IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-2147

Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOUGLAS TSOU,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Texas
(CR-H-88-57)

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(January 18, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Douglas Tsou was convicted of one count of knowingly communicating classified information to a representative of a foreign country in violation of 50 U.S.C. § 783(b). The district court sentenced Tsou to ten years' imprisonment. This appeal followed.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

**I.**

On May 15, 1986, Federal Bureau of Investigation (FBI) Special Agent Daniel Bolick learned from a confidential source that Douglas Tsou, a Chinese language translator employed by the FBI in Houston, Texas, had been in contact with representatives of the Coordination Counsel for North American Affairs ("CCNAA"), which represents the Taiwanese government and maintains an office in Houston. See § 1-204, Executive Order No. 12143 (June 24, 1979, published in 44 C.F.R. § 37191; 22 U.S.C. § 3301 (Taiwan Relations Act).

Tsou's superiors in the FBI had not authorized Tsou's contacts with the CCNAA, which were in violation of FBI policy and constituted grounds for employment sanctions. It is undisputed, however, that simple unauthorized communication between a FBI employee and foreign government -- without the transmission of classified information -- is not a violation of the statute under which Tsou was charged. Thus, the FBI's original concerns about Tsou were not that he had violated the law, but instead merely that he had breached FBI internal policy.

On June 3, 1986, FBI Special Agent Joe Clark questioned Tsou about the allegations against him. Tsou readily admitted that he had engaged in unauthorized communication with certain CCNAA officials with whom he had become acquainted when he lived in Taiwan. Tsou was advised that, in accordance with established procedure, the matter would be turned over to Douglas Gow, the

Special Agent-in-Charge of the Houston Division of the FBI, and that Tsou would be the subject of an internal FBI administrative (as opposed to criminal) investigation. Tsou was also informed he would likely be required to submit to a polygraph test. At this point, FBI officials had no reason to believe that Tsou had conveyed any classified information to the CCNAA.

It is undisputed that the FBI at this time had a policy that any FBI employee who refused to cooperate in an internal administrative investigation was subject to some type of employee disciplinary action. As FBI Agent Joe Clark stated at Tsou's pretrial suppression hearing, had Tsou not cooperated in the administrative investigation -- such as by refusing to take a polygraph -- "[h]e would have been written up for insubordination" and would have been "subjected to administrative discipline in some form or fashion."[1] It is also undisputed that, although this policy was in effect, FBI officials never threatened Tsou that if he refused to cooperate, he would be subject to some type of employee disciplinary action. The district court nevertheless accepted Tsou's claim that he cooperated with the FBI investigation because of a fear that he would be sanctioned, including losing his job.

On August 27, 1986, Tsou was flown to FBI headquarters in Washington, D.C., where he was to be administered a polygraph by Edmund Diem, a FBI agent, and later given a series of interviews

[1] The record is unclear with respect to the type of sanctions that would result from an employee's refusal to cooperate.

conducted by other FBI officials. Diem initially conducted a "pre-test interview." Rather than threatening Tsou with sanctions if he refused to comply, Diem asked Tsou to sign a waiver that stated that the polygraph test was given voluntarily.[2] Tsou signed the waiver. Unexpectedly, Tsou then volunteered highly incriminating information about which Diem and others in the FBI had no prior knowledge. Tsou stated that in the spring of 1986 he had sent an anonymous, unsolicited letter containing classified information to the CCNAA. At Diem's request, Tsou reconstructed the letter. This was the first time that anyone in the FBI had reason to be believe that Tsou had violated the law.

Tsou was not immediately thereafter arrested, although in all subsequent interviews with FBI officials in Washington, Tsou was repeatedly warned that the results of the administrative investigation could subject him to criminal penalties in view of his revelations to Diem.[3] Accordingly, FBI officials also asked Tsou to sign a written waiver that informed him that he had the right to remain silent and that he could refuse to answer questions that might tend to incriminate him. The form also expressly stated that any refusal to answer any question on the ground that it might incriminate "will not subject you to disciplinary action by the FBI or Department of Justice." Prior

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[2] This form did not contain standard Miranda-type warnings.

[3] At no point during Tsou's stay in Washington, which lasted four days, was Tsou taken into custody.

to each of the several interviews that followed, Tsou agreed to execute such a form.

Following the polygraph test and interviews in FBI headquarters, Tsou was instructed to return to Houston. As he was being escorted from FBI headquarters to the airport in Washington, Tsou -- without any solicitation -- admitted to his FBI escort, Steven Hancock, that Tsou possessed certain "other things" at his residence at Houston that were relevant to the investigation. Hancock bid Tsou farewell at the airport and proceeded to relay the new information to FBI officials in Houston.

When Tsou arrived in Houston, after his unescorted flight, he was met at the airport by FBI Special Agents Mark Foster and Ralph Harp. Even at this point, however, Tsou was not arrested or otherwise taken into custody. Tsou agreed, in writing, to consent to a search of his home by FBI agents. Upon arriving at his residence, Tsou requested that the FBI agents permit him, prior to the search, to spend fifteen minutes alone with his wife while the FBI agents waited outside his residence. The FBI agents stated that they believed the visit would be "inappropriate" and that they would prefer to search immediately. Tsou stated that he "understood," and the agents began to search his home. The agents described Tsou as thoroughly "cooperative" and noted that Tsou even volunteered that the agents should begin their search in the study. Following a four hour search, agents recovered, inter alia, Tsou's typewriter and its ribbon.

After the search of Tsou's home, Tsou returned to the FBI offices in Houston, where another round of questioning occurred, to which Tsou responded with additional incriminating statements. The next week Tsou again flew to Washington where FBI agents attempted to administer another polygraph. For the first time, Tsou refused to cooperate and requested an attorney. Thereafter, the FBI ceased any further questioning. FBI agents eventually recovered from the CCNAA the original copy of Tsou's type-written letter, which was post-marked March 31, 1986.[4] Thereafter, Tsou was indicted and taken into custody.

At trial, the Government offered not only Tsou's various incriminating statements and the evidence seized from his home, but also introduced the actual letter in redacted[5] form:

> Dr. Mr. Chen, you might be interested in the following stories. . . . Mr. [**name redacted**] whose Chinese name is [**name redacted**] or [**name redacted**] surrendered to the FBI not long ago. He said that he was a Communist China's intelligence officer station[ed] in Taiwan since Communist chinese took over China's mainland. His relatives in Taiwan are government officials and military officers at high rank. One of them is Chinese Ambassador to [**name of country redacted**], [**name of ambassador redacted**]. Last month [**name redacted**] failed a polygraph test. He lodged protest without success. You will be highly appreciated if these are useful for you or your assistants. Sincerely, GWC.

It is undisputed that the information contained in Tsou's letter was classified.

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[4] It was later determined that the typewriter recovered from Tsou's residence had been the one used to type the envelope containing the letter mailed to the CCNAA and Tsou's typewriter at his FBI office had been used to type letter itself.

[5] Redactions were made pursuant to the Classified Information Protection Act, 18 U.S.C. App. § 2 et seq.

## II.

Tsou raises four claims on appeal. First, he challenges the district court's admission of Tsou's various confessions as violative of the Fifth Amendment. Second, he challenges the constitutionality of the admission of fruits of the search of his home by FBI agents as violative of the Fourth Amendment. Third, Tsou challenges the sufficiency of the evidence to show that he had the necessary mens rea to constitute a criminal violation under 50 U.S.C. § 783(b). Finally, he claims his Sixth Amendment rights were violated by the district court's refusal, pursuant to the Classified Information Procedures Act, 18 U.S.C. App. § 2 et seq., to admit into evidence at trial classified information that, Tsou claimed, he needed to impeach a Government witness. We disagree with Tsou's contentions and affirm the judgment of the district court in all respects.

### A) Tsou's Fourth and Fifth Amendment claims

As the Government points out, the search of Tsou's residence occurred in the midst of his various interviews with the FBI. Tsou's Fourth and Fifth Amendment claims, both involving contentions that the waiver of Tsou's constitutional rights was involuntary, are thus properly addressed together. At the conclusion of a suppression hearing, the district court held that Tsou's various statements and his consent for the search of his home were voluntarily given and, therefore, constitutionally admissible.

Initially, we note certain principles of black-letter law applicable to both claims. The voluntariness of a defendant's consent permitting law enforcement authorities to search is judged under the same "totality-of-the-circumstances" standard used in Fifth Amendment cases. See United States v. Riley, 968 F.2d 422, 426 (5th Cir. 1992) (citing Florida v. Royer, 460 U.S. 491 (1983)); United States v. Rojas-Martinez, 968 F.2d 415, 418 (5th Cir. 1992) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)). The Government has the burden of proving by a preponderance of the evidence that a defendant voluntarily waived his Fourth or Fifth Amendment rights. See Colorado v. Connelly, 479 U.S. 157, 168-69 (1986). The district court's findings of historical fact regarding the issue of voluntariness are entitled to deference unless clearly erroneous, Riley, 968 F.2d at 427 n.8; Rojas-Martinez, 968 F.2d at 418, although the ultimate question of voluntariness is a mixed question of law and fact reviewed de novo on appeal, United States v. Raymer, 876 F.2d 383, 386 (5th Cir.), cert. denied, 493 U.S. 870 (1989).

**i) Tsou's incriminating statements**

Tsou argues that all incriminating statements that he made to the various FBI agents who questioned him were involuntarily given. The basis of Tsou's Fifth Amendment claim is his contention that he felt coerced to incriminate himself because of implied threats that he would lose his job with the FBI if he refused to confess. He relies on Gardner v. Broderick, 392 U.S.

273 (1968), and Garrity v. New Jersey, 385 U.S. 493 (1967), cases in which the Supreme Court held that incriminating statements given by law enforcement officers were inadmissible because the officers were threatened with dismissal by the government unless they waived their Fifth Amendment rights. Such a threat rendered their waivers involuntary. As Justice Douglas held for the Court, "[w]e conclude that policemen [like other public employees] are not relegated to a watered-down version of their constitutional rights." Garrity, 385 U.S. at 500.

We do not believe that such precedent is controlling in the instant case. The record does indicate that there was a FBI policy in effect at the time that Tsou made his statements that refusal of a FBI employee to cooperate in an internal FBI administrative investigation was grounds for employment disciplinary action. Furthermore, the record indicates that Tsou made his first incriminating statements to Diem before Tsou had been specifically warned that he could invoke his Fifth Amendment right against self-incrimination with total impunity. However, although the FBI policy that required cooperation under the threat of employment sanctions was technically in effect at that time, under the totality of the circumstances we cannot say that Tsou was unduly coerced into making the original incriminating statements.

Tsou volunteered the admission that he had conveyed classified information to the CCNAA. The purpose of Diem's questioning was simply to probe about Tsou's general contacts

with the Taiwanese. Diem and the other FBI officials investigating Tsou believed at that juncture that Tsou had simply violated FBI internal policy, which generally proscribed any unauthorized communication with foreign governments. It was Tsou who gratuitously revealed that he had not simply breached FBI internal policy by contacting the CCNAA, but also had broken federal law by passing on classified information to a foreign government. It was not as if Diem or other FBI officials threatened Tsou with employment sanctions unless he admitted that he had conveyed classified information to the CCNAA.

Moreover, we observe that Tsou was not in a custodial environment during his interview with Diem. Rather, he was participating in a mere administrative investigation, which was outside the criminal process. Furthermore, notwithstanding the existence of the FBI policy regarding noncompliance with such an investigation, Diem not only did not threaten Tsou with that policy, but actually secured a written waiver from Tsou that his participation in the polygraph test was voluntary. We recognize that the district court found that Tsou honestly felt "obliged," in view of the FBI's policy, to admit not only to his general contacts with the CCNAA, but also to his passing of classified information. However, we hold that under the totality of circumstances a reasonable person would not feel unduly compelled by the policy to offer incriminating information such as that offered by Tsou, when there was no indication that the FBI had any prior knowledge that Tsou had not only breached FBI internal

policy but also a federal statute outlawing the knowing conveyance of classified information.[6] Notwithstanding the existence of the policy, there was no impermissible overreaching by the FBI in this case.

All incriminating statements given by Tsou in the days following Tsou's original admission were likewise admissible. In all subsequent interviews in Washington and Houston, the FBI's policy requiring compliance in administrative investigations unquestionably ceased to apply. After Diem informed other FBI officials that Tsou had possibly broken the law by conveying classified information to the CCNAA, Tsou was informed on the written waivers that he signed that he could assert his Fifth Amendment rights with impunity. Therefore, the district court did not err in ruling that all of Tsou's incriminating statements were admissible at trial.

**ii) The search and seizure**

Tsou argues that his acquiescence in the FBI agents' requests to search his residence was involuntary and, therefore, renders the evidence seized inadmissible under the Fourth Amendment. At the suppression hearing, the district court held that Tsou voluntarily consented to the search of his residence.

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[6] We note that there is no reason to believe that Tsou, who was foreign-born, was under any misconception of FBI policy as a result of a language or cultural barrier. The record reveals that at the time of the offense Tsou, who had spent six years working for the FBI, was fluent in written and spoken English. Tsou also had earned a master's degree from an American University.

For the reasons we noted supra, with respect to the voluntariness of Tsou's confessions, we likewise do not believe that Tsou's agreement to allow FBI officials to search his residence was involuntary in view of any compulsion that Tsou felt as a result of the FBI's policy regarding employee cooperation in administrative investigations.

Tsou additionally argue that the warrantless search and seizure were unconstitutional because of the FBI officials' refusal to permit Tsou to meet with his wife for fifteen minutes prior to the entry of the FBI officials into Tsou's home. We disagree. The record reveals that Tsou did not demand that FBI officials permit him a short visit. Rather, he merely suggested the idea, and a FBI agent simply responded that it would be "inappropriate." Tsou, still in a cooperative mood, stated that he "understood." No protest of any sort was lodged. Instead, Tsou proceeded voluntarily to lead the FBI officials into his study where the incriminating evidence was discovered. Again, under the totality of the circumstances, we cannot conclude that Tsou's will was wrongly overborne. There was, thus, no Fourth Amendment violation.

**B. Tsou's other claims**

Tsou's remaining two claims, although wholly distinct in their substantive content, may be addressed in conjunction and disposed of at one fell swoop. Tsou's third claim is that there was insufficient evidence offered at trial to establish an

element of the offense of which he was convicted -- namely, that Tsou knew that the information that he conveyed to the CCNAA was classified.[7] Tsou's fourth claim is that his Sixth Amendment rights were violated by the district court's refusal to admit certain classified information into evidence at trial pursuant to the Classified Information Procedures Act, 18 U.S.C. App. § 2 et seq.

Tsou's third claim is entirely without merit. Not only did his confessions include the recognition that the information in the letter was classified, but also in Tsou's testimony during the trial Tsou explicitly admitted that he knew the information was classified when he mailed the letter.[8] A rational jury could

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[7] The statute creating the offense, 50 U.S.C. § 783(b), speaks of the unlawful conveyance of classified information by a U.S. Government employee who "knows or has reason to believe" the information is in fact classified. The Government chose to indict Tsou only for a "knowing" violation of the statute; the jury was likewise charged in that manner. It is undisputed that the information was classified.

[8] The record reveals the following colloquy between the prosecutor and Tsou:

Q. Are you telling the jury that the information that was in the letter you knew was classified?

A. That's it. That's right. I did.

Q. You sent that classified information to the [CCNAA] in Houston, Texas; is that correct?

A. Yes.

Tsou attempted to rehabilitate himself by arguing that he honestly believed that, although classified, the information was no longer of any use to the Government -- in view of supervening events -- and that consequently the release of the information to the Taiwanese was "harmless." This argument, of course, ignores that the plain meaning of the statute makes no exception for

thus have easily convicted Tsou of possessing the mens rea of actual knowledge that the letter contained classified information. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Glasser v. United States, 315 U.S. 60, 80 (1942).

Tsou's fourth claim is based on his inability to use certain classified information regarding the job description of Tsou's former position as a FBI translator to impeach a Government witness; Tsou hoped to show the jury that in view of the nature of his job he could not have known that the information was in fact classified. The Government's witness, FBI Special Agent Leo Suter, testified that because of Tsou's job, he had to have known the information was classified. Without access to the classified information about the nature of Tsou's former job, Tsou argues, his cross-examination of Suter was impeded and his defense was "effectively gutted."

We need not even reach the merits of Tsou's final claim. Assuming, without deciding, that there was such a Sixth Amendment violation, it was harmless beyond a reasonable doubt in view of the overwhelming amount of evidence that Tsou in fact knew that the information in his letter was classified. His cross-examination of FBI Special Agent Suter, even with the classified information Tsou sought, would not have changed the verdict. See Fed. R. Crim. P. 52(a); Olden v. Kentucky, 488 U.S. 227, 232 (1988) (per curiam) (Confrontation Clause violations subject to harmless error analysis).

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purportedly "stale" classified information.

## III.

For the foregoing reasons, we AFFIRM the judgment of the district court.