MAR 12 1963

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

#9843

UNITED STATES OF AMERICA	:	
v.	:	NO. 10,698 CRIMINAL
DAVID ICCHOK SHACKNEY, a/k/a DAVID ISSAC SHACKNEY and DAVID I. SHACKNEY	:	

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL THE PROSECUTION TO ELECT

The defendant's Motion to Compel the Prosecution to Elect is directed at Counts One and Three of the Indictment. Although the Motion itself sets forth no grounds upon which the Motion is made, it is assumed that the ground is the same as that set forth in a memorandum filed some time previously with the Court by the defense entitled VII Dismissal of Counts Three and Four. The ground there specified is that the involuntary servitude count (Count 3) is an "illegal duplication" of the peonage count (Count 1).

I

The counts in question do not duplicate one another. The applicable rule is that where the same conduct constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. Blockburger v. United States, 284 U.S. 299 (1932) Gavieres v. United States, 220 U.S. 338 (1911).

Applying the rule to the instant case, the count on peonage under 18 U.S.C. 1581(a) requires proof of the element of indebtedness, or claimed indebtedness. See, e.g., Pierce v. United States, 146 F. 2d 84 (5th Cir. 1944); U. S. v. Clement, 171 Fed. 974 (D. S.C. 1909). The count on involuntary servitude under 18 U.S.C. 1584 has no such requirement. On the other hand, the statute (18 U.S.C. 1584) under which the count on involuntary servitude is drawn specifically states that the holding must be done "wilfully and knowingly" whereas there is no such language in the statute (18 U.S.C. 1581(a)) under which the peonage count is drawn. It would appear, therefore, that the only intent necessary with regard to the peonage count is the general one that the accused must not have acted mistakenly or inadvertently. See, e.g., Sinclair

v. United States, 279 U.S. 263, 299 (1928). Consequently, the element of specific intent is present in the offense charged in Count 3 but lacking in the offense charged in Count 1.

Teran v. United States, 88 F. 2d 54 (8th Cir. 1937) is a case which aptly illustrates the principle on identity of offenses. There the defendant was convicted on a four-count indictment charging violations of the Internal Revenue laws. Count 3 charged that on a specified date in a certain automobile in a certain place the defendant unlawfully, knowingly and feloniously concealed and aided in the concealing of distilled spirits on which the required tax had not been paid. Count 4 charged that the same defendant, on the same day, in the same automobile, in the same place, unlawfully, wilfully and feloniously possessed distilled spirits without the immediate container thereof having affixed thereto a stamp denoting the quantity contained therein and evidencing payment of the required revenue taxes. Before trial the defendant moved to compel the government to elect to proceed on either count 3 or count 4 on the ground that they alleged the same offense in different language. The motion was denied and this was urged on appeal as a ground for reversal. The Court of Appeals held that the trial court did not err in denying the motion. Said the Court of Appeals: "The offenses were purely statutory. It was the province of Congress to define these offenses, and having done so, its definition is conclusive." The Court went on to say that each count charged a distinct statutory offense and required proof of a fact which the other did not. See, also, Brennan v. United States, 240 F. 2d 253 (8th Cir. 1957).

II

Even if the offenses charged in Counts 1 and 3 of the instant case are considered to be a duplication of each other, the Government should not be compelled to elect to proceed on one or the other. Such election is being requested, presumably, on the basis of Rule 14, Federal Rules of Criminal Procedure, Title 18, United States Code, which provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts . . . or provide whatever other relief justice requires.

Such a motion is addressed to the sound discretion of the trial court. See, e.g., Opper v. United States, 348 U.S. 84, 95 (1954); Randall v. United States,

148 F. 2d 234 (5th Cir. 1945); United States v. Solomon, 26 F.R.D. 397 (S.D. Ill. 1960). However, as the court stated in United States v. Solomon, supra, at 403:

> Unless it appears that the rights of defendants would be prejudiced and that they would be embarrassed in their defense by the fact of being tried upon multiple charges before the same jury, a court should not compel election between counts properly joined in an indictment. (Emphasis added).

In Finnegan v. United States, 204 F. 2d 105 (8th Cir. 1953), the court said, in holding that the motion to compel election there was properly denied:

> (I)t may be said that the fundamental principle underlying the practice of requiring the prosecution to choose between offenses or counts is the prevention of prejudice and embarrassment to the accused, and if the charges are of the same general character and are manifestly joined in one indictment in good faith, the government should not be required to elect upon which count or counts it will proceed to trial. p. 110 (Emphasis added).

The court in the Finnegan case observed that the defendant had not shown, nor made any effort to show, how he would be "confounded in his defense" by being tried on all the counts there involved.

In the instant case, the defense has not shown, nor can it be seen, how the defendant will be prejudiced or embarrassed in his defense by being tried on all seven of the remaining counts in the indictment. It is submitted that in the absence of such a showing, compelling the Government to elect between Counts 1 and 3 would be an abuse of the Court's discretion.

In this connection, United States v. Maryland State Licensed Beverage Association, 240 F. 2d 420 (4th Cir. 1957), is appropos. In that case the trial court entered an order requiring the government to elect whether it would proceed under the first or second count of an indictment. The first count charged a conspiracy to restrain interstate commerce under Section 1 of the Sherman Act. The second count charged a conspiracy to monopolize under Section 2 of the same act. Counsel for the government conceded that the same proof would be relied on for the establishment of the conspiracy alleged in both counts. The trial judge, for that reason, was of the opinion that only one conspiracy was involved and that he should, on the authority of Braverman v. United States, 317 U.S. 49, require one count to be dismissed. The Court of Appeals held that this was error and reversed. Said the Court of Appeals at

> The fact that the same evidence was relied upon to establish the conspiracies charged in both counts of the indictment does not mean necessarily that there was only one conspiracy. . . Even if only one conspiracy was involved, however, this would not support the action taken by the District Judge. Braverman's case holds merely that there may not be more than one punishment for a single conspiracy, not that a single conspiracy may not be charged as a crime in several counts to meet different interpretations that might be placed upon the evidence by the jury. Upon the government's evidence . . . the jury might conceivably conclude that the accused were guilty of conspiracy to restrain trade by fixing prices but not of conspiracy to monopolize, or they might conclude that they were guilty of conspiracy to monopolize but not to fix prices or they might conclude that they were guilty of conspiracy to do both. If the evidence showed that there was only one conspiracy, the judge would impose only one punishment; but this is no reason for requiring dismissal of one of the counts in the early stages of the case . . .
> "It has long been the approved practice to charge, by several counts, the same offense as committed in different ways or by different means, to such extent as will be necessary to provide for every possible contingency in the evidence." 27 Am. Jur. p. 688.

* * *

> The purpose underlying the practice of requiring in proper cases that the prosecution elect between offenses or counts is to prevent prejudice to the accused which might result from being required to meet a multiplicity of charges in one trial. It has no application to a case where the different counts are merely variations or modifications of the same charge. . . Here there could be no possible prejudice to the accused in going to trial under an indictment charging in separate counts that conduct complained of constituted violations of separate sections of the Sherman Act; and to require such an election was to prejudice the prosecution in the presentation of its case and cannot be upheld as a sound exercise of discretion.

Likewise, in the instant case, there can be no possible prejudice to the defendant by allowing the trial to continue on both of the counts in question. To compel an election would not be justified and would put the Government at a possible disadvantage in not being able to meet the various interpretations which may be placed on the evidence by the jury.

The decision in the Maryland State Licensed Beverage Association case has been approved and followed by the Second Circuit in United States v.

McKnight, 253 F. 2d 817 (2nd Cir. 1958), where Circuit Judge Lumbard said at 819:

> Although the proof showed only one conspiracy, two counts were permissible to meet the different interpretations which might be placed on evidence by the jury.

See, also, the Per Curiam decision in Williams v. United States, 244 F. 2d 303 (4th Cir. 1957).

III

The Court has indicated his concern over the case of Milanovich v. United States, 365 U.S. 551. There the Supreme Court, in a five to four decision held that a defendant could not be convicted of stealing government property and for receiving and concealing the same property and that the jury should have been charged that they could convict of either but not of both. Even though four members of the Supreme disagreed with the majority and felt that under the facts of that case the defendant properly could have been found guilty of both offenses charged in the indictment, nevertheless, there is nothing in the opinion of the majority which contradicts the principle that the same offense may be alleged in separate counts in different ways so as to meet the varying interpretations which might be placed on the evidence by the jury. Indeed, allowing the case to go to the jury on two counts under an instruction of the type required by the Milanovich decision is just as consistent with the rule as would be sending both counts to the jury with no instruction on the point. Consequently, nothing in the Milanovich decision requires that the Government be compelled to elect between Counts 1 and 3.

IV

Finally, it is submitted that the defendant has waived his right to object to the indictment on the ground that Counts 1 and 3 duplicate each other. Before the trial began the defense moved for dismissal of the indictment on the ground, inter alia, that "Counts 1 and 3 are a duplication in that the allegations are identical except for different labels." Subsequently, and before the motion was heard, the defendant withdrew his motion to dismiss for the reason that he was "desirous of having his guilt or innocence adjudged by a full jury of 12." For this reason and in view of Rule 12(b)(2) of the Federal Rules of Criminal Procedure, Title 18, United States Code, the defendant cannot now

insist upon compelling the Government to elect even if the offenses in the specified counts are duplicative, as to which counsel for the Government does not agree.

Respectfully submitted,

UNITED STATES OF AMERICA

BY ROBERT C. ZAMPANO
United States Attorney

BY JAMES B. O'CONNOR
Assistant United States Attorney

DISTRICT OF CONNECTICUT

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UNITED STATES OF AMERICA)
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) NO. 10,698 CRIMINAL
DAVID ICCHOR SHACKNEY, a/k/a)
DAVID ISAAC SHACKNEY and)
DAVID I. SHACKNEY)

DEFENDANT'S BRIEF ON MOTIONS AT THE CONCLUSION OF ALL THE EVIDENCE

After all evidence is in, the defense intends to renew its motion, made at the end of the government's case, for judgments of acquittal on all counts. In addition, a motion to compel the United States to elect among various of the remaining counts will be filed.

Concerning the motion of judgments of acquittal, the court already has heard most of the defense contentions and we will, therefore, in this brief, attempt to avoid the mere repetition of those arguments.

I. The General Motion for Judgments of Acquittal Addressed To All Remaining Counts.

Since the court has already indicated that it feels there is no significant legal difference between the peonage count and those involving involuntary servitude, we will address ourselves only to the latter. There appear to be four elements to the crime proscribed by Title 18, Section 1583.

(1) There must be "servitude." This element should cause little difficulty here; although there is a conflict in the evidence concerning how much work there was and who instructed whom to do it, there is no question but that the Crosses "served" on the Shackney farm.

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(2) The servitude must be "involuntary".

(3) The defendant must have "held" someone to that "involuntary servitude". This constitutes, narrowly, the criminal "act" involved.

(4) There must have been the requisite specific criminal intent, i. e. "wilfully and knowingly".

It is the second and third listed elements--and the interaction between them--which cause the principal problems in this case. Where an employer actually chains a man to his work bench or in some other way imposes actual physical restraint upon him, the "holding" is clear and the "involuntary" nature of the servitude easily inferred. Where, however, the "force" alleged is "psychological" as is the case here, the "crime" becomes a horribly amorphous thing. The establishing of the "involuntary" aspect of the servitude throws the court and jury headlong into the morass of "will" and "volition"-- something which has bothered philosophers since time began. Although the defense concedes that the case law (passage) indicates that in rare circumstances, threats may suffice to establish a "holding to involuntary servitude" under 18 U. S. C. 1584 (1581), such servitude would perhaps more properly be termed "voluntary" in our general usage of that term. It is significant here that the Hobbs Act defines the Federal crime of extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force..." 18 U. S. C. 1951. Further, the "act" alleged tends to break down to the raised eyebrow and finance grimace type of proof--compounded by alleged "allowable innuendo" and the repeating of alleged threats by the weakest kind of inference. Such a charge has a grave tendency to reduce the

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usually exacting evidentiary requirements which characterize the criminal law to the rankest kind of speculation; in just such a situation, it is submitted, the trial court should be especially wary of what kind of case it lets "go to the jury".

Since the evidence has been discussed at some length both in a prior brief and in argument, we will focus our attention on the law. It is our view of this offense that a threat, to have any legal significance in the context of the crime here charged, must be one which entails the loss of freedom or imposition of restraint in some way. Concededly there is no case law specifically so holding; indeed, loose language in some of the cases would appear to indicate there is no limitation on the kinds of threats which could result in criminal liability. Bernal vs. United States, 241, Fed. 339 (5 Cir. 1917). Such a holding, however, if taken literally would expose to criminal sanction all those who used the threat of economic steps such as a "blackball" or a 'lockout' to hold people in their employ; such threats may not be "nice" in the individual case; but surely Congress did not intend to drag them into criminal jeopardy under this statute passed pursuant to and in implementation of the Thirteenth Amendment.

Further, an inspection of the meager case law in this area reveals no case of a conviction where the threats had not been of a nature directed at putting the servitor under physical restraint. In the Bernal case, supra, the defendant had threatened the complaining witness with reporting her to the immigration authorities which would have resulted, according to the accused, in five years imprisonment. In United States vs. Ingalls, 73 F. Supp.76 (S. D. Cal. 1947) a prosecution brought under a related but different statute, 18 U. S. C. 443, the accused had threatened

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the slave with being sent to jail on an adultery charge unless she remained in her service.

In United States vs. Clement, 171 Fed. 974 (S. C. 1909), the key factor was the threat of criminal prosecution. In Davis vs. United States, 12 F. 2d 253 (5 Cir. 1926), the servitors "were kept under surveillance, and remained against their will because of their fear of physical punishment and criminal prosecution." The Georgia statute struck down as repugnant to the Thirteenth Amendment in Taylor vs. United States, 315 U. S. 25 (1942) applied criminal sanction to those who failed to discharge employment contracts founded upon advancement of loans. In both United States vs. Clyatt, 197 U. S. 207 (1905) and United States vs. Reynolds, 225 U. S. 133 (1915), the threats appear to have centered on arrest and imprisonment. Finally, in Pierce vs. United States, 146 F. 2d 84 (5 Cir. 1944), there was a combination of actual physical violence and threats of a serious physical nature, i. e. the brandishing of a pistol.

It may be that the court also views the statute as requiring proof of some threat or threats going to an actual restraint on the person; the oral ruling on the earlier motion seemed to be couched in that language. If that is so, the defendant will only briefly state again its contention that the threat to return people to the place they come from (not prison) does not impose a prospective "restraint" significant enough to qualify it as an act made criminal by 18 U. S. C. 1584 or 1581. Virtually all threats, be they economic, social or otherwise, contain some element of restraint in the sense of a restriction on complete freedom of the individual; to qualify as a "holding" under the section here in question, however, the restraint threatened should be of some real severity-- a factor not here present.

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A closely related problem which the defense did not press specifically at the close of the government's case in chief involves the interaction of the alleged threats constituting the "holding" and the alleged fear created which resulted in the "involuntary servitude". Our understanding of the court's ruling when the first motion was made was that the court felt that such an alleged threat 'could have' resulted in such an intolerable choice as to effectively destroy the will of Mr. Cross. It is submitted that such a standard is far too subjective and leaves a criminal defendant at the mercy of the most unreasonable paranoid fears of the victim; the test must be, to some extent at least, an objective one.

The [illegible] case law in this area would indicate that such a contention has never been raised in peonage and/or involuntary servitude prosecutions. There is some guidance in closely related cases however. The government's case is built on an alleged action by the accused followed by an alleged 'reaction' by the so-called victim--thereby causing the "involuntary servitude". Must not the "reaction" follow reasonably from the "action" in order to create criminal liability? Must we not use some form of an objective test to determine the reasonableness of the "reaction"?

The crime of extortion and assault similarly rest on an alleged "action" in the form of a threat and a required "reaction" of fear. Speaking of the Federal anti-racketeering and extortion statute, 18 U. S. C. 1951, Wharton says, "The threat must also be such as would ordinarily create alarm". (Emphasis added). 3 Wharton, Criminal Law and Procedure (1957 ed.) 796. In ticking off the necessary elements of that crime, the [illegible] has said, "If fear was created in the victim's

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mind, if such fear was a reasonable one, and if the defendants by making use of that fear extorted money or property, the foundation for guilt is established." Callagan vs. United States, 233 F. 2d 171, 175 (8 Cir. 1955), cert. den. 350 U. S. 862. (Emphasis added).

The requirement in assault cases is similar; the response of fear must be reasonably attuned to the act allegedly constituting the assault. The leading case in this regard is State vs. Ingram, 237 N. C. 197, 74 S. E. 2d 532 (1953). There, the complaining witness, a young girl, was walking on a road when the defendant passed, slowly, in his car. She testified that he kept watching her and " he had his head out of the window leering at me a curious look." A short time later, while crossing a field, the girl heard the motor of a car stop on the road--following which time she saw the accused striding toward her across the field. She became terrified and ran. The Supreme Court of North Carolina, reversing a guilty verdict, said,

> " The display of force or menace of violence must be such as to cause the reasonable apprehension of immediate bodily harm..."
>
> *****
>
> " ...that she was frightened is unquestionable, ~~but that fact alone is insufficient~~ but that fact alone is insufficient to constitute an assault in the absence of a menace of violence of such character under the circumstances, as was calculated to put a person of ordinary firmness in fear of immediate injury and cause such person to refrain from doing an act he would otherwise have done, or to do something he would not have done except for the offer or threat of violence." (Emphasis added).

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It is submitted that no reasonable man--nor any reasonable Mexican immigrant worker--should have been so terrified by the rather ridiculous threats here alleged so as to result in the overwhelming of his "will" and in "involuntary" servitude. Such a response was completely unreasonable in light of the threats here alleged to have been made; the alleged subjective reaction of this man cannot expose the accused to criminal penalties--and the jury should not be allowed the opportunity to be unduly impressed by that reaction.

II There is a Complete Failure of Proof On Counts Six Through Nine.

Counts Six through Nine of the indictment concern the four youngest Oros Children, Maria Theresa, Sergio, Maria Virginia and Luz Maria. The two smallest girls did not testify at all and there was no evidence that they, individually, heard and understood any alleged threats by the accused--nor that they became frightened in any way--nor that their "will" was overcome--nor that their father, because of his fear, held them there. Sergio and Maria Theresa, while they testified, did not fill the vital gaps in the counts relating to them. Sergio testified about one instance when, allegedly, the defendant "jokingly" told he was going to "build a box" for him or have him sent back to Mexico--and told the court he was momentarily frightened. He said nothing, however, of wanting to leave and having had his "will" overwhelmed--nor did he or his father testify that he was kept on the farm because of the father's fear. Maria Theresa did not even testify as to any alleged threats overheard by her--much less concerning the effect any such threats had.

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The defense respectfully submits that there is absolutely no evidence concerning the second and third necessary elements ("involuntariness" and a "holding") of the offense for counts six, eight and nine--and no evidence of the "involuntary" nature of Sergio's "servitude", and whether or not, if involuntary, it was caused by the lone "throat" Sergio heard. This is an indictment charging the defendant with the commission of nine distinct and separate crimes, seven of which remain as of this writing. He is possibly subject to seven separate and cumulative penalties for these alleged offenses. It would seem shocking that a defendant's exposure might depend upon the attitude toward birth control on the part of the prime 'victim".

The court has indicated its feeling that the four counts in question are sufficient to go to the jury because "the will of the father is the will of the child". The defense respectfully submits that to predicate criminal responsibility upon such a factual or legal presumption is to violate every tenet of the criminal law which, for good reason, places a strict burden of proof on the prosecution. The effect of such a ruling, it would seem, is to make a man guilty of many crimes, by "osmosis," merely if proven guilty of one; such a result should not be allowed.

It appeared to the defense that the court was taking judicial notice of the fact that, in this particular family, the "will of the father was the will of the younger children." It is urged that the court reconsider that ruling. Although there is no hard and fast rule concerning the types of facts that a court may notice judicially, the general rule is that a court may notice

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> "(1) Matters which are actually so notorious to all that the production of evidence would be unnecessary;
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> (2) Matters which the judicial function supposes the judge to be acquainted with, in theory at least;
>
> (3) Sundry matters not included in either of those heads; they are subject for the most part to the consideration that though they are neither actually notorious nor bound to be judicially known, yet they would be capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary."
>
> 9 Wigmore, Evidence, pg. 547-8, Section 2571.

By no conceivable stretching of the judicial notice doctrine can it be extended to encompass facts like the ones here in issue--that the will of Louis Oros, Sr. was the will of his four youngest children. Judicial notice is to be involved only in "100%" situations--not in 50-50 situations nor even in those where the likelihood of a certain truth is 90-10.

It is the defendant's position that the Court, earlier, was logically inconsistent when it dismissed the two counts concerning Mrs. Oros while it let stand counts six through nine. The recognition by the court that Mrs. Oros must be deemed, as an adult, to have a "will" of her own would seem to necessitate a judgment of acquittal on the childrens' counts. For if their mother is deemed to have a will of her own--and if she may well have stayed for reasons other than coercion by the defendant, might not the children have stayed because their mother liked it on the farm? Surely, in today's world, it is far from a rarity to see motherpack up the children and take them off to grandmother's or someplace else-leaving father to exercise his iron will over an

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empty house. If anything, the statistical incidence would probably favor the proposition that it is the mother whose will governs the minor children. Further, the court's holding on the last four counts seems to rule out the possibility of a mid-twentieth century Huckleberry Finn--surely a sad commentary on our jaded society.

It is contended that the facts put before this court and jury are completely insufficient on counts six through nine. There is no evidence--and there is no basis for noticing judicially the crucial elements of those four felony charges. The defense moves that the court reconsider its earlier ruling and enter judgments of acquittal on counts six, seven, eight and nine.

III Counts Five Through Nine Represent Improper Fragmentation of A Single Alleged Crime.

In the instant case, the indictment charges the defendant with commission of nine separate crimes--leaving him open to cumulative punishment on all counts. Seven of those counts remain and, after the government elects between counts one and three, there will be six. The defense contends that these six involuntary servitude counts represent only one, or at the most, two, possible crimes.

We have heard in evidence about one set of "acts" on the part of the defendant. With the exception of one alleged threat testified to by Maria Elena, Luis Oros, Sr. testified to all of the alleged "criminal acts". Some of them, to be sure, are alleged to have taken place in the presence of other members of the family--but there is no evidence of separate acts by the defendant other than those allegedly directed at Luis, Sr. One possible exception is two alleged threats testified to by Maria Elena--one concerning

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being sent back to Mexico if anyone got sick and the other concerning the same fate if anyone "was seen off the farm". Counsel's notes do not indicate whether or not these threats allegedly were made in the presence of Mr. Oros--but counsel's best recollection is that they were. At any rate, only count five could be affected if in fact those threats constitute separate acts or transactions. Counts six through nine are supported (if at all) only by the same evidence directed at proving count three. The same act or set of acts cannot constitute multiple crimes under this statute.

In Bell vs. United States, 349 U. S. 81 (1955), the defendant had been convicted of two counts of violation of the Mann Act; he had been given consecutive sentences on the two counts. The two counts arose from the transportation in interstate commerce of two women, both for the illegal purpose, in one car on the same trip. The Supreme Court held that the one transportation, with two women, resulted in only one crime rather than two. The Court said:

> " When Congress has the will it has not difficulty in expressing it--when it has the will that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.".
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> " if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes."

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Since Bell, in an analogous situation, the Court in Ladner vs. United States, 358 U. S. 169 (1958), hewed to the spirit of that earlier decision. In Ladner, the accused had shot two federal officers with one blast from a shotgun and had been convicted of two separate crimes on the basis of that single act. The Supreme Court reversed the double conviction.

> " Moreover, an interpretation that there are as many assaults committed as there are officers affected would produce incongruous results. Punishments totally disproportionate to the act of assault could be imposed because it will often be the case that the number of officers affected will have little bearing upon the seriousness of the criminal act."
>
> 358 U. S. 169 at 177.

Speaking of the "rule of lenity" laid down in Bell, the Court said,

> " This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. If Congress desires to create multiple offenses from a single act affecting more than one Federal officer, Congress can make that meaning clear. We thus hold that the single discharge of a shotgun by the petitioner in this case would constitute only a single violation of Sec. 254."

The so-called "rule" admittedly has not been applied to all statutory offenses. The primary exception is the mail fraud statute, 18 U. S. C. 1341, where the courts have read the statute as creating a separate criminal offense for each use of the mails in furtherance of even a single scheme. (But there of course are separate acts for each offense). The illegal transportation of aliens results in a single offense for each alien transported and not each separate transportation--on the basis of rather specific statutory provision for multiplication of offenses, however. Vega-Murillo vs. United States, 247 F.

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2d 735 (9 Cir. 1957); Jones vs. United States, 260 F. 2d 89 (9 Cir. 1958). This area of the law is not without its anomalies. Each cutting of a mail bag (even as part of the same transaction) is a separate offense while the theft of more than one letter from the mails at the same time is a single crime. Ebeling vs. Morgan, 237 U. S. 625 (1915); Johnson vs. Lagomarsino, 88 F. 2d 86 (9 Cir. 1937); Smith vs. United States, 211 F. 2d 957 (6 Cir. 1954). While, as noted above, the cutting of several mail bags constitutes several offenses, the simultaneous theft of the same bags is a single offense. Kerr vs. Squier, 151 F. 2d 308 (9 Cir. 1945). In a pre-Bell case, the Second Circuit held, in Oudo vs. United States, 174 F. 2d 854 (2 Cir. 1949), that under the National Stolen Property Act separate crimes were properly proven--and [illegible] punishment imposed--for separate "shipments" within a single hijacked truck. On the other hand, the theft of four horses from a stable, at the same time, was only one crime. Braden vs. United States, 270 Fed. 441 (8 Cir. 1920); see also State vs. Simpson, 137 Iowa 267, 138 N. W. 473 (1912).

But, especially since Bell, the courts have been liberal in holding that "doubt should be resolved against turning a single transaction into a multiple offense." Fisher vs. United States, 231 F. 2d 99, 103 (9 Cir. 1956). In Rayborn vs. United States, 274 F. 2d 366 (6 Cir. 1960), the Sixth Circuit held that the simultaneous transportation in interstate commerce of three machine guns and a corresponding number of "ammo sets" constituted only a single offense. A district court held, in United States vs. Jacek, 196 F. Supp. 152 (W. D. Pa. 1961), that the "receiving"

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of ten postal money orders on the same day (presumptively in the same transaction) constituted only a single violation of 18 U. S. C. 473, the court noting that the statutory language was "no more specific and unambiguous" than the Mann Act.

The Municipal Court of Appeals of the District of Columbia recently held that where the "problem is doubtful", that doubt must be resolved in favor of the accused. There, in Conner vs. United States, 137 A. 2d 212 (App. D. C. 1957), the court held the carrying of two separate unlicensed pistols at the same time a single offense. The Court of Appeals of Kentucky, in Commonwealth vs. Colonial Stores, Inc., 350 S. W. 2d 467 (Ky. 1961), was faced with a defendant charged with 416 violations of selling underweight packages of meat; all of the alleged offenses were discovered on a single day by a spot-checking state meat inspection team. Because the statute did not specifically provide for separate multiple offenses, the court resolved the doubt in favor of the defendant. For an excellent discussion of this entire area of the law in the context of the double jeopardy, double punishment and collateral estoppel problems which arise, see the opinion of Judge Nathan Sobel in People vs. DeSisto, 27 Misc. 2d 217, 214 N. Y. S. 2d 858 (1961).

It is conceded that "our crime" does not consist of a single act, rather a series of alleged acts. It is maintained, however, that only one series of acts was shown--those directed immediately toward Luis Orcs, Sr. (with the possible exception, noted above, in the testimony of Maria Elena). The question arises whether or not that one series of acts--or single "transaction" in the context of the crime charged--is sufficient

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legally to support the multiplicity of offenses charged. (The factual basis for these counts has been attacked separately). It is submitted that, under the particular statute here in question, there can be only one answer-- No!

The defendant invites a comparison of 18 U. S. C. 1581, the "involuntary servitude" statute, with The Mann Act. If there was ambiguity in the latter, so must there be in our case. A comparison with 18 U. S. C. 473, the relevant statute in the [illegible] case, supra, must lead the court to the same conclusion, as must inspection of the criminal statutes in [illegible] vs. United States, [illegible] vs. United States and [illegible] vs. United States, all supra. So far as defendant has been able to ascertain, there is nothing in the available legislative history of the involuntary servitude statute which leans one way or the other concerning the allowable unit of prosecution for a single "act" or "transaction". In that situation, the Supreme Court has instructed that the accused must receive the benefit of the doubt.

IV. The Motions.

Since the first part of this brief has "gone to press", the defense has prepared an additional motion-- to have counts five through nine consolidated into count three; it will be discussed infra.

The defense will raise its motions in the following order: The motion for judgments of acquittal. Concerning the broad grounds addressed to all counts, counsel will confine himself (in the interests of time) to stating for the record his claims-- unless the court indicates that it desires full argument. On the

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motion for acquittal directed only at the last four counts, counsel desires to be heard fully. The defense feels that it is of the utmost importance to rid the indictment of these "clutter" crimes. There is all too much law arising out of "inconsistent" jury verdicts--and such "inconsistent" verdicts are all too often the product of the kind of proliferating pleading here indulged in by the government. The possibility of an improper "compromise" by a jury is always a distinct possibility even when they have been fully and correctly charged by the court-- and the defense feels strongly that all insufficient and/or improperly fragmented counts should go out before the case goes to the jury.

If the defense is turned down on the motion for judgments on the last four counts, it will pass on to the motion to compel the government to elect among count three and all of the childrens' counts and then to the motion to consolidate counts, in that order. Both motions are proper procedurally.

We concede that where the units of prosecution stated in the indictment are improper, the indictment is open to pre-trial attack. United States vs. Personal Finance Co., 174 F. Supp. 87[illegible] (S. D. N. Y. 1959). Here, however, the improper nature of the units of prosecution could not become known to the defense until the government's evidence was in. Both of the motions which have now been made are proper ones.

The motion to elect is specifically approved for this very purpose by Justice Clark, speaking for three other members of the court, dissenting in Wilenowich vs. United States, 365 U. S. 351

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(1961). There is nothing in the majority opinion which disapproves of his suggested procedure; counsel below merely had asked the judge to charge the jury that they could convict on only one of the two counts--and the Court reversed because that was not done. If counsel had followed this procedure instead, the exact same issue would have been framed. Also, Judge Dimock in United States vs. Hughes, 195 F. Supp. 795, 798 (S. D. N. Y. 1961) indicated that a motion to compel election is a proper procedural weapon in the instant situation, citing Natral vs. United States, 233 Fed. 984 (9 Cir. 1916), cert. den. 242 U. S. 648.

The motion to consolidate is also a proper remedy. It was used, successfully, by the defense in Universal C. I. T. Credit Corp. vs. United States, 344 U. S. 218 (1952) and has specifically been approved by two distinguished District Judges in this circuit. See Judge Bryan's opinion in United States vs. Greenberg, 30 F. R. D. 164, 169 (S. D. N. Y. 1962) and that of Judge Dimock in United States vs. Hughes, 195 F. Supp. 795 (S. D. N. Y. 1961).

THE DEFENDANT

By _____
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His Attorneys

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
V.	:	CRIMINAL NO. 10,698
DAVID ICCHOK SHACKNEY, also known as DAVID ISAAC SHACKNEY, DAVID I. SHACKNEY	:	

MEMORANDUM OF LAW -
STATE OF MIND AND THE HEARSAY RULE

Since the service rendered by the victims in this case must be shown to have been involuntary, the state of mind of the victims is an essential element in the case. Where state of mind is material, it may be shown by out-of-court statements and the hearsay rule is inapplicable. Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892); Mattox v. News Syndicate Co., 176 F. 2d 897, 903-904, (2nd Cir. 1949), cert. denied 338 U.S. 858.

Originally, the rule was discussed in terms of "res gestae", see Travelers Ins. Co. v. Mosley, 75 U.S. 397 (1869), but later it has become known as an exception in and of itself. See Mutual Life Ins. Co. v. Hillmon, supra. In the Hillmon case the Court said at 295:

> A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the intent is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.

More recent cases, including those in the Second Circuit, have observed the rule that evidence of declarations and statements by the victim of an offense which requires a showing of state of mind in the victim are admissible to show state of mind. See, e.g., U.S. v. Kennedy, 291 F. 2d 457 (2nd Cir. 1961); U.S. v. Palmiotti, 254 F. 2d 491, 497 (2nd Cir. 1958); U.S. v. Warlack, 225 F. 2d 665, 673 (2nd Cir. 1955); Nick v. U.S., 122 F. 2d 660, 671

(8th Cir. 1941), cert. denied 314 U.S. 687.

Respectfully submitted,

UNITED STATES OF AMERICA

BY ROBERT C. ZAMPANO
United States Attorney

BY JAMES D. O'CONNOR
JAMES D. O'CONNOR
Assistant United States Attorney

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO. 10,698
DAVID ICCHOK SHACKNEY, also known as DAVID ISSAC SHACKNEY and DAVID I. SHACKNEY	:	

MEMORANDUM CONCERNING THE ADMISSIBILITY OF EVIDENCE OF THE IMPROPER TOUCHING BY THE DEFENDANT OF THE OROS DAUGHTERS

In response to the order of the Court that Counsel for the Government make known in advance to the Court and Counsel for the defendant , his intention to introduce any evidence concerning the improper touching of the Oros girls by the defendant, and in view of the intention of Counsel for the Government to introduce such evidence in the near future, this memorandum is respectfully submitted to show the materiality and propriety of admitting such evidence.

The Government has charged in the indictment that the defendant held the persons named therein to a condition of peonage and/or to involuntary servitude. Thus, an essential element to be proved is the holding against their wills of the named persons by the defendant. (See e.g. Clyatt v. United States, 197 U.S. 207, 215-216 (1905); In re: Peonage Charge, 138 Fed. 686, 687-688 (N.D. Fla., 1905).

The Government has alleged further in its Bill of Particulars that the holding of the named persons against their wills was accomplished, not by physical force, but by psychological and economic intimidation and coercion, including threats of deportation, threats of economic deprivation, threats of harassing legal action; and threats of splitting up the family unit. Such coercion, if proved, is sufficient to support the charges in the indictment, since the means of coercion is immaterial if the party is thereby induced to remain in the service of another against his will. (Pierce v. United States, 146 F. 2d 84, 86. (5th Cir, 1944), certiorari denied 324 U.S. 873; (Bernal v. United States, 241 F. 339, 342 (5th Cir. 1917), certiorari denied 245 U.S. 672.)

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Due to the nature of the charges involved it is essential to show, not only that the defendant made the named parties labor for him, but that this service was rendered against the wills of the persons concerned. On that question it is certainly relevant and material to show the conditions under which they lived and the treatment to which they were subjected. In United States v. Clement, 171 F. 974, 976 (D.S.C. 1909), the Court stated that, while it is not unlawful for any person to use every proper means of persuasion to induce his debtor to perform his contract of employment, it is unlawful to compel such performance by force or by intimidation. The Court stated further that what constitutes force or intimidation is a question of fact, each case depending on its own circumstances, and that the character and condition of life of the two parties are always to be considered in deciding a question of that nature.

In Peonages Cases, 123 Fed. 671, 681, (M.D. Ala., 1903), the Court stated that in considering whether the service in a case of this nature is involuntary, the jury must consider the situation of the parties, the relative inferiority or inequality between the persons contracting to perform the service and the person exercising the influence to compel its performance.

The Government contends that the treatment to which the Oros girls were subjected by the defendant is most relevant to the question of whether their service was involuntary. Indeed, it is but another phase of the conditions under which they and their family were forced to live and evidence of their desire to leave the employment of the defendant. The treatment to which the Oros girls were subjected is direct evidence of the desire of this family to leave the farm and hence, most pertinent to the issues of whether or not the service rendered by them was voluntary.

Not only is the evidence in question material to the question of the involuntariness of the service, but it is also relevant to the state of mind, or intent, of the defendant. Even though no specific intent is required for the offenses in question still it must be shown that the defendant's conduct in holding these persons in his employ was voluntary and purposeful and not

engaged in through mistake or inadvertence or other innocent reason,(See, e.g., Sinclair v. United States, 279 U.S. 263, 299 (1928); Armour Packing Co. v. United States, 209, U.S. 56, 85 (1907). The evidence as to the defendant's treatment of the Oros girls in particular, just as the evidence of his treatment of the family in general, tends to show his attitude and his feelings toward the persons named in the indictment. It tends to show his lack of respect for them as persons and that he looked upon them more like chattels, to be handled and manipulated by him at his will. Such evidence is therefore admissible on the issue of the state of mind of the defendant.

Counsel for the defendant contends that evidence of the defendant's improper touching and caressing of the Oros girls should not be admitted because it is "highly prejudicial and inflamatory." Counsel for the Government does not agree that such evidence is any more prejudicial than any other evidence of the defendant's guilt of the crimes with which he has been charged. As for the inflamatory nature of the evidence in question, it is hardly more so than evidence already in the record. There has already been testimony to the effect that the defendant collected from the Croses an unreasonable and usurious rate of interest on money advanced; that he provided diseased chickens and molded bread for them to eat; that he required a(7)seven year old child to labor long hours daily for seven days a week; and that he did not allow the Oros children to attend school or church or otherwise leave the farm except on purposes of necessity when accompanied by him. Surely the evidence sought to be introduced would seem to be no more inflamatory than that evidence. Such evidence cannot be considered in a vacuum and, when considered with other evidence in the case is most material to show the involuntariness of the service and to show the state of mind of the defendant.

Likewise, the evidence sought to be introduced here is no more inflamatory, if as much so, as that admitted in other cases involving similar charges. It is of significance, also, that in those cases, as in the instant case, the evidence was not such as would normally induce a person to remain but rather to want to leave. In Bernal v. United States, supra, the defendant was charged with holding persons in peonage. Even though the charge involved the holding

of the complaining witness to involuntary servitude as a house servant, evidence was admitted to show that the defendant had made efforts to obtain the complaining witness' services as a prostitute prior to the time that she had been required to serve in the capacity of a servant to pay off the alleged indebtedness.

In Pierce v. United States, supra, the defendant also was charged with peonage. There, evidence was admitted to show that the defendant had required a number of girls to prostitute themselves and engage in other acts of immorality for the purpose of paying off an alleged indebtedness to the defendant.

In United States v. Ingalls, 73 F. Supp. 76 (S.D. Cal. 1947), the defendants were charged with enticing, persuading and inducing another to go from one place to another with the intent that such person be held as a slave. Evidence was admitted to show that during a long cross-country trip on which the complaining witness accompanied the defendants, the complaining witness was required either to sleep at night in the car parked on a public street or to sleep on the floor of her mistress' hotel room.

These are but some of the cases which show the kind of evidence admissible in cases of this nature.

Finally, the Government contends that the previous hearing of the Court concerning the original Bill of Particulars has no bearing on the question here involved. At that hearing the issue was whether or not an allegation in the Bill of Particulars concerning the molesting and touching of the Oros girls was responsive to the Court order for a bill of particulars. Here the question is whether or not evidence of such touching is admissible to show the state of mind of the Oros family and/or the state of mind of the defendant, both of which are material to this case.

Respectfully submitted,

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BY ROBERT C. ZAMPALO
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Assistant United States Attorney

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
V.	:	CRIMINAL NO. 10,698
DAVID ICCHOK SHACKNEY, also known as DAVID ISAAC SHACKNEY, DAVID I. SHACKNEY	:	

MEMORANDUM OF LAW - ADMISSIBILITY OF PRIOR CONSISTENT LETTERS OF OROS AND ADMISSIBILITY OF REMAINING PORTION OF LETTER OF WHICH DEFENDANT'S EXHIBIT 40 IS A PART

1. Admissibility of Prior Consistent Letters.

The general rule is that prior consistent statements by witnesses are not admissible to bolster his testimony even though his credibility has been attacked on the ground of prior inconsistent statements. Wigmore on Evidence, Vol. IV, Sec. 1126, pp. 197-202; McCormick on Evidence (1954), Chap. 5, Sec. 49. However, where, at the time of making the prior consistent statement the witness had no "motive to fabricate", such statement is admissible for the purpose of refuting the implications arising from the inconsistent statements introduced by the opposition. See, e.g. Lindsay v. U.S., 237 F. 2d 893 (9th Cir. 1956); U.S. v. Sherman, 171 F. 2d 619, 621-622 (2nd Cir. 1948). The "motive to fabricate" must be more than a mere contention or a mere possibility that the witness might have been motivated by an impeaching circumstance which may or may not have been shown to exist at the time of the trial. U.S. v. Grunewald, 233 F. 2d 556, 566 (2nd Cir. 1956), reversed on other grounds 353 U.S. 391 (1957).

In the Grunewald case several persons were being prosecuted for conspiracy to defraud the government and one of the co-conspirators, who had turned state's evidence, admitted, during his cross-examination, that he had pleaded guilty to an indictment for conspiracy and that at the time of his testimony he was awaiting sentencing. On redirect, the government was allowed to show that prior to the indictment the witness had visited his attorney and had given the attorney a statement consistent with his present testimony. At the same time the witness had requested the attorney to communicate the statement hypothetically to the United States Attorney.

On appeal counsel for the defendants urged that admission of the prior consistent statement was error since the witness' act in giving it was no more than an attempt to make a bargain with the government and his motive to falsify was no less operative at that time than at the time of the trial. In rejecting this argument, the Court of Appeals for the Second Circuit said, at 566:

> (T)his is mere contention, appropriate enough in summation to the jury, but insufficient to form the basis for the rejection of the testimony as a matter of law. Otherwise, it would never be proper to rehabilitate a witness by proof of prior consistent statements in cases where numerous impeaching circumstances were shown to exist at the time of the trial but where there may be found a theoretical possibility that the witness might have been motivated by one of them at the time of making the prior consistent statement. It is well established law in this circuit that in such cases the prior consistent statements may be received. (Citations.)
>
> . . . .
>
> The principle involved is that where the circumstances are such as to leave it reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them.

In the instant case counsel for the defense has not established any motive on the part of Oros to fabricate a story at the times the letters in question were written by him. The possible inferences from the cross-examination that Oros was seeking a "way out" of his contract after finding out that the defendant would not bring Oros' son to this country are pure conjecture since, on the stand, Oros denied that he ever knew prior to writing the letters that the defendant was not bringing his son to this country. Likewise, any possible inferences from the evidence adduced on cross-examination to the effect that Oros sought legal advice after leaving the farm is irrelevant to show a motive at the time when the letters were written, and any motive to fabricate, based upon such evidence would be only a "theoretical possibility", as stated by the Court in the Grunewald case.

There is support for the admission of the letters in question in other authorities which speak in terms of an exception to the general rule where the cross-examination as to prior inconsistent statements is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony. See, e.g., U.S. v. Keller, 145 F. Supp. 692 (D. N.J. 1956); Wigmore on Evidence, Vol. IV, Sec. 1129; McCormack on Evidence (1954), Chap. 5,

Sec. 49. In the Keller case the Court held that where the defense, on cross-examination, sought to establish that a witness for the government had contrived his testimony after the witness was charged with a federal violation, a statement consistent with his testimony in chief which was given prior to the time he was so charged, was admissible on the issue of the witness' credibility. As has already been shown relative to the "motive to fabricate" discussion above, in the instant case there was no such contrivance or plan shown to exist at the time Oros wrote the letters in question.

Aside from the above-mentioned grounds, there is another upon which the letters comprising defendant's Exhibits 29, 30 and 31 For Identification should be admitted into evidence. The defense has "opened up" the inquiry as to these letters. Cohen v. U.S., 157 Fed. 651 (2nd Cir. 1907), is a case in point. There the court said at 656:

> In the tenth point (of error) it is claimed that the court erred in receiving in evidence a statement of occurrences signed by a witness for the prosecution . . . Of course, this statement was not admissible for the purpose of bolstering up the witness' testimony. It was not offered for such purpose. Leavitt had testified for the government, and on cross-examination was asked by defendant's counsel whether he had signed a statement for the prosecution and been paid a check when he did so. The prosecution then offered the statement in evidence, and it was received. It thus appears that the defendant's counsel opened up the inquiry concerning this statement. Having done so, we think it was not prejudicial error for the court to admit the statement in evidence.

In the instant case the defendant's counsel has questioned the witness, Oros, concerning the three above-mentioned letters. Consequently, he too has opened the inquiry thereto and the government should be allowed to introduce them.

II. Admissibility of Remaining Portion of Letter of Which Defendant's Exhibit 40 is a Part.

There is ample authority for the proposition that where a portion of a statement or writing has been introduced into evidence by the defense for purposes of impeaching the witness, the opposition may, on redirect examination, introduce the remainder of the statement for purposes of giving to the jury the full circumstances in which to consider the witness' credibility. Grobeiny v. Cowen, 151 F. 2d 810 (2nd Cir. 1945); U.S. v. Weinbaum, 121 F. 2d 826 (2nd Cir. 1941); Powers v. U.S., 294 Fed. 512 (5th Cir. 1923); McCall v. Pittsburgh,

Chartiers & Youghiogheny Ry. Co., 168 F. Supp. 665 (W.D. Pa. 1958). The only requirement seems to be that the remaining part be explanatory of the part already admitted and relevant to the subject matter about which the witness has been cross-examined. McCall v. Pittsburgh, Chartiers & Youghiogheny Ry. Co., supra. Such evidence is admissible for the purpose of aiding the jury in a proper understanding of what already has been received so that a false impression will not be obtained by viewing only a portion of the writing out of context. U.S. v. Weinboen, supra, Vause v. U.S., 53 F. 2d 346 (2nd Cir. 1931).

The portion of the letter in question concerns subject matters as to which the witness was questioned on cross-examination, namely, debts owed by Oros in Mexico and the payment of the notes. Furthermore, the portions of the letter which were introduced as defendant's Exhibit 40 relate to matters as to which the remaining portion is necessary to give the jury the complete picture. The paragraph immediately preceding the omitted portion dealt with Oros' state of well-being; so does the first paragraph of the omitted portion. The last paragraph of the omitted portion deals with circumstances which led Oros to believe that the defendant would surprise him. The succeeding paragraphs (which were introduced by defendant's counsel) explains why Oros had such a belief.

Surely these are closely related portions of the same letter and are explanatory of the parts already in evidence. As such, they are admissible by the government.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
V.	:	CRIMINAL NO. 10,698
DAVID ICCHOK SHACKNEY, a/k/a DAVID ISAAC SHACKNEY, a/k/a DAVID I. SHACKNEY	:	

GOVERNMENT'S ANSWER TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL UNDER RULE 29(a)

In the instant case the defendant, during the Government's case in chief, has introduced some sixty (60) exhibits. It is the Government's contention that by offering evidence on his own behalf he has waived his right to a Motion for Judgment of Acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure at the conclusion of the Government's case.

Ladrey, et als v. United States, 155 F. 2d 417

In considering a motion for judgment of acquittal the role of the Court is a limited one. The Second Circuit has established the rule that the standard of evidence necessary to send the case to the jury is the same in both civil and criminal cases, that given evidence from which a reasonable person might conclude that the charge in the indictment has been proved, the Court should look no further and that the only difference between a civil action and a criminal prosecution is in the instruction that must be given to the jury that they must be convinced beyond a reasonable doubt. See U.S. v. Masiello, 235 F. 2d 279 (2nd Cir., 1956), cert. denied 352 U.S. 882; U.S. v. Castro, 228 F. 2d 807 (2nd Cir., 1956), cert. denied 351 U.S. 940; U.S. v. Costello, 221 F. 2d 668 (2nd Cir., 1955), affirmed 350 U.S. 359; U.S. v. Sherman, 171 F. 2d 619 (2nd Cir., 1948); U.S. v. Andolschek, 142 F. 2d 503 (2nd Cir., 1944); U.S. v. Feinberg, 140 F. 2d 592 (2nd Cir., 1944). In stating the doctrine the Court of Appeals for the Second Circuit stated in U.S. v. Castro, supra, at 807-808:

> "The principal error charged on this appeal is that the credibility of the witnesses for the prosecution was so impaired upon the trial, that no reasonable jury could have been satisfied beyond a reasonable doubt of the accuseds' guilt. This assumes that in a criminal prosecution the judge may not submit the case to the jury unless he is himself satisfied, not only that there is testimony from which the accused's guilt may

> be inferred, but also that reasonable persons might be so satisfied beyond a reasonable doubt. This theory is based upon the postulate that the accused is entitled to a protection greater than that the jury must be told that they must not have any fair doubt of the guilt of the accused, and that there is this preliminary question for the judge to answer. Whether that is the doctrine in all the circuits we need not inquire, for it is the thoroughly established doctrine in this circuit that the only difference between a civil action and a criminal prosecution is in the instruction that must be given to the jury that they must be convinced beyond all fair doubt."

In ruling on a motion for acquittal at the close of the Government's case the standard to be applied is whether the trial judge could and not whether he would find the accused guilty on the Government's evidence.

U.S. v. Consolidated Laundries Corporation, 291 F. 2d 563 (2nd Cir. 1961)

There has been criticism of the Second Circuit doctrine and other circuits state the rule governing such motions in a different manner. See, e.g. Riggs v. United States, 280 F. 2d 949 (5th Cir., 1960). The rule prevailing in many of the other circuits is that the sole duty of the trial judge, in passing upon a motion for judgment of acquittal, is to determine whether upon the evidence taken in the light most favorable to the government, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw therefrom all justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. See, e.g., Glasser v. U.S., 315 U.S. 60 (1942); Riggs v. U.S., 280 F. 2d 949 (5th Cir., 1960); Johnson v. U.S., 265 F. 2d 496 (4th Cir., 1959); U.S. v. Yeoman-Henderson, 193 F. 2d 867 (7th Cir., 1952); Pritchett v. U.S., 185 F. 2d 438 (D.C. Cir., 1950); Bell v. U.S., 185 F. 2d 302 (4th Cir., 1950).

In the instant case it is unnecessary to choose between the two rules enunciated since the evidence already adduced is sufficient to satisfy either.

Nine offenses have been charged in the indictment. Count one charges that the defendant held one Luis Humberto Ubiarco Oros to a condition of peonage beginning on or about July 12, 1961, and continuing until on or about March 3, 1962. Count two alleges the same offense for the same dates with respect to one Virginia Espina Oros. Count three alleges that beginning on or about July 12, 1961, and continuing until on or about March 3, 1962, the defendant knowingly and wilfully held one Luis Humberto Ubiarco Oros to involuntary servitude. Counts four, five, six, seven, eight and nine allege the same offense for the

same period with respect to Virginia Espina Oros, Maria Elena Oros, Maria Therese Oros, Sergio Oros, Maria Virginia Oros, and Luz Maria Oros, respectively.

Peonage, as set out in the first two counts of the indictment, is a status or condition of compulsory service based upon the indebtedness of the peon to the master. The basal fact is indebtedness and that which is contemplated by the statute is compulsory service to secure payment of the debt. See, e.g., Clyatt v. U.S., 197 U.S. 207, 215-216 (1905); In re Peonage Charge, 138 Fed. 686, 687-688 (N.D. Fla., 1905). Thus, if it be shown that the defendant held Luis and Virginia Oros against their wills to work in payment of a debt owed or claimed to be owed the offenses in counts one and two are established. The genuineness of the debt is immaterial. Pierce v. U.S., 146 F. 2d 84, 86 (5th Cir., 1944); U.S. v. Clement, 171 Fed. 974, 976 (D.S.C. 1909). So is the amount. Pierce v. U.S., supra; Bernal v. U.S., 241 Fed. 339, 342 (5th Cir., 1917), cert. denied 245 U.S. 672.

In the instant case the over-all evidence introduced by the Government spells out a well planned scheme on the part of the defendant first to bring the Oros family to the United States and second to place them, as a family unit, in a position where they would not and could not leave.

In the summer of 1960 the defendant met the Oroses while he was in Mexico. During the course of conversation, Oros discovered that the defendant was looking for a family to come to the United States to work on the defendant's chicken farm. Upon Oros' indication of a desire to come to the United States, the defendant then instructed Oros to begin getting his family's papers in order with a view toward coming.

Evidence further shows that during the next six months or so Oros proceeded to obtain necessary papers and also wrote the defendant repeatedly, virtually begging to come to this country, and imploring the defendant to give him some word and not to kill his hopes. The defendant did not acknowledge Oros' communications in any way until January of 1961 when he sent Oros a telegram instructing Oros to call him. Evidence has been introduced showing that subsequent to January, 1961, there were numerous telegrams from the defendant and that a number of telephone conversations were held but never once did the defendant write anything to Oros until March, 1961, when the first

so-called contract was furnished for the signatures of the Oroses. Evidence further shows that after some preliminaries the final "contract" was signed and returned to the defendant in April, 1961. Later in April, 1961, the defendant sent to Oros an affidavit in support of the Oros visas for coming to this country. The evidence shows that immediately after sending the affidavit the defendant called Oros by telephone and instructed Oros not to advise the American Consular officials of the so-called contract.

Evidence shows that there was good reason for these instructions. The so-called contract, a most unconscionable document, provided for only $160.00 per month for the services of three persons--Mr. Oros, Mrs. Oros and their oldest daughter for long hours each day "7 days a week 365 days a year without exception". The affidavit, which was intended for American Consular authorities, provided for $225.00 per month for the services of only two persons--Mr. and Mrs. Oros for 60 hours per week.

The evidence shows that the defendant represented to Mr. Bargas, an American Consulate official in Mexico, that Mr. Oros was a man of great experience in the field of caring for and raising of chickens. At the same time, however, the defendant had in his possession a number of documents, referred to by the defense as "contracts", stating that the Oroses "actually did not have any experience as farm workers."

Evidence shows further that after utilizing all the money they could borrow, the Oroses still could not pay for their visas and their transportation to this country. The defendant obtained the visas for the Oroses and provided them with bus tickets to Hartford, Connecticut. The expenditures totaled less than $600.00. However, the defendant obtained from Mr. Oros 18 promissory notes for $100.00 each, supposedly for the amount of the expenditures and interest he anticipated charging on a claimed loan of $1,200.00.

Evidence shows further that not one penny was given to the Oroses and that the family of seven made a four-day five-night bus trip from Mexico City to Hartford, Connecticut, with but $6.00 for food and that they had nothing to eat throughout the trip but coffee and donuts.

Evidence shows that upon their arrival at the farm of defendant the whole family, including the four young children not mentioned in the so-called

contract, were put to work within approximately one hour of their arrival. One of these children was a 7 year old girl. Evidence further shows that during the period from July 12, 1961 to March 3, 1962, each of the family, including the 7 year old girl, a 9 year old girl, a 12 year old boy, a 14 year old girl and a 16 year old girl, labored long hours each day, seven days a week.

The evidence shows that the defendant often told the family of other persons whom he had had deported because they had displeased him in their work, that he had, on occasions, sent the husband and father back to Mexico and that the wife and family were left in this country crying. The defendant told them that if they got sick they would be sent back to Mexico. He told them that if they didn't pay the notes, the house of Oros' friend, who had co-signed the notes, would be taken in Mexico.

He told them that the police, the postmen, immigration officials, the neighbors, and "everybody" were his friends, and that if someone displeased him he would spend any amount of money to get him deported. He told them that if anyone left the farm they would contact disease and convey it to his chickens and intimated that Oros had no money to pay for the thousands of chickens when they died. He told the family that if anyone went outside the farm, he should prepare himself to return to Mexico. He told Oros that if he broke the contract he would be deported and that thereafter neither Oros not Oros' son nor his son's son could ever return to this country.

Evidence shows that none of the family was allowed to leave the farm except on two or three occasions when accompanied by the defendant, and then only for purposes of necessity. The children were not allowed to attend school and no one was allowed to attend church, even though the Oroses were accustomed to going to church, and four of the five children had been attending school in Mexico. The evidence further shows that the defendant paid the Oroses not one penny in money during the entire period that they remained on the farm. Rather, each month the amount "earned" was credited against the alleged indebtedness.

The evidence shows further that the Oroses were forbidden to talk to persons who had occasion to come upon the farm and that visitors were forbidden to talk to the Oroses. There is also evidence that the Oroses found indications that their mail, which had to be posted and received through the defendant, was being tampered with. There is evidence that the Oroses "smuggled" out certain

letters and that as a result of one such letter, friends from Philadelphia came to see about them and initially were denied admittance to the farm by the defendant.

The above-described treatment is more than simply harshness on the part of the defendant. It is evidence of the defendant's scheme of holding the Oroses against their will by threatening them and by keeping from them the funds and means necessary to leave and the opportunity to become acquainted with their rights by associating and communicating with other people.

In addition, there is evidence that the living quarters provided for the Oroses were grossly inadequate. When, in the final reckoning, the defendant was confronted by "outsiders" with the issue of the "contract" he denied that there was any contract and attempted to have Oros sign a "paid in full" receipt before Oros left the farm.

The above enumerated evidence, already in the record, clearly shows that the element of debt, or claimed debt, has been established. It also clearly appears that Oros and his wife, Virginia, worked for the defendant in payment of that claimed indebtedness. Since the evidence clearly shows that the basal fact of indebtedness has been established relative to the peonage charges, it remains only to be considered whether substantial evidence has been introduced on the question of the involuntariness of the service rendered.

With respect to both the peonage counts and the involuntary servitude counts the question of the involuntariness of the service is essential. See Clyatt v. U.S., supra; In re Peonage Charge, supra; U.S. v. Clement, 171 Fed. 974, 976 (D. S.C. 1909). Consequently the following discussion of the question of involuntariness applied equally to all counts of the indictment.

Involuntary servitude, as contemplated by the statutes here involved, may exist wholly unattended by circumstances of physical force. See, e.g. Pierce v. U.S., supra; Bernal v. U.S., supra; U.S. v. Ingalls, 73 F. Supp. 76 (S.D. Cal. 1947); U.S. v. Clement, supra.

It is the holding of persons in unwilling servitude which is necessary and such a holding may be accomplished by threats and intimidations as effectively as by force. See, e.g., Pierce v. U.S., supra; Bernal v. U.S., supra, U.S. v. Ingalls, supra; U.S. v. Clement, supra. If the circumstances are such

that the employer by threats and intimidation placed the employee in fear and thereby induced the party to remain in the service against his will, then the "holding against the will" is just as effective as if the party were held by chains and bars. As the Court states in U.S. v. Clement, supra, at 976, if the defendant made threats and thereby induced the parties to remain in his service against their wills, overmastering their weakness by his strength, and thus subduing their wills to his, then he would be guilty of holding such persons to involuntary servitude.

Whether or not the service was involuntary is a question of fact, each case depending on its own circumstances. See U.S. v. Clement, supra. Consequently, this is a question for the jury to decide and the only function of the Court on this motion for acquittal is to determine whether there is substantial evidence in the record from which, considered in the light most favorable to the government, a reasonable person might conclude that the defendant did, by threats and other forms of psychological intimidation and coercion, subdue the wills of these parties to his own and thus kept them in his employ.

The evidence already in the record which has been outlined above shows that the defendant made threats to the Oroses. Knowing of the burning desire of these persons to remain in this country, the defendant constantly reminded the Oroses of his alleged friends and connections and influence with the police and the immigration authorities. He repeatedly told them of other families whom he had deported and he threatened the Oroses with deportation if they did not perform faithfully under the so-called contract. He forbade the Oroses to communicate with others except through letters which the evidence shows were probably censored by the defendant. Aside from these factors other intimidating circumstances are apparent from the evidence as hereinbefore summarized.

As to the question of what made the Oros family work, the Government claims that in addition to the above stated threats the so-called "contract" was a dominating factor. To a person who knew his rights or could find out what his rights were the "contract" would not be controlling. To an uninformed person kept in ignorance it could be overpowering. This the government submits

is a question for the jury. It clearly appears, therefore, that there is substantial evidence in the record from which a reasonable person may conclude that the Groses were held to involuntary servitude and that, in addition, such holding as to Mr. and Mrs. Gros was, inter alia, for the liquidation of a claimed indebtedness.

For the above discussed reasons, the motion for judgment of acquittal should be denied.

Respectfully submitted,

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