMISSED.

6 MR. BEARD: THANK YOU, YOUR HONOR.

7 MR. RAGEN: YOUR HONOR, MAY ALL THE BONDS BE

8 EXONERATED?

9 THE COURT: WELL, WE'LL TURN IT OVER TO MR.

10 LEWIS NOW, AND SEE WHAT HE WISHES TO DO. HE MAY WISH

11 TO WITHHOLD THAT UNTIL HE DECIDES IF HE WANTS TO APPEAL

12 THAT.

13 MR. LEWIS: YOUR HONOR, WHEN YOU INDICATE THE

14 INDICTMENT IS DISMISSED, IS THE COURT'S ORDER IN REFERENCE

15 TO THE REDACTED INDICTMENT THAT WAS PRESENTED TO THE JURY

16 THAT HAS BEEN THE SUBJECT OF DISCUSSION, OR IS IT THE

17 INDICTMENT IN TOTAL THAT HAS THE RICO COUNTS, THE FRESNO

18 COUNTY, THE PRIVATE SECTOR AND THE FRAUD ALLEGED AGAINST

19 THE CITY OF SAN DIEGO, COUNTY OF SAN DIEGO, WHICH HAVE

20 BEEN SEVERED FROM THE MAIL FRAUD CASE.

21 THE COURT: I'M PREPARED TO RULE THAT AS I READ

22 THE ENTIRE INDICTMENT -- I HAVE GONE THROUGH TO TRY TO

23 FIND THAT TYPE OF INNUENDO FROM --

24 WELL, FIRST, NO PLACE IN THE INDICTMENT, EITHER

25 THE ORIGINAL INDICTMENT OR THE REDACTED INDICTMENT ARE

1 THERE ALLEGATIONS THAT THERE WAS A LOSS OF COUNTY PROPERTY,
2 OR LOSS TO THE COUNTY.
3 AND NOW, I GUESS I CAN ONLY RULE ON WHAT'S BEFORE
4 ME. THE RICO COUNTS ARE BASED ON THE SAME CONDUCT WHICH
5 IS THE BASIS OF THE MAIL FRAUD.
6 IT WOULD SEEM TO ME THAT WHEN YOU HAVE PLED
7 THE INDICTMENT -- AND I WENT THROUGH IT -- WHEN YOU PLED
8 RICO RACKETEERING COUNTS, YOU ALSO WENT BACK TO DESCRIBE
9 THE SAME CONDUCT THAT WAS SET FORTH IN THOSE COUNTS, 7
10 THROUGH 38, COUNTS 41 AND 42, ET CETERA.
11 NOW, I DID NOT MAKE A RULING THAT THAT CONDUCT
12 IS NOT SUBJECT TO SOME TYPE OF PROSECUTION, BUT I DON'T
13 THINK IT'S SUBJECT TO THE MAIL FRAUD STATUTE.
14 MR. LEWIS: YOUR HONOR, I WONDER IF -- IN TERMS
15 OF THE GOVERNMENT'S POSITION -- I WOULD REQUEST THAT THE
16 COURT NOT GRANT THE MOTION FOR EXONERATION, THAT THE COURT
17 CALENDAR IN APPROXIMATELY TEN DAYS A HEARING, AND THE
18 GOVERNMENT AT THAT TIME CAN PRESENT TO COUNSEL AND THE
19 COURT ITS PROPOSED PLAN.
20 THE COURT: ALL RIGHT. I'LL STAY THE EXECUTION
21 OF THAT ORDER FOR TEN DAYS, UNTIL --
22 WELL, LET ME ASK YOU TO DO IT A LITTLE SOONER,
23 BECAUSE I WAS DUE TO START THIS TRIAL NEXT WEEK, AND I
24 THINK THEY'RE ENTITLED TO AN ANSWER.
25 LET'S HAVE IT NEXT THURSDAY MORNING AT 9:00.

1 MR. LEWIS: THAT WOULD BE THE 13TH?
2 THE COURT: YES. IS THAT SATISFACTORY?
3 MR. SCHATZ: YES.
4 MR. BEARD: THE CLIENTS DON'T HAVE TO BE
5 PRESENT, DO THEY?
6 THE COURT: NO.
7 MR. SCHATZ: IS IT THE UNDERSTANDING, THEN,
8 THAT THE MOTION TO DISMISS THE INDICTMENT IN ITS ENTIRETY
9 HAS BEEN GRANTED, AND WHAT WE ARE COMING BACK FOR ON THE
10 13TH IS TO HEAR FROM THE GOVERNMENT AS TO WHAT THEY MIGHT
11 PROPOSE WITH RESPECT TO FURTHER PROCEEDINGS, IF SUCH SHOULD
12 OCCUR?
13 THE COURT: YES.
14 MR. RAGEN: THANK YOU, YOUR HONOR.
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