--- F.3d ----, 2013 WL 28392 (C.A.9 (Nev.)), 13 Cal. Daily Op. Serv. 109, 2013 Daily Journal D.A.R. 104
(Cite as: 2013 WL 28392 (C.A.9 (Nev.)))

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff–Appellee,
v.
CHAO FAN XU, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Ying Yi Yu, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Guo Jun Xu, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Wan Fang Kuang, Defendant–Appellant.

Nos. 09–10189, 09–10193, 09–10201, 09–10202.
Argued and Submitted April 17, 2012.
Filed Jan. 3, 2013.

OPINION

GOODWIN, Circuit Judge:

Four Chinese nationals appeal their convictions and sentences for federal crimes that they committed as part of a scheme to steal funds from the Bank of China, where two of the defendants were high-level employees, and to escape prosecution and retain the proceeds by illegal transfers of funds and by immigration fraud. We affirm the convictions, and vacate the sentences and remand for resentencing.

Defendants Xu Chaofan ("Chaofan"), Xu Guojun ("Guojun"), Yu Ying Yi ("Yingyi"), and Kuang Wan Fang ("Wanfang") [FN1] (collectively, "Defendants"), challenge the application of the Racketeer Influenced and Corrupt Organizations Act ("RICO") to extraterritorial conduct which occurred in China, as well as various rulings on evidence and defense motions. They also challenge their sentences.

The scheme involved diverting bank funds from the Bank of China to a holding company in Hong Kong. Defendants were charged with manipulating auditing controls to conceal their diversion of bank funds, and using the funds to speculate in foreign currency, to make fraudulent loans, to purchase real estate in Asia and North America, and to finance gambling trips to Las Vegas and other casino venues. As an essential part of the scheme, each of the Defendants entered into a fraudulent marriage with a spouse who held valid United States immigration status. After the Bank of China discovered their scheme, Defendants fled to the United States using their falsified immigration documents. Defendants were arrested and brought to trial in the United States District Court for the District of Nevada.

We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

I. Facts and Procedural Background

Guojun and Yingyi were legally married in China in 1985. Chaofan and Wanfang were legally married in China in 1992. Chaofan was employed by the Bank of China from 1982 through 2001. The Bank of China is a state-owned bank that is headquartered in Beijing. It operates throughout China through a series of provincial branches, second-level branches, and sub-branches. In 1992, Chaofan was promoted to president/general manager of the Kaiping sub-branch in Guangdong province, and he served in that position until August 1998. Guojun was hired in 1994 as head of accounting at the Kaiping sub-branch. In August 1998, Chaofan was promoted, and unindicted co-conspirator Yu Zhendong ("Zhendong") became president/general manager of the Kaiping sub-branch. When Zhendong was promoted in May 2000, Guojun took over at the Kaiping sub-branch and served as president/general manager until the Bank of China discovered the fraud in October 2001.

During their management of the Kaiping sub-branch, the three managers engaged in three types of fraud: (1) foreign exchange speculation, resulting in a loss to the Bank of China of approximately $147 million; (2) "out-of-book" loans, which are loans that were not properly recorded in the bank's accounting system, resulting in a loss of approximately $181 million; and (3) false loans, in which loans totaling $90–95 million were entered into the bank's accounts, but the proceeds from the loans were diverted into a Hong Kong conduit company named Ever Joint.

In 1995, the Bank of China conducted a foreign exchange audit including the Kaiping sub-branch. To avoid discovery of the foreign currency exchange losses, Chaofan, Guojun, and Zhendong directed Kaiping sub-branch employees to falsify bank records. These efforts succeeded. The three managers were able to pass subsequent audits by the Bank of China in the same way.

During the course of the fund diversions, Chaofan, Guojun, Wanfang, and Yingyi entered into false marriages with spouses who held valid United States immigration status. The purpose of the false marriages was to gain residency status in the United States to avoid Chinese Law enforcement.

During the time alleged in the indictment, Chaofan, Guojun, Wanfang, and Yingyi made numerous gambling trips to Macao, Australia, Malaysia, and the Philippines. These trips were financed with wire transfers totaling more than $80 million from Ever Joint accounts. Using counterfeit visas and passports, the group also traveled to Las Vegas in 2000 and 2001, where they stayed at casino hotels and spent substantial sums playing baccarat. The gambling money was arranged through intermediaries who used cashier's checks drawn from Ever Joint accounts to set up credit lines at the casinos. The Las Vegas gambling money included wire transfers totaling over $2 million from Ever Joint accounts that resulted in checks being issued by the casinos to the intermediaries to facilitate the return of the funds to Defendants for their personal use.

On October 12, 2001, due to a change in accounting procedures, the Bank of China discovered a $482 million discrepancy in bank records that was attributed to the Kaiping sub-branch. Chaofan and Guojun fled to Hong Kong. Using their fraudulent passports and visas, they flew to Vancouver, British Columbia, and continued on to Las Vegas. Chaofan and Guojun then discovered that Chinese authorities had frozen the $8 million that they had transferred to Caesars Palace casino for their personal use. Wanfang and Yingyi fled separately to Vancouver and then to the United States using their fraudulently obtained immigration status. The United States does not have an extradition treaty with China.

Zhendong was arrested in Los Angeles on December 19, 2002. Zhendong pleaded guilty to federal charges and agreed to return to China. He cooperated with the FBI in the investigation and prosecution of Defendants. *Id.* Guojun and Yingyi were arrested in Wichita, Kansas, on September 22, 2004. Chaofan and Wanfang were arrested in Edmond, Oklahoma, on October 6, 2004.

In the second superseding indictment, Defendants were charged with RICO conspiracy in violation of 18 U.S.C. § 1962(d) (count one), money laundering conspiracy in violation of 18 U.S.C. § 1956(h) (count two), conspiracy to transport stolen money in violation of 18 U.S.C. § 371 (count three), use of a fraudulently obtained visa in violation of 18 U.S.C. § § 1546(a) & 2 (counts four through nine), and use of a fraudulent passport in violation of 18 U.S.C. §§ 1542 & 2 (counts ten through fifteen).

From February 2005 through early 2008, the parties were involved in lengthy pretrial motions and discovery, including two rounds of videotaped depositions of witnesses who either lived in or were incarcerated in China. The government, together with Defendants and their counsel, conducted the depositions from Las Vegas, Nevada, via video link with the witnesses in China. Defendants cross-examined each witness. Defendants waived their right to be present in China to confront the witnesses face to face.

After a 38–day trial (from June 10, 2008, to August 29, 2008), the jury convicted Defendants on all counts. The district court sentenced Chaofan to 25 years in prison, Guojun to 22 years, and Wangfan and Yingyi to 8 years each. The court also sentenced each defendant to three years of supervised release, and entered restitution orders totaling $482 million. Defendants timely appealed to this court. The appeals were assigned to this panel and consolidated.

We granted the government's motion to expand the record for this appeal to include 31 DVDs containing the complete, unedited video depositions for all witnesses who appeared at trial.

II. Defendants' Count One Rico Conspiracy Convictions

A. Count One Activities

Viewed as a whole, the activities subject to count one encompass a unified scheme, wherein the Defendants: stole as much money as possible from the Bank of China; transferred the stolen funds out of China; escaped, through immigration fraud, to a safe harbor in the United States; and then spent the funds in, among other places, Las Vegas casinos. Defendants were thus engaged in an international enterprise, using many of the tools of the global economy. We therefore consider RICO's application in a multinational context.

B. Extraterritorial Application of Rico

Defendants argue that their count one convictions are invalid because the charged conspiracy was extraterritorial and outside the reach of RICO. We review *de novo* a challenge to the extraterritorial application of criminal statutes. *See* Vasquez–Velasco, 15 F.3d 833, 838–40 (9th Cir.1994); *see also* United States v. Felix–Gutierrez, 940 F.2d 1200, 1203–04 (9th Cir.1991); Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir.1984).

In Morrison v. National Australia Bank Ltd., —— U.S. ——, ——, 130 S.Ct. 2869, 2875, 177 L.Ed.2d 535 (2010), the Supreme Court confronted the question whether § 10(b) of the Securities Exchange Act applies extraterritorially. The Court began its analysis under the premise that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." Id. at 2878. The Court then concluded that, because § 10(b) contained no "affirmative indication" of extraterritorial effect, it could not be applied extraterritorially. Id. at 2883.

In the wake of *Morrison,* this circuit has not considered whether RICO applies extraterritorially. We have previously held, however, that RICO is silent as to its extraterritorial application. *See* Poulous v. Caesars World, Inc., 379 F.3d 654, 663 (9th Cir.2004). Other courts that have addressed the issue have uniformly held that RICO does not apply extraterritorially. *See generally* Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir.2010); European Cmty. v. RJR Nabisco, Inc., 2011 WL 843957, at *5 (E.D.N.Y. Mar.8, 2011); In re Toyota Motor Corp., 785 F.Supp.2d 883, 913 (C.D.Cal.2011); Sorota v. Sosa, 842 F.Supp.2d 1345, 1349 (S.D.Fla.2012). Although those cases addressed the civil rather than the criminal RICO statute, they are faithful to *Morrison's* rationale: "Rather than guess anew in each case, this Court applies the presumption [against extraterritorial application] in all cases, preserving a stable background against which Congress can legislate with predictable effects." Morrison, 130 S.Ct. at 2881. Therefore, we begin the present analysis with a presumption that RICO does not apply extraterritorially in a civil or criminal context.

Defendants argue that because RICO does not apply extraterritorially, the government cannot apply the statute in this case because the conspiracy took place in China and Hong Kong, not the United States. Defendants define the enterprise as having two parts. Indeed, Defendants were charged here with membership in a criminal enterprise that involved not only embezzlement against the Bank of China that occurred in China and Hong Kong (part one) but also immigration fraud to escape to the United States with their ill-gotten gains (part two). Accordingly, we must determine whether under the circumstances of this case RICO can be lawfully applied to any, or all, of Defendants' conduct—foreign or domestic. *See* id. at 2884 (the "presumption here (as often) is not self-evidently dispositive, but its application requires further analysis.").

C. Determining RICO's Focus

Morrison frames the extraterritorial inquiry in terms of "the 'focus' of congressional concern" in enacting the statute. *Id.* The *Morrison* Court further defined the concept of focus in terms of the "objects of the statute's solicitude" and "th[e] transactions that the statute seeks to regulate." *Id.* (internal quotation marks omitted).

The inquiry into RICO's focus is far from clear-cut. *See* In re Toyota, 785 F.Supp.2d at 914 ("It is unclear how *Morrison's* logic, which evaluates the 'focus' of the relevant statute, precisely translates to RICO."). The Second Circuit side-stepped the issue by summarily declaring in *Norex* that the defendants' "slim contacts with the United States ... are insufficient to support extraterritorial application." Norex, 631 F.3d at 33 (2d Cir.2010). Given *Morrison's* detailed analysis regarding the focus of the Exchange Act, however, our best path forward is to determine RICO's focus.

Courts that have addressed the issue fall essentially into two camps. One camp asserts that RICO's focus is on the enterprise. *See, e.g.,* Cedeno v. Intech

Group, Inc., 733 F.Supp.2d 471, 473 (S.D.N.Y.2010); *European Cmty.*, 2011 WL 843957, at *5; *Farm Credit Leasing Servs. Corp. v. Krones, Inc. (In re Le–Nature's, Inc.)*, 2011 WL 2112533, at *3 n. 7 (W.D.Pa. May 26, 2011) (adopting the enterprise-focused model but acknowledging that "RICO may have more than one 'focus'—including, for example, the pattern of racketeering activity required by the statute."); *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 2012 WL 1657108, at *4 (N.D.Cal. May 10, 2012); *In Re Toyota*, 785 F.Supp.2d at 914; *United States v. To*, 144 F.3d 737, 744 (11th Cir.1998) (a pre-*Morrison* case); *United States v. Hoyle*, 122 F.3d 48, 51 (D.C.Cir.1997) (a pre-*Morrison* case).

The other camp asserts that RICO's focus is on the pattern of racketeering activity. *See, e.g., Agency Holding v. Malley–Duff*, 483 U.S. 143, 154, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) ("the heart of any RICO complaint is the allegation of a pattern of racketeering.") (emphasis in original omitted); *United States v. Philip Morris USA, Inc.*, 783 F.Supp.2d 23, 29 (D.D.C.2011) (addressing the possibility that domestic conduct could provide the basis for a foreign corporation's RICO liability); *CGC Holding Co. v. Hutchens*, 824 F.Supp.2d 1193, 1209 (D.Colo.2011) (citing *Philip Morris*, 783 F.Supp.2d at 29); *Chevron Corp. v. Donziger*, 2012 WL 1711521, at *7–8 (S.D.N.Y. May 14, 2012) (quoting *CGC Holding Co.*, 824 F.Supp.2d at 1209–10); *In re Le–Nature's Inc.*, 2011 WL 2112533, at *3 n. 7; *accord* Note, R. Davis Mello, *Life After* Morrison: *Extraterritoriality and RICO*, 44 VAND. J. TRANSNAT'L L.. 1385, 1411 (2011) (arguing that courts should "apply RICO in any case where a plaintiff alleges the commission of enough predicate acts in the United States within the statutory time period to establish a 'pattern of racketeering activity,' even if the 'enterprise' is a foreign enterprise or the scheme involves the commission of predicate acts in a foreign jurisdiction.").

We address both models in turn.

1. Focus on the Enterprise

Two district courts in the Second Circuit have concluded that the focus of RICO is on the enterprise—specifically, domestic enterprises.

In *Cedeno*, 733 F.Supp.2d at 472, the district court addressed extraterritorial application of RICO in a civil action seeking damages arising out of a wide-ranging money laundering scheme through which Venezuelan nationals used United States banks as conduits for fraudulently obtained funds. The scheme's contacts with the United States were limited to the movement of currency into and out of New York bank accounts. *Id.* After determining that the focus of RICO is on "the enterprise as the recipient of, or cover for, a pattern of racketeering activity," the court held that "RICO does not apply where ... the alleged enterprise and the impact of the predicate activity upon it are entirely foreign." *Id.* at 474.

In *European Community*, 2011 WL 843957, at *5, the district court, upon examining the elements of RICO, concluded that "the statute does not punish the predicate acts of racketeering activity—indeed, each predicate act is, itself, a separate crime—but only racketeering activity in connection with an enterprise." Thus, the "object of [RICO's] solicitude, and the focus of the statute" is the enterprise. *Id.* (internal quotation marks omitted). The court concluded that a RICO enterprise "must be a domestic enterprise." *Id.*

Determining the geographic location of an enterprise—whether foreign or domestic—is a difficult inquiry, however. *See Chevron*, 2012 WL 1711521, at *6 ("the emphasis on whether the RICO enterprise is domestic or foreign simply begs the question of how to determine the enterprise's character."). Two district courts have addressed the issue of determining geographic location by utilizing the "nerve center" test. *See European Cmty.*, 2011 WL 843957, at *5–6; *Mitsui O.S.K. Lines*, 2012 WL 1657108, at *4–5. The nerve center test originated as "the vehicle of choice" in determining the principle place of business for a corporation when analyzing a federal court's diversity jurisdiction. *See European Cmty.*, 2011 WL 843957, at *5 (internal quotation marks omitted) (citing *Hertz Corp. v. Friend*, —— U.S. ——, ——, 130 S.Ct. 1181, 1192, 175 L.Ed.2d 1029 (2010)). The nerve center test focuses on where the enterprise's decisions are made, as opposed to carried out, and thus centers on the "brains" of an enterprise, not the "brawn". *European Cmty.*, 2011 WL 843957, at *6.

European Community and *Mitsui O.S.K. Lines* entailed a fairly straightforward application of the nerve center test that resulted in different conclusions regarding extraterritoriality. The *European Community* court concluded that a money-laundering scheme

that originated in South America and Europe "issued from those criminal organizations located in South America and Russia—not ... in the United States," and, consequently, the enterprise was extraterritorial. 2011 WL 843957, at *2–3, *7. *Mitsui O.S.K. Lines* involved a fraudulent shipping scheme conceived by United States corporations but executed primarily overseas. 2012 WL 1657108, at * 1, *7. In that case, the decision making process of the criminal enterprise "occurred substantially within the territory of the United States," and, thus, the enterprise was considered domestic. *Id.* at *7.

Both courts emphasized the administrative ease, familiarity, and consistency of the nerve center test. *European Cmty.*, 2011 WL 84397, at *6; *Mitsui O.S.K. Lines,* 2012 WL 1657108, at *5. Both courts realized, however, that application of the nerve center test could lead to "artificially simplified results," *Mitsui O.S.K. Lines,* 2012 WL 1657108, at *4, and that "hard cases" will arise that do not "in all instances, automatically generate a result," *European Cmty.,* 2011 WL 84397, at *6. Indeed, as the Supreme Court has noted, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Morrison,* 130 S.Ct. at 2884 (emphasis in original).

The case before us presents just such a hard case that illuminates the inadequacy of the nerve center test and the enterprise-based model upon which it relies. As the *Chevron* court pointed out, the nerve center test could "produce absurd results" when applied to a hypothetical criminal prosecution of two separate corporate entities—one foreign and one domestic—both engaged in the same pattern of criminal activity in the territorial United States. *See Chevron,* 2012 WL 1711521, at *6. The court labeled "risible" the notion that the domestic corporation would be culpable whereas the foreign corporation would be immune from prosecution simply because its ringleaders had the forethought to incorporate overseas. *Id.* This is sound reasoning.

The geographic location of an enterprise may be relevant under certain factual scenarios, like the criminal schemes at issue in *European Community* and *Mitsui O.S.K. Lines.* But in a case like this one, where the "brains" of the operation were located overseas but the enterprise violated United States immigration law in the United States, "there is no necessary or ... even probable connection between where the RICO enterprise makes its decisions and whether the application of RICO to the racketeering activity at issue ... was the sort of activity with which Congress would have been concerned." *Chevron,* 2012 WL 1711521, at *7. Moreover, while administrative simplicity may be "a major virtue in a jurisdictional statute." *Hertz,* 130 S.Ct. at 1193, a statute's extraterritorial reach is a merits question, not a question of subject-matter jurisdiction. *See Morrison,* 130 S.Ct. at 2877 ("to ask what conduct [a statute] reaches is to ask what conduct [a statute] prohibits, which is a merits question."). Therefore, an inquiry into the application of RICO to Defendants' conduct is best conducted by focusing on the pattern of Defendants' racketeering activity as opposed to the geographic location of Defendants' enterprise.

2. Focus on the Pattern of Racketeering Activity

"[T]he heart of any RICO complaint is the allegation of a pattern of racketeering." *Agency Holding,* 483 U.S. at 154 (emphasis in original omitted); *see also H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 236, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (describing "RICO's key requirement of a pattern of racketeering"). As noted, several post-*Morrison* courts have determined that RICO's focus is on the pattern of racketeering activity for purposes of analyzing extraterritorial application of the statute. *Philip Morris, Inc.,* 783 F.Supp.2d at 29; *CGC Holding Co.,* 824 F.Supp.2d at 1209; *Chevron,* 2012 WL 1711521, at *7–8.

RICO's statutory language and legislative history support the notion that RICO's focus is on the pattern of racketeering activity. For example, 18 U.S.C. § 1962(c), which forms the basis of Defendants' count one convictions, prohibits the conduct of a criminal enterprise's affairs "through a pattern of racketeering activity." Other sections prohibit the use of funds derived from a pattern of racketeering activity in the investment in or acquisition of an enterprise involved in interstate commerce. *Id.* §§ 1962(a)-(b). Furthermore, RICO's legislative history shows that the statute was enacted to promote "the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies *to deal with the unlawful activities* of those engaged in organized crime." *Organized Crime Control Act of 1970,*

Statement of Findings and Purpose, Pub.L. No. 91–452, 84 Stat. 922 (1970) *reprinted in* 1970 U.S.Code Cong. & Admin. News 1073 (emphasis added).

Given this express legislative intent to punish patterns of organized criminal activity in the United States, it is highly unlikely that Congress was unconcerned with the actions of foreign enterprises where those actions violated the laws of this country while the defendants were in this country. *See* *Chevron,* 2012 WL 1711521, at *6. Thus, to determine whether Defendants' count one convictions are within RICO's ambit, we look at the pattern of Defendants' racketeering activity taken as a whole.

3. Application to the Case at Hand

The second superseding indictment describes two parts of the enterprise: (1) "Enriching the members and associates ... through among other things, fraud, money laundering, and foreign and interstate transfer of funds," and (2) "Enabling the members and associates ... through marriage, passport, and visa fraud, to travel, among other countries ... [including] the United States, and to flee China and Hong Kong in the event that the criminal activity of the Enterprise was discovered." One part consisted of racketeering activities conducted predominantly in China, and one part consisted of racketeering activities in the United States.

The first part centers on the Bank of China fraud and, to the extent it was predicated on extraterritorial activity, it is beyond the reach of RICO even if the bank fraud resulted in some of the money reaching the United States. *See* *Cedeno,* 733 F.Supp.2d at 472 ("the scheme's contacts with the United States ... were limited to the movement of funds into and out of U.S.-based bank accounts."); *Norex,* 631 F.3d at 33 ("The slim contacts with the United States ... are insufficient to support extraterritorial application of the RICO statute.").

The second part, however, bound the Defendants' enterprise to the territorial United States. This second part involved racketeering activities conducted within the United States including the commission of RICO predicate crimes based on violations of United States immigration laws, as codified in 18 U.S.C. §§ 1542, 1546(a). Specifically, Defendants entered the United States using fraudulent visas and passports. Defendants traveled within the United States to execute documents in furtherance of their immigration fraud and to open bank accounts. Finally, Defendants were arrested in Kansas and Oklahoma in possession of these fraudulent immigration documents.

By conspiring to enter and hide out in the United States with the fruit of their ill-gotten gains, Defendants engaged in an enterprise that had the implicit goal to breach United States immigration law in furtherance of the overall goal of the enterprise. The dual parts of Defendants' enterprise were necessarily conjoined in pursuit of that goal—i.e., to steal large sums of money from the Bank of China and to get away with it in the United States. Defendants intended to use the immigration fraud to consummate the purpose of the enterprise: to acquire the money and safely enjoy it the United States, beyond the reach of Chinese law. Without the immigration fraud, the bank fraud would have been a dangerous failure. *See, e.g.,* *CGC Holding Co.,* 824 F.Supp.2d at 1210 ("In the present case, the conduct of the enterprise within the United States was a key to its success.").

In sum, Defendants' violations of United States immigration laws fall squarely within RICO's definition of racketeering activity. *See* 18 U.S.C. § 1961(1)(B) (listing 18 U.S.C. §§ 1542, 1546 as RICO predicates); *cf.* *Rocha v. United States,* 288 F.2d 545, 548 (9th Cir.1961) (sham marriages in violation of § 1542 are "crimes directed toward the sovereign itself [and] may be tried within the jurisdiction even though committed without") (internal quotation marks omitted). Defendants' pattern of racketeering activity may have been conceived and planned overseas, but it was executed and perpetuated in the United States. Under *Morrison,* we look "not upon the place where the deception originated," but instead upon the connection of the challenged conduct to the proscription in the statute. 130 S.Ct. at 2884. Having determined that RICO's focus is on the pattern of racketeering activity, we conclude that Defendants' criminal plan, which included violation of United States immigration laws while the Defendants were in the United States, falls within the ambit of the statute.

We affirm Defendants' count one convictions because the convictions are not based on an improper extraterritorial application of RICO, but rather are based on a pattern of racketeering activities that were conducted by the Defendants in the territorial United

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States.[FN2]

* * * *

IX. Conclusion

We affirm Defendants' convictions but vacate their sentences and remand for resentencing. Defendants' count one convictions are not the result of an improper extraterritorial application of the RICO conspiracy statute because Defendants' criminal enterprise involved both bank fraud and immigration fraud centered on stealing money from the Bank of China and traveling freely with that stolen money in the United States. The evidence was sufficient to support convictions on count two, money laundering conspiracy, and count three, conspiracy to transport stolen money.

We remand for resentencing because the district court improperly relied on Defendants' foreign conduct to meet the requirements of § 2S1.1(a)(1)(A) resulting in procedural error, improperly applied a one-level enhancement based on foreign conduct, and failed to provide an adequate legal and factual basis for the $482 million restitution order.

AFFIRMED, IN PART, VACATED, IN PART, AND REMANDED.

FN1. Chinese custom puts a person's surname first and given name last. We refer to Defendants by their first name to avoid confusion with certain witnesses who share a surname with a defendant.

FN2. It was constitutional error for the jury to be instructed on the first part of the second superseding indictment, to the extent that this part of the indictment was predicated on extraterritorial activity that is not a basis for RICO liability. *See Hedgpeth v. Pulido*, 555 U.S. 57, 60, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008). However, the error was harmless beyond a reasonable doubt as the "evidence was overwhelming" as to the second part of the second superseding indictment, and the jury would have convicted on the basis of that evidence alone. *United States v. Green*, 592 F.3d 1057, 1071 (9th Cir.2010).