

No. 10-50074

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,  
v.

DONGFAN GREG CHUNG,

Defendant-Appellant.

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**GOVERNMENT'S ANSWERING BRIEF**

**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

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**ANSWERING BRIEF**

**I**

**ISSUES PRESENTED**

A. Whether there was sufficient evidence to support each of defendant's convictions.

B. Whether a Brady violation occurred where, defendant used two of the documents to cross-examine witnesses at trial, and the district court found that the third document was inculpatory and did not affect its decision in a bench trial.

C. Whether the admission of a hearsay certification was harmless error where the certification did not support any element of the charged offenses and the district court did not rely on it.

D. Whether the district court abused its discretion in

admitting a "tasking list" found in a co-conspirator's home.

E. Whether the district court abused its discretion in choosing U.S.S.G. § 2M3.2 as the most analogous guideline for the foreign agent charge.

## II

### STATEMENT OF THE CASE

#### A. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE DISTRICT COURT

Defendant Dongfan Chung appeals his conviction and sentence following a bench trial before the Honorable Cormac J. Carney, United States District Judge.

On February 6, 2008, a grand jury returned an indictment charging defendant with conspiracy to commit economic espionage, 18 U.S.C. § 371 (count 1); economic espionage, 18 U.S.C. § 1831 (counts 2-9); acting as an unregistered foreign agent, 18 U.S.C. § 951 (count 10); obstruction of justice, 18 U.S.C. § 1512 (count 11); making false statements, 18 U.S.C. § 1001 (counts 12-14); and criminal forfeiture, 18 U.S.C. § 1834 (count 15). (CR 1; ER 37.)<sup>1</sup>

Prior to trial, the court granted the government's motion to dismiss counts 8, 9, 12, and 13. (CR 91.)

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<sup>1</sup> "CR" refers to the Clerk's Record. "AOB" refers to appellant's opening brief; "ER" and "GER" refer to the Excerpts of Record filed by defendant and the government, respectively. GX and DX refer to the government's and defendant's trial exhibits, respectively.

Trial commenced on June 2, 2009. (CR 96.) On July 16, 2009, the court filed a memorandum of decision finding defendant guilty on all counts except count 11, and count 15 was dismissed by motion of the government. (CR 116-117; GER 1648.)

Defendant moved for recusal and for a new trial on all counts. (CR 124-125.) On October 5, 2009, the court denied the motions. (CR 148-149.)

On February 8, 2010, the court sentenced defendant to 188 months' imprisonment and 3 years' supervised release. (CR 171.)

#### B. JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The judgment and commitment order was entered on February 11, 2010. (CR 172.) Defendant filed a timely notice of appeal on February 12, 2010. (CR 174.)

Defendant is serving the sentence imposed in this case.

#### C. STATEMENT OF FACTS

##### 1. Background

Defendant was born in the People's Republic of China ("PRC") in 1936, and graduated from National Taiwan University in 1960 with a degree in civil engineering. (ER 2113; GER 2379, 2385.) Defendant came to the United States in 1962 and became a naturalized citizen in 1972. (GER 2390, 2430.) Defendant began

work at Boeing in 1964. (ER 2113-18.) Except for a three-year period from 1969 to 1972, defendant worked for Boeing or Rockwell (whose space division was acquired by Boeing in 1996) until his resignation in September 2002. (Id.; GER 499.) For most of his career at Rockwell and Boeing, defendant worked as a stress analyst on the forward fuselage section of the Space Shuttle. (GER 496.) After the crash of the Columbia orbiter in February 2003, defendant returned to Boeing as a contractor to assist in the evaluation of the crash. (GER 499-500.)

Defendant held a secret clearance from 1973 until September 2002. (ER 2117; GER 73.) Upon retirement, defendant signed an agreement stating that he would not use or disclose any proprietary, confidential, or trade secret information belonging to Boeing or any Boeing customer or supplier. (GER 2363.) Defendant verified that he had returned to Boeing "all documents, computer software or databases, and other materials or items which at the time of the termination of my employment were in my possession, custody or control by virtue of my employment with Boeing." (Id.)

In 2005, agents found defendant's contact information while searching the residence of Chi Mak, whom agents suspected was spying for the PRC. (GER 8, 19-21, 23-25, 27-30, 39-40, 2571-72, 2582-93.) In 2006, during a second search of Chi Mak's residence, agents found a letter addressed to defendant from Gu

Weihaio, a senior official with the China Aviation Industry Corporation ("AVIC").<sup>2</sup> (GER 8-10.) The letter asked defendant to provide information on airplanes and the Space Shuttle, and referred to information previously provided by defendant. (ER 2197-98.) Agents subsequently conducted a series of trash searches at defendant's house, and found approximately 1,000 pages of documents relating to the Space Shuttle inserted between pages of Chinese-language newspapers in defendant's trash. (GER 45-71.)

On September 11, 2006, agents searched defendant's home and found more than 300,000 pages of trade secret and proprietary information belonging to Boeing, as well as correspondence, journals and briefings revealing that, for more than two decades, defendant led, as the district court found, a "secret life" as a "spy for the PRC." (ER 4-5; GER 91-97, 367.)

## 2. Unregistered Foreign Agent (Count 10)

Count 10 charged defendant with acting as an unregistered foreign agent who operated under the direction or control of the PRC.

The district court found that as early as 1979, defendant

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<sup>2</sup> AVIC was a national industrial corporation under the direct leadership of the PRC State Council. It was a consortium of aircraft manufacturers (including Chengdu, Harbin, Xi'an, and Nanchang), and included research institutes and universities. It was responsible for developing and manufacturing military and civilian aircraft, missiles, and airborne equipment. (GER 834-38.)

wanted to contribute to "China's Four Modernizations," and began by sending materials to Professor Chen Lung Gu of the Harbin Institute of Technology in response to Professor Gu's technical questions. (ER 1650; GER 113-15.) In response, Professor Gu wrote "you have actively put in your efforts towards the Four Modernizations of the motherland." (ER 1660; GER 116-118.)

Defendant traveled to the PRC in 1985 to conduct a "technical exchange" on topics requested by Chen Qinan, project manager of the China National Aero Technology Import and Export Corporation, a subsidiary of AVIC. (ER 1586, 1650, 1603-14, 1620-27; GER 118-39, 2480-81.) Prior to the trip, defendant wrote to Chen Qinan, "It's a great honor and I am excited to be able to make some contributions to the four modernizations of the motherland." (ER 1608.) Defendant proposed a series of Space Shuttle-related topics to present. (ER 1644.) Defendant prepared briefings in handwritten Chinese and English regarding the Space Shuttle and helicopter structure design (the latter as requested by Chen), despite acknowledging that "[i]nformation regarding the Space Shuttle is classified as secret" and that helicopter structural design information is "controlled by the Department of Defense." (GER 2480.) Chinese language briefings on the Space Shuttle seized from defendant's home contained information proprietary to Boeing. (ER 1662, 1921, 1951-2102; GER 974-82, 1206-08.)

In his correspondence, defendant expressed a desire to visit aircraft manufacturers at Harbin, Xi'an, Chengdu and Shanghai and to "contribute my expertise." (ER 1620.) While in China, defendant visited and received a tasking list from the Nanchang Aircraft Company, a production factory of AVIC ("Nanchang Tasking List"). (ER 1631-36, 2134; GER 139-40.) This tasking list contained more than forty-five highly technical questions, including specific questions regarding U.S. military aircraft. (ER 1631-36; GER 140-45.) Even defense expert Douglas Stanley admitted that some of the questions on the Nanchang Tasking List solicited sensitive information. (GER 1192-93, 1287.)

After returning to the United States, defendant sent Engineer Feng of Nanchang Aircraft "answers for the questions that were not answered when I was in Nanchang." (ER 1589-93, 1617; GER 149-52.) Technical documents responsive to the Nanchang Tasking List were found in the search of defendant's residence. (E.g., GER 327-28, 332, 346-47.)

In addition, defendant informed Feng that he had collected the requested B-1 bomber manuals, which would be delivered through Zhao Zhen Lan, a PRC Consul based in San Francisco. (GER 152-56, 2456, 2485.) Defendant later sent a list of the twenty-four B-1 bomber design manuals he had provided to Zhao. (ER 1596; GER 164-66.) The manuals' introductory volume bore a restriction stating that distribution outside of Rockwell was

prohibited. (ER 1532.) Defendant's supervisor at the time, Paul Benson, testified that defendant did not ask for approval to send the B-1 manuals to the PRC, which Benson would not have given. (GER 985.)

The government introduced two other tasking lists requesting specific technologies. One list was found in defendant's home and the second was found in Chi Mak's home. (ER 1647, 2183-2185; GER 15-17, 181-83.) Defendant collected documents responsive to both lists. (E.g., GER 17-18, 183-85, 332-33.)

In the letter found at Chi Mak's home, dated 1987, AVIC official Gu Weihao wrote to defendant, "It is your honor and China's fortune that you are able to realize your wish of dedicating yourselves to the service of your country." (ER 2198.) Gu told defendant that: (1) he could pass information through Chi Mak, "a channel [that] is much safer than others"; (2) defendant would be able to take his cash compensation outside of the PRC; (3) once in Guangzhou, defendant could meet with Gu and his colleagues in a "small setting, which is very safe"; and (4) defendant could use traveling to Hong Kong, visiting relatives, or accompanying his artist wife to an arts academy in the PRC as cover stories for his travel to the PRC. (ER 2197-98.) In another letter to defendant in 1988, Gu asked defendant to "provide information on advanced technologies . . . There is no need to limit the scope that we proposed while we were in the

United States. Please provide at any time." (GER 2573.) Gu reiterated that "it is safer and faster" to pass information through Chi Mak. (Id.) Defendant continued to correspond with Gu until at least 2003. (ER 2157, 2165, 2168; GER 2534.) Defendant also met with Gu in the United States in 1990, 1991 and 1992. (ER 2156, 2176-77.)

Defendant's journal entries revealed that defendant had extensive personal contact with several other PRC officials between 1990 and 2003. (See, e.g., ER 2161-62, 2165-68; GER 2318.)

In April 2001, defendant again traveled to China and gave presentations on the Space Shuttle. (GER 312, 1791.) Defendant recorded numerous entries in his journal documenting his preparation and presentations. (ER 2162-64.)

Defendant made two more trips to the PRC in September 2002 and December 2003. (GER 1792.) In 2002, defendant learned that he would be forced to resign from Boeing because he had elected not to move to Houston with Boeing's Space Shuttle program. Defendant then downloaded more than 500 Space Shuttle specifications from the Shuttle Drawing System ("SDS"), a restricted database at Boeing, before leaving Boeing and traveling to the PRC in September 2002. (GER 1002-04, 1067.) Chi Mak's name and work and home phone numbers were written on one of the SDS specifications. (GER 305-07.) Defendant used

correction fluid to mask the user name, date/time stamp, and/or other identifying information on more than a third of the downloaded SDS specifications. (GER 1060-64.) Defendant used correction fluid to cover notifications that the documents contained proprietary information that could not be disclosed without permission. (Id.) Defendant also created two indices for the downloaded specifications, which he continually modified until his trip to the PRC in December 2003. (GER 1053-54.)

The district court found that the 300,000 pages of Boeing proprietary information seized during the search of defendant's home on September 11, 2006, constituted "incredibly incriminating evidence of [defendant's] service as a foreign agent for the PRC." (ER 6.) Defendant's "staggering" library (id.) included:

- More than 700 SDS documents, which were export-controlled (GER 1007, 1057-58);
- Other tutorials, structural diagrams, and specifications relating to the Space Shuttle, including many documents containing proprietary information and/or marked "trade secret" (e.g., GER 314-16, 334-35, 339);
- Other proprietary and sensitive Boeing information, including documents relating to the X-37 space vehicle (GER 345-46), the thermal protection system on the International Space Station (GER 347), and information on military aircraft including the F-15 fighter (GER 346), CH-46/47

Chinook helicopter (GER 307-09), and B-52 Bomber. (GER 355.)

(ER 6-7.) The district court concluded:

The Court finds overwhelming evidence of [defendant's] guilt on the charge of acting as an agent for the PRC. The evidence presented at trial establishes without a doubt that [defendant] was collecting highly technical aerospace and military technology belonging to Boeing and then passing that technology to the PRC. [Defendant] engaged in this conduct under the direction and control of PRC officials. [Defendant] has no plausible explanation for misappropriating, cataloging, passing, and selectively destroying documents. The suggestion that [defendant] did so because he was a "pack rat" is ludicrous. [Defendant] did so because he was a spy.

(ER 15.)<sup>3</sup>

3. Economic Espionage (Counts 2-7) and Conspiracy (Count 1)

Based on documents found in defendant's home, counts 2 through 7 charged defendant with violating the Economic Espionage Act ("EEA") by possessing Boeing trade secrets with the intent to benefit the PRC. Count 1 charged defendant with a related conspiracy. The four documents underlying counts 2-5 contained technology relating to a phased-array antenna Boeing developed for the Space Shuttle ("Phased Array Documents"). (ER 1154-1222.) The two documents underlying counts 6 and 7 contained technology Boeing developed for the Delta IV rocket ("Delta IV Documents"). (ER 1394-1449.)

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<sup>3</sup> Defendant never notified the Attorney General that he was acting as an agent of the PRC. (GER 2376.)

At trial, numerous witnesses testified that the six charged documents involved trade secrets, i.e., information that Boeing had taken measures to keep secret and that derived independent economic value from not being generally known to and readily ascertainable by the public. A senior security manager testified that Boeing had extensive physical security measures in place to protect its information, and other Boeing employees described the company's extensive information control policies and training. (GER 699-720, 724-44, 753-812, 2333-60.) Defendant received regular training on information security while at Boeing, including training on trade secrets and the EEA. (GER 789-803, 2364.)

a. Phased array documents

Boeing engineer Emad Farag testified that in 1996 Rockwell began a feasibility study to replace the Space Shuttle's communication system, a gimbaled dish, with a phased array antenna. (GER 614-21.) Rockwell spent \$1 million on the feasibility study. (GER 621.) Although the antenna was never used on the Space Shuttle, the technology is used for other Boeing projects. (GER 622-27.)

Farag testified that the Phased Array Documents derived independent economic value from not being generally known to, or readily ascertainable by, the public. Farag testified that none of the Phased Array Documents were in the public domain, and that

the information contained therein would be valuable to Boeing competitors. (GER 635-40.) The documents underlying counts 2 and 4 consist of Item Change Analyses ("ICAs") and supporting documents. These documents display tasks to be done, the number of hours for each task, and costing data. (GER 627-42, 1346-49.) The ICAs are never made public by the company. (Id.)

The documents underlying counts 3 and 5 were marked proprietary, and gave an overview of the work done to place a phased array antenna on the Shuttle. Although portions of the documents were presented at a NASA conference, the number of elements was not. (GER 679-81.) The elements were Monolithic Microwave Integrated Circuits or MMICs. (GER 625.) The number of MMICs was significant because it showed that Boeing could install antenna modules without the need for active cooling during re-entry. (GER 622.) The number of MMICs was also important to Boeing because it would give competitors insight into the efficiency Boeing obtained and, because the number of elements increases the cost, the cost of developing the antenna. (GER 635.)

Defendant's expert, Douglas Stanley, offered three exhibits that allegedly contained information "similar" to that found in the Phased Array documents. (GER 1190-91, 1248.) Stanley admitted on cross-examination, however, that the three exhibits did not deal with the proposed phased-array antenna upgrade for

the Shuttle, and that he did not find the information in the Phased Array Documents in the public domain, only information that was similar. (GER 1246, 1249-53.)

b. Delta IV documents

Boeing engineer Cliff Barnett testified that the Delta IV Documents were a "do-it-yourself kit" on building the Tail Service Mast ("TSM") assembly system that fuels the Delta IV rocket immediately before ignition. (GER 397-409, 426.)

Barnett, who headed the TSM program, explained that the TSM must detach from the rocket in less than a second from the moment of ignition to avoid the destruction of the rocket and launch pad.

(Id.) A team of thirty Boeing engineers spent more than five years and \$50 million developing the TSM system. (GER 409.)

Barnett explained that because Boeing continued to compete domestically and internationally for the business of building and launching rockets, the TSM technology derived value from not being known to Boeing's competitors. (GER 434-36.) Boeing limited access to TSM technology on a need to know basis, which was determined by program management. (GER 432-33.) Boeing also required hard copies of TSM documents be locked up at night, and prohibited the removal of such documents from the facility.

(Id.)

Barnett and Dong Ngo, the lead engineer on the TSM project, testified that the technology contained in the Delta IV Documents

could not be found in the public domain. (GER 411-12, 423, 430, 1109-11.) Barnett was cross-examined about whether one non-sensitive diagram in the Delta IV Documents was in the public domain, but defendant otherwise did not contest that the Delta IV Documents contained Boeing trade secrets.

4. False Statement (Count 14)

FBI agents interviewed defendant prior to the search of his home on September 11, 2006. When asked about the documents agents found in his trash, defendant said his boss, Bill Novak, gave him permission to take the documents home. (GER 90.) After agents found more than 300,000 pages of technical documents, defendant claimed his boss had given him permission in 2001 to bring work documents home because they were otherwise going to be destroyed. (GER 1087.)

Novak contradicted these statements. Novak testified that when the Shuttle group moved to a smaller facility in 1999, he told his engineers to dispose of obsolete data in designated dumpsters and otherwise box up unneeded data to send to a storage facility. (GER 508.) Novak testified:

Q Did you ever tell your engineers it was okay to take some work documents home?

A No, I don't recall saying that.

Q Do you recall the defendant ever asking you if he could take Rockwell documents home?

A No, I do not.

(GER 509.)

Novak also testified:

Q During that time you were at Rockwell, were engineers allowed to take work documents home?

A We weren't allowed to, but occasionally I'm sure some of us if we needed to finish an assignment or something, guys would take some stuff home with the expectation to bring it back the next day or the next few days or whatever.

(GER 501.)

Based on this testimony, the district court found that Novak never gave defendant permission to take work documents home, and that Boeing "employees were unequivocally not allowed to keep documents in their homes, for any purpose." (ER 28.)

### III

#### ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT EACH OF DEFENDANT'S CONVICTIONS

1. Standard of Review

Sufficiency-of-the-evidence challenges are reviewed to determine whether "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

2. Foreign Agent (Count 10)

Defendant challenges his conviction on count 10 (acting as

an unregistered foreign agent of the PRC, in violation of 18 U.S.C. § 951(a))<sup>4</sup> on the ground there was insufficient evidence defendant acted as an agent of the PRC within the statute of limitations period -- i.e., after February 6, 2003. (AOB 29-30.) The district court rejected this claim as "contradicted by the evidence," noting that "[t]hrough 2006, [defendant] possessed documents, selectively destroyed documents, and accessed his personal SDS index." (ER 15 n.10.) The district court correctly concluded that there was sufficient evidence defendant acted within the limitations period by downloading, cataloging and indexing requested Shuttle documents prior to his December 2003 trip to the PRC, by his selective and furtive destruction of documents in 2006, and by the vast library of documents defendant had at the time of arrest on September 11, 2006.

The statute defines "agent of a foreign government" as "an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official." 18 U.S.C. § 951(d). Although the statute requires acts on behalf of a foreign country, not mere status as a foreign agent, the statute is satisfied as long as the defendant "took acts of some kind on behalf of" the foreign government. United States v. Latchin, 554 F.3d 709, 715 (7th Cir. 2009) (emphasis in

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<sup>4</sup> The pertinent language of sections 951, 1001, and 1831 is set forth in the statutory index attached to this brief.

original); see also United States v. Duran, 596 F.3d 1283 (11th Cir. 2010) (citing Latchin).

Contrary to defendant's contention that he was not subject to the direction or control of the PRC, the evidence established that in response to specific requests from the PRC for information relating to the development, design, and composition of the Space Shuttle (e.g., ER 1647, 2197), defendant spent most of 2003 inputting and indexing hundreds of export-controlled, technical specifications for the Shuttle that he had downloaded from the SDS system. After his termination from Boeing, defendant created a "Specification.doc" file on his home computer on January 2, 2003. (GER 1053-54, 1874.) This file contained defendant's own alpha-numeric indexing system for the hundreds of SDS documents found in his residence. (GER 300-01, 1052.) After writing a letter to Gu Weihao on February 10, 2003, defendant continued to "input" or "organize" "spec material" on at least seventeen occasions. (ER 2168-71.) On March 27, 2003, defendant reported in his journal that he was "[d]one with organizing Spec. material and arranging in numerical orders." (ER 2169.) The following day, on March 28, defendant created another specifications index called "Spec\_Mod.doc." (GER 1052-53, 1837.) Between March 31 and April 3, defendant recorded "organizing Spec. material," "modifying Spec. material" (two entries), and that he was "[d]one with modifying Spec. material." (ER 2169.)

Defendant returned to Boeing on April 7, 2003. (ER 2170.) Between August 12, 2003, and November 24, 2003, defendant recorded another 36 separate entries in his journal containing one of the following activities: "Input 'specification' material," "Input and organized 'specification' material," or "Input Spec. material." (ER 2170-71.) Defendant also downloaded additional SDS specifications at Boeing between the months of September 2003 and November 2003. (See, e.g., GER 2213-2310 (excerpt of GX 183).) Shortly after applying for a visa, defendant "[o]rganized Spec. material" on four more occasions between December 4 and December 8, 2003. (ER 2171-72.) Defendant last modified both "Specification.doc" and "Spec\_Mod.doc" on December 15, 2003. (GER 1053-54.) On December 27, 2003, defendant left for the PRC, after which he stopped modifying his SDS indices. (GER 1792.)

Based on this evidence, a rational factfinder could conclude, beyond a reasonable doubt, that defendant spent most of 2003 downloading, cataloging and indexing export-controlled Space Shuttle specifications in order to deliver the information to the PRC in December 2003, and that, in so doing, defendant acted on behalf of the PRC.

Agents also caught defendant secretly disposing of technical documents, including SDS documents, in August 2006. (GER 45-71.) Viewed in the light most favorable to the government, a rational

factfinder could infer that defendant made the effort to secrete these documents within the pages of Chinese newspapers to hide his activities on behalf of the PRC. Finally, at the time of his arrest on September 11, 2006, defendant maintained a library of the hard-copy SDS specifications (numbering more than 700) as well as more than 300,000 pages of other technical documents, including documents specifically responsive to previous requests from PRC officials. (See p. 10-11, supra.)

In summary, the evidence was sufficient to establish that defendant continued to act subject to the direction or control of the PRC during the limitations period.

### 3. Economic Espionage Act (Counts 2-7)

Counts 2 through 7 charged defendant with violating the EEA. Defendant does not contest that the Phased Array Documents and Delta IV Documents were trade secrets, but contends that there is no evidence that he possessed those documents with the intent to benefit the PRC. (AOB 24-28.) The district court concluded that if the information were readily available in the public domain or not valuable to the PRC, defendant would not have gathered it in violation of well-established Boeing policies. (ER 25.)

First, defendant contends that none of the tasking lists or letters specifically requested information concerning the Phased Array Antenna or the Delta IV TSM. The PRC had, however, requested information relating to the development, design, and

composition of the Space Shuttle in letters and tasking lists to defendant. (E.g., ER 1647, 2197.) The Phased Array Antenna was a proposed upgrade to the communications system on the Space Shuttle. The PRC also made it clear to defendant that it was interested in all advanced technologies, not just those specified in its requests:

I hope that you will introduce advanced technologies and provide information on advanced technologies. . . . There is no need to limit the scope that we proposed while we were in the United States. Please provide at any time.

(GER 2573-74.) Testimony at trial also underscored that the PRC collected a wide range of information -- not only information on how to build things, but also information revealing the technological capabilities of the United States. (GER 874-75.) The Delta IV Documents, a "do-it-yourself toolkit" for building a rocket-fueling system, clearly was the type of advanced technology sought by the PRC. (GER 409.) There is no question that the trade secrets at issue would benefit the PRC by revealing U.S. capabilities and costs in solving complex engineering issues, and furthering the PRC's ability to compete in launching satellites. (GER 949-50.)

Second, defendant wrongly argues that he passed only "open source information" to the PRC, and then argues from this incorrect premise that no intent to pass trade secrets can be inferred. (AOB 25.) Defendant's claim that he only passed "open

source information" is contradicted by, among other things, the restricted B-1 Bomber manuals he delivered to the PRC Consul, the sensitive nature of the information defendant provided in response to the Nanchang tasking list, and the export-controlled status of the SDS specifications he downloaded, catalogued and indexed for his 2003 trip to the PRC.<sup>5</sup>

Furthermore, the evidence showed the proprietary nature of the Shuttle briefings defendant delivered in the PRC. Contrary to defendant's characterization of these materials as readily available in textbooks and technical publications, defendant's supervisors, Benson and Novak, testified that, with one exception, the briefings concerned various aspects of the Space Shuttle and contained information proprietary to Rockwell and Boeing. (GER 974-82, 1206-08.) Defendant, significantly, did not tell his supervisors that he was delivering these briefings in the PRC, as he was required to do. (GER 540, 974.) Both Benson and Novak testified that had they known of the briefings, they would not have allowed defendant to give them.<sup>6</sup> (Id.) The

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<sup>5</sup> Defendant signed an SDS access agreement in 2001 confirming that he knew the information on SDS was export controlled. (GER 1004-08, 2084.)

<sup>6</sup> The only testimony defendant offered to counter the proprietary nature of the briefings was Stanley's opinion that he found "similar information" in various open sources. But the issue was not whether the briefings (or the trade secret documents) used known engineering principles. The proprietary and trade secret nature of the documents derived from the Boeing employees' use of their expertise to apply such knowledge to

most telling indicator of the briefings' sensitivity may be what is missing from the presentation Rockwell authorized for a PRC delegation in 1990, five years after defendant first delivered his Shuttle briefings. The presentation Rockwell gave to the delegation contained none of the detail found in any of defendant's unauthorized Shuttle briefings he gave in the PRC. (GER 2490-2532.)

Next, defendant asserts that he did not behave like a spy, noting that he kept incriminating letters from the PRC and protested against the Tiananmen Square incident. (AOB 26-27.) The government's espionage expert<sup>7</sup> testified, however, that this behavior would not be unusual for a spy. (GER 879-80.)

Finally, defendant contends that even if there was evidence of defendant's intent to benefit the PRC at an earlier time, the evidence failed to demonstrate that defendant still had the requisite intent on September 11, 2006, when he possessed the charged trade secrets. (AOB 25 n.12.) Defendant, however, offers no plausible alternative explanation for his continued possession of the trade secret documents. The district court

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specific problems. (See GER 981-82.) Stanley's opinion on this subject matter is, in any case, of limited weight as he had no experience working on the Shuttle and admitted that both Benson and Novak had more "hands on" experience with respect to the Shuttle. (GER 1225-35.)

<sup>7</sup> At trial, defendant expressly declined to challenge the witness' expertise and knowledge regarding espionage when offered an opportunity to do so. (GER 867.)

rejected as “ludicrous” defendant’s claim that he was a “pack rat.” (ER 15.) There was overwhelming evidence that defendant retained possession of the charged documents for the same reason that he misappropriated, collected, downloaded, catalogued and passed thousands of pages of other highly technical aerospace and military technology -- because he wanted to benefit the “motherland.”

4. Conspiracy to Commit Economic Espionage (Count 1)

Count 1 charged defendant with conspiracy to violate the EEA. Defendant challenges his conviction on two grounds: 1) there was insufficient evidence showing that defendant agreed with another person to violate the EEA; and 2) the government did not prove overt acts within the limitations period. The district court correctly found an ongoing conspiracy to possess trade secret information as well as numerous overt acts in furtherance of the conspiracy after February 2003.

First, the district court correctly pointed out that defendant’s correspondence and journals show that he conspired with numerous individuals to collect trade secret and proprietary information for the benefit of the PRC: Professor Gu, Chen Qinan, Engineer Feng, Zhao Zhen Lan, Gu Weihao, Consul Wu Hui Jun, Chi Mak, Bu Shi Lin, and Consul Shang. (ER 26, 1614, 1650, 2161, 2176, 2177, 2197-98; GER 2485.) There was sufficient evidence for the district court to conclude that the conspiracy extended

well beyond the enactment of the EEA in 1996. Defendant corresponded with his co-conspirators through at least 2003, (see, e.g., ER 2157, 2168; GER 2534), and regularly met with them in that time period as well. (See, e.g., ER 2161-62, 2165-66, 2168; GER 2318.)

This conspiracy was broad in scope, and sought a broad range of information, regardless of whether the information was sensitive, proprietary, and/or a trade secret: "[i]nformation regarding the Space Shuttle . . . classified as secret" (GER 2480); helicopter structural design information "controlled by the Department of Defense" (GER 2480); "process standards for the manufacturing of the F-15" (ER 2183-85); "finite element analysis software . . . NASTRAN - NASA Structural Analysis Program" (Id.); and "Boeing Company's technical information on chemical milling" (Id.). Co-conspirator Gu Weihao directed defendant to provide "advanced technologies" that were unlimited in "scope." (GER 2573-74.) There was testimony at trial that the PRC was interested in collecting technologies that encompassed trade secrets. (GER 887.)

Second, the government presented sufficient evidence that both defendant's December 2003 trip to the PRC and his possession of trade secrets on September 11, 2006, were in furtherance of the conspiracy. As discussed, in the months leading up to his December 2003 trip, defendant worked on two personal SDS

specifications indices -- downloading, organizing and inputting hundreds of export-controlled SDS specifications from which he had redacted identifying information and at least one sensitivity warning. Defendant clearly intended to pass export-controlled SDS information to PRC officials on this trip. As such, a rational factfinder could also conclude that defendant's trip facilitated contact with co-conspirators or the passage of trade secret information in furtherance of the conspiracy to commit economic espionage. Likewise, it was proper for the district court to find that defendant maintained a "secret library" (which included the trade secret documents) in 2006 as part of an "ongoing effort to conceal the conspiracy and avoid detection by law enforcement" (ER 27); the secret library also provided defendant continued access to trade secret information collected for the PRC.

In sum, the government introduced sufficient evidence to establish a conspiracy to commit economic espionage, where at least one overt act extended into the limitations period.

5. False Statement (Count 14)

Defendant argues that there was insufficient evidence that he knowingly lied about having permission to take documents home because Novak's testimony was equivocal and other trial testimony indicated that employees took proprietary documents home for work purposes. (AOB 54-56.) Viewed in the light most favorable to

the government, Jackson, 443 U.S. at 319, there was ample evidence to establish that defendant knew Novak had not given him permission to take the documents found in his home.

Under Jackson, this Court cannot second-guess the factfinder's credibility assessments. United States v. Nevils, 598 F.3d 1158, 1170 (9th Cir. 2010) (en banc). The district court clearly credited Novak's testimony, which it cited in finding that Novak never gave defendant permission to take work documents home. (ER 28.) The district court further noted:

It is also very telling that [defendant] used correction fluid to cover information on the documents, and in one case, to cover a security warning . . . If defendant truly believed that he had permission to keep work documents in his home, he would not have covered up information in the documents or secretly disposed of them.

(ER 28-29.)

Defendant's suggestion that he could have understood "from the context" of his work environment that he did have permission to take work documents home (AOB 56) is baseless. First, many of the documents in defendant's massive stash were unrelated to his work assignments (e.g., the X-37 document). Second, none of the Boeing employees who testified said they could keep documents at home permanently, as defendant claimed to the FBI. Third, the false statement charged in the indictment was defendant's statement that Novak specifically gave defendant permission to take the documents home. Defendant did not tell the agents that

he understood it was generally permissible for employees to take work materials home; to the contrary, defendant told the FBI that employees were not allowed to bring documents home but that Novak made an exception for him. (ER 117.) Finally, defendant's reliance on United States v. Jiang, 476 F.3d 1026 (9th Cir. 2007), is misplaced. In Jiang the agent's question was unclear and defendant's answer was thus susceptible of more than one interpretation; in that context, there was insufficient evidence that the defendant's response was intentionally false. Id. at 1029-31. Here, unlike Jiang, defendant's statement was clearly and unequivocally false.

Accordingly, there was sufficient evidence to convict defendant of knowingly making a false statement.

B. THERE WAS NO BRADY VIOLATION

Defendant claims the government violated Brady with respect to three documents: (1) DX 580, a summary by two Boeing engineers of their review of the briefings defendant gave in the PRC (ER 2210-11); (2) DX 606, a summary by a Boeing engineer of his review of certain documents found in defendant's home (ER 2216-19); and (3) an FBI interview report ("302") of Professor Gu, who received materials from defendant in 1979 (ER 953).

1. Facts

a. DX 580

Boeing produced DX 580 to the defense prior to trial in

response to a subpoena. (AOB 16.) The document, dated May 10, 2007, was written by Novak and Boeing engineer Tony Chi. (ER 2210-11.) They were asked to review two binders of documents that the FBI gave to Boeing security. (Id.) The first binder contained copies of briefings defendant gave in the PRC beginning in 1985 (GX 294-296 and 298-300). (ER 1723-1921, 1951-2102, 2210; GER 579-80.) The second binder contained materials found on defendant's home computer. (ER 2211.) DX 580 stated that no classified or Boeing proprietary data was found in either binder. (ER 2211.)

In his testimony during the government's case-in-chief on June 5, 2009, Novak did not testify about the documents covered in DX 580. (GER 494-544.)

Defendant discovered DX 580 among the subpoenaed materials on June 8, 2009 and presented it to the court the following day (the fifth day of trial). (ER 283.) There had been no testimony on the sensitivity of the briefings at that point.

On June 10, 2009, Paul Benson, who was defendant's supervisor for 22 years, testified that the briefings contained proprietary information. (GER 968.) Benson testified that defendant told him he was going to the PRC for a vacation in 1985, but did not say he was going to give briefings on the Space Shuttle, and that Benson would not have approved the briefings. (GER 974, 982.) As noted above, Benson testified that, while the

briefings contained information from open sources, they also contained information proprietary to Rockwell. (GER 974-82.) Benson also testified that a briefing Rockwell gave to a visiting delegation from the PRC in 1990 (GX 301) contained nowhere near the detail found in the unauthorized briefings defendant gave in the PRC, which included finite element models, stress analysis, and thermal protection analysis that were proprietary to Boeing/Rockwell. (GER 983-84.)

Novak was later recalled and the defense cross-examined him with DX 580. (GER 1914-1210, 1212-16.) Novak stated that the binders did not contain any information marked classified or "Boeing Proprietary data." (GER 1202, 1211.) In response to a request for clarification from the court as to whether Novak meant they did not find any proprietary data, or whether they did not find any data marked proprietary, Novak replied, "I didn't see anything marked proprietary." (GER 1206-07.) Novak said a stress analysis report for the Shuttle crew module mid-deck that he considered proprietary was in one of the binders. (Id.)

None of the documents referenced in DX 580 concerned the Phased Array Antenna or the Delta IV, the technologies underlying the EEA charges. The government offered the briefings referred to in DX 580, and the testimony concerning their contents, in support of the foreign agent charge, to show that defendant was providing nonpublic Rockwell information to the PRC contrary to

Rockwell's policies.

b. DX 606

On June 9, 2009, the day defendant presented DX 580 to the court, the court ordered Boeing to conduct another search for any other reports similar to DX 580. (ER 314.) Boeing provided DX 606 to defendant and the government on June 15, 2009. (ER 730.) Defendant was then allowed to cross-examine Novak and agent Moberly regarding DX 606. (ER 762-800; 827-34.)

Called to the stand a third time, Novak testified that he wrote DX 606 after Boeing's legal department asked him to review some documents provided by the FBI. (ER 764.) Novak received a box of documents with a post-it note asking him to review the documents for "general description, sensitivity, use to China, and need in engineer's home" prior to meeting with the prosecutor the following week. (Id.) Novak prepared DX 606 for his own use to "jog his memory" about the documents; he testified that his notes were not self-explanatory or "stand-alone." (ER 765.) DX 606 was a four-page chart that identified documents by exhibit number, with columns for brief comments. With respect to sensitivity, Novak testified that he reviewed the documents to see if they were marked with restrictions: "my judgment of sensitivity was to look for ITAR stamped, Boeing proprietary stamped or secret-type stamped data." (ER 764-65.) DX 606 included references to the Delta IV and Phased Array Antenna

documents (GX 65 and 76), which Novak listed as Boeing proprietary. (ER 2217-18.)

Novak attended a trial preparation meeting on May 26, 2009, with the prosecutor and case agent. During the meeting Novak was handed documents by the government and asked questions about them. (ER 828.) Novak testified that he had DX 606 in a folder with a number of other documents during the meeting. (ER 770, 801.) While he referred "a few times" to DX 606, he never showed the document or mentioned it to the prosecutor or case agent, and had no knowledge whether the prosecutor had seen the document. (ER 769, 800-01.) The case agent testified that he never saw DX 606 as there were "thousands of papers strewn all over the table" during the meeting. (ER 806.)

c. Ruling on DX 580 and 606

During argument on defendant's Brady claim concerning DX 580 and 606, defendant's counsel admitted that he had not been prejudiced:

I think that as a general matter, we were not ultimately prejudiced because it came to light in the trial and Your Honor was quite attentive and accommodating to let us delve further, and we were able to get what I think is the ultimate best facts out on the table.

(ER 845.) The court found there was no intentional misconduct or bad faith on the part of the government, and no Brady violation because DX 580 and 606 were available to the defense during

trial, and defendant's counsel "put on evidence concerning the proprietary nature of the information in the binders, and they zealously cross-examined Mr. Novak and Agent Moberly about it." (ER 855.)

d. Professor Gu 302

On April 23, 2009, an FBI agent telephonically interviewed Professor Gu, whose 1979 correspondence with defendant was referenced in the court's Memorandum of Decision. (ER 8.) Gu denied knowing defendant. (ER 953.) After being read defendant's 1979 letter to Gu mentioning technical documents Gu had requested and defendant had sent, Gu denied requesting or receiving any of the materials. (Id.) After being read the letter he wrote to defendant in 1979 acknowledging their receipt, Gu admitted that it appeared he had received the materials, but continued to claim that he did not recognize defendant. (Id.) The 302 was produced after trial when defense counsel contacted the prosecutor saying that Gu had been interviewed by the FBI.<sup>8</sup>

As part of a motion for an evidentiary hearing on the

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<sup>8</sup> The prosecutors were unaware of DX 580 and 606 and the Gu 302 prior to trial. Although the documents were not necessarily exculpatory or impeaching, had they been aware of them, the prosecutors would have produced the documents in discovery to ensure that defendant was able to make whatever use of them at trial that he wished. (GER 582-83.) Furthermore, the government agrees that if it were actually aware of exculpatory documents held by a third party, such as Boeing, the government would be required to advise the defense of the fact that such documents exist.

failure to produce the Gu 302, defendant submitted a letter he obtained from Gu after trial. (ER 950.) The letter stated that the "technical information mentioned in [defendant's] letter(s) that was gifted to Harbin Institute of Technology is publicly published materials, does not harm the United States." (Id.) Professor Gu also opined that the "affection" expressed in defendant's letter did not indicate that defendant was working for the Chinese government. (Id.)

On February 8, 2010, before sentencing defendant, the court considered defendant's motion. The court stated its tentative ruling that there was no Brady violation:

I don't believe there has been a sufficient showing to justify an evidentiary hearing. I believe agent Gaylord's 302 interview of Professor Gu . . . is inculminating and, consequently, I don't believe there is a Brady violation. But, in any event, even if it should have been turned over, I don't believe [defendant] was prejudiced by the government's failure to disclose the 302 interview to the defense prior to trial. I say that because I looked at Professor Gu's hearsay statement and it does not cause me to question the overwhelming evidence of [defendant's] guilt that was presented at trial. And I don't believe it rebuts or contradicts my finding that [defendant] gathered an enormous amount of information for the PRC regarding Delta IV, the phased array, SDS, the F-15, the Chinook helicopter, and other aerospace and defense technology. Simply put, when I look at Professor Gu's statement, it contains several irrelevant and improper opinions of China and [defendant's] intent that really are not helpful to me and do not affect or impact my sentencing of [defendant].

(GER 1683.)

The court heard argument from counsel and testimony from the

agent who interviewed Gu. (Id.) Defendant argued that the 302 supported his theory of the case that he gave only open source materials to the PRC. (GER 1684-85.) Defendant also argued that the Gu letters from 1979 were critical to the court's decision. (GER 1685.) The court disagreed with the latter statement, noting that the letter defendant obtained from Gu post-trial did not address the Phased Array, Delta IV, SDS, or other documents that defendant had at home. (GER 1686-87.) The government argued that the correspondence between Gu and defendant was offered only to show defendant's motive to help the PRC. (GER 1706.) The government never characterized Professor Gu as an official of the PRC, and did not allege that the materials sent by defendant to Gu in 1979 were restricted. (Id.) On both direct and cross-examination, the agent testified that the 302 contained all the information that Gu provided during the interview, and that the statement in Gu's 2010 letter concerning the supposed public nature of the documents sent to him by defendant was never mentioned by Gu during the interview. (GER 1709-10, 1723.)

At the conclusion of the hearing, the court adopted its tentative ruling:

I'm going to stick with my tentative. I did cite Professor Gu's letter in my memorandum decision, but I was trying to give the reader, the public and the parties, the story. And Professor Gu was part of that story and the initial contact, at least from I could

see from the evidence, with the PRC. What people's motives were really are not that important to me. It was not really relevant to my decision, that time period. And, again, when I look at the hearsay statement that Professor Gu put in now, at this point, really doesn't, I think, have any bearing on the decision that I made. And, again, I want to emphasize is, there was an enormous amount of information that [defendant] had collected for the PRC. And Professor Gu's statement that was submitted doesn't even address any of that information. And some of his statements that he makes, they are self-serving, they're speculation. There is not really a foundation for them, but I'm to go through them. I think they're actually not helpful to [defendant]. Let me pull it out and I'll give you the specific one that troubles me: "China has been bullied in the past hundred years. We all hope our race can be respected." I'm not sure what that means, but it reflects, to me, almost anger. Again, I wouldn't find that statement helpful to [defendant] because it almost gives motive and opportunity to do what I believe [defendant] did.

(GER 1732-34.)

## 2. Standard of Review

Brady claims are reviewed de novo. United States v. Price, 566 F.3d 900, 907 (9th Cir. 2009). This Court has not decided what deference should be afforded a district court's factual findings, but has noted that other circuits accept such findings unless clearly erroneous. Id. at n.6

## 3. Summary of Argument

The three components of a Brady violation are the following:

- (1) "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching";
- (2) "that evidence must have been suppressed by the State"; and

(3) "prejudice must have ensued." Price, 566 F.3d at 907.

There was no Brady violation. It is undisputed that defendants possessed and utilized DX 580 and DX 606 at trial, so there was no prejudice to defendant, nor were the two documents suppressed. The Gu 302 was not exculpatory and did not affect the district court's conclusions as fact finder.

4. There Was No Brady Violation Regarding DX 580 and 606

There was no Brady violation with respect to DX 580 and 606 because there was neither prejudice nor suppression. Defendant therefore cannot demonstrate a Brady violation even if the documents were favorable to him.<sup>9</sup> Price, 566 F.3d at 907 (in addition to evidence being favorable, there must be suppression and resulting prejudice to establish a Brady violation).

a. Prejudice

Defense counsel admitted during the Brady argument that defendant suffered no prejudice. (ER 845.) Defendant recalled Novak and used DX 580 and 606 during cross-examination. (GER

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<sup>9</sup> Defendant's claim that the "information in DX 580 and 606 undercuts the government's claim about the sensitivity of the briefings, the structures manuals, the SDS materials, the X-37 document, and other key documents" (AOB 39) is vastly overstated. Novak testified that the remarks in DX 580 and 606 concerning the sensitivity of the documents were limited to whether the documents bore a stamp indicating a restriction, and did not reflect his opinion concerning the actual sensitivity of the information contained in the documents. Moreover, DX 606 identified the phased array, X-37, and Delta IV documents, and the SDS as proprietary, and noted a number of documents that had ITAR or export control stamps.

1200-10, 1212-16, 1372-1414.) Defendant's argument that DX 580 and 606 "came too late to incorporate into opening statements or early cross-examinations or to permit further examination" is unavailing. (AOB 43.) Defendant had DX 580 prior to trial, so the decision not to use it earlier was his. In any event, Novak was recalled twice to allow defendant to cross-examine him on DX 580 and 606, and the court did not restrict that cross-examination in any way. Defendant did not ask for a continuance or seek to recall other witnesses. Finally, defendant discussed DX 580 and 606 at length both in closing argument and his closing brief. (GER 1518-22, 1528.) See United States v. Woodley, 9 F.3d 774, 777 (9th Cir. 1993) (defendant not prejudiced despite claim that he could not use belatedly disclosed documents in opening statement where defendant used claimed Brady evidence effectively at trial).

Defendant's argument that his witnesses "vigorously disputed" the sensitivity of documents also undermines his position. (AOB 43.) That defendant was able to vigorously dispute the sensitivity of the documents indicates that DX 580 and 606 were at best cumulative of other testimony on the same subject. See United States v. Inzunza, 580 F.3d 894, 908 (9th Cir. 2009) (concluding that alleged Brady evidence which duplicated other evidence presented was not material).

b. Suppression

Nor were DX 580 and 606 suppressed. With respect to DX 580, a year before trial the government disclosed the 302 for Tony Chi, the other author of DX 580. (AOB 32, n.14.) The 302 reflected statements by Chi that the "briefings" were a "general description of the Shuttle and typical Shuttle-related technology . . . that same information can be found on NASA's website." (GER 58-82.) Thus, defendant had the "salient facts regarding the existence of the evidence that he claims was withheld." Rhoades v. Henry, 596 F.3d 1170, 1182 (9th Cir. 2010), and there was no suppression.<sup>10</sup>

Furthermore, there must be suppression by "the State." Price, 566 F.3d at 907. DX 580 and 606 were not under the control of the government.<sup>11</sup> The government obtained documents from Boeing through subpoenas. (GER 1341.)

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<sup>10</sup> For the same reason, defendant was not prejudiced. See Schad v. Ryan, 606 F.3d 1022, 1035-37 (9th Cir. 2010) (no prejudice where state disclosed promise to assist witness in unrelated criminal proceeding but did not disclose letters written on defendant's behalf).

<sup>11</sup> Defendant's implication that the case agent received DX 580 from Boeing before trial is unfounded. (AOB 33.) Agent Moberly testified that he did not receive DX 580 from Boeing; the 302 he wrote for the production that supposedly included DX 580 listed all the documents received, but did not list DX 580. (ER 805, 826.) Boeing's lawyer testified that the proof of service for the production did not have an index of the documents produced, and he could not say with certainty that DX 580 was part of the production. (ER 759.)

Defendant argues that “when a government contractor/victim has such a close relationship with the prosecution, the prosecutor has a duty to learn of favorable evidence in the alleged victim’s possession,” (AOB 41), but the case law is to the contrary. In United States v. Joselyn, 206 F.3d 144 (1st Cir. 2000), the court rejected defendant’s effort to attribute to the government for Brady purposes information possessed by American Honda Corporation, despite that company’s close cooperation in the prosecution of its former employees. Id. at 152-54. The First Circuit stated, “While prosecutors may be held accountable for information known to police investigators . . . we are loath to extend the analogy from police investigators to cooperating private parties who have their own set of interests.” Id. at 154 (internal citation omitted). See also United States v. Graham, 484 F.3d 413, 417 (6th Cir. 2007) (government did not suppress evidence possessed by cooperating witness, since evidence was not within control of government). The case defendant cites does not hold otherwise. United States v. Kilroy, 523 F.Supp. 206 (E.D. Wis. 1981), did not involve a Brady claim; the court ruled only that the government should use its “best efforts” to obtain the documents sought by defendant, who was in pro per, from Standard Oil, based on the fact that Standard Oil was cooperating with the government. Id. at 214.

In this case, Boeing provided documents in response to

subpoenas from the government, and its employees appeared as witnesses at trial pursuant to subpoenas. Although prosecutors may be charged with responsibility to disclose information in the possession of other governmental agencies with whom they conduct joint investigations, see United States v. Reyes, 577 F.3d 1069, 1078 (9th Cir. 2009); United States v. Risha, 445 F.3d 298 (3rd Cir. 2006), there is nothing in the record to establish a relationship between Boeing and the prosecutors that would justify imparting constructive knowledge or possession of reports held by Boeing. Cf. United States v. Stein, 488 F. Supp. 2d 350, 361 (S.D.N.Y. 2007) (documents in possession of accounting firm deemed within control of the government due to non-prosecution agreement between firm and government that specifically gave the government the legal right to demand documents from firm).

5. The Gu 302 Was Neither Exculpatory nor Material

There was no Brady violation from the failure to produce the Gu 302 because, as the district court found, neither the 302 nor the letter defendant obtained from Gu were exculpatory, and no prejudice ensued. "The touchstone of [the prejudice analysis] is whether admission of the suppressed evidence would have created a reasonable probability of a different result." Price, 566 F.3d at 911 (internal quotation omitted). Because this was a bench trial, the question of whether disclosure of the Gu 302 creates a reasonable probability of a different result has been

conclusively answered. The district court considered both the 302 and Gu's post-trial letter, and twice found they would not have changed the court's decision.<sup>12</sup> (GER 1683, 1732-34.)

There also was no prejudice because, as the district court found, the 302 was not exculpatory. It was not known what defendant sent to Gu and the sensitivity of those documents was not at issue. (GER 1706.) The government's purpose in introducing defendant's letters to Gu was to show defendant's desire to help the PRC. (Id.) Indeed, the district court cited the 1979 Gu letter in its decision for that limited purpose. (GER 1732-34.) Moreover, the Gu 302 indicated that Gu had no independent recollection of defendant or of having received the materials from defendant (more than a quarter of a century earlier), making it apparent that he had no value to either party as a percipient fact witness.

C. ADMISSION OF GOVERNMENT EXHIBIT 211 WAS HARMLESS

The admission of GX 211, a certification by the State

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<sup>12</sup> Unlike the typical Brady situation where this Court must assess the likely impact of undisclosed evidence on a jury, here the district court explained the lack of impact of the documents, particularly the Gu 302, on its decision. Defendant fails to explain why, in the context of a Brady violation, a case should be remanded to a judge who sat as fact finder and require him to reconsider evidence he previously considered and addressed. See Fed. R. Crim. P. 33(a) (allowing for new jury trial if additional evidence emerges post-trial, but for a bench trial permitting district court to consider evidence and enter new judgment, rather than retry case).

Department that the trade secret documents were subject to export controls, was error. The certification was testimonial under Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), decided a day after trial ended in this case, because the certification was prepared solely for trial. However, the error was harmless. None of the charges required proof that any information was subject to export controls. The EEA and conspiracy counts required proof of trade secrets. The court did not cite GX 211 in its decision and the government did not rely on it during its closing arguments.

1. Standard of Review

This Court “must remand for a new trial unless the government demonstrates beyond a reasonable doubt that admission of the evidence was harmless.” United States v. Orozco-Acosta, 607 F.3d 1156, 1162 (9th Cir. 2010). In evaluating whether a Confrontation Clause violation is harmless, this Court considers a variety of factors, including: (1) the importance of the witness’ testimony in the prosecution’s case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution’s case. Id.

## 2. Background

GX 211 was a certification by the State Department that the Delta IV and Phased Array documents charged in counts 2-7 (GX 76 and 65), were "technical data" with the meaning of the Arms Export Control Act, 22 U.S.C. § 2778. The certification was made in response to a request from the FBI to determine whether the documents were subject to export controls. (ER 427.) GX 211 was introduced through Anthony Dearth, the Division Chief for Space and Missile Technology at the State Department. (ER 424.) He did not review the documents cited in the certification. (ER 433.) Dearth testified that GX 211 was the official record of the analysis done by engineers and defense experts at the Department of Defense of the documents provided by the FBI. (ER 430.) Dearth testified that the documents listed in GX 211 were subject to export control laws. (Id.) Dearth also testified that there was an embargo against the PRC that prevented the export of any technical data to that country. (ER 431.) Finally, Dearth testified that documents restricted from export may contain information in the public domain, but if even a small portion of the document contained technical data, the entire document would be restricted. (ER 432.) Defendant objected to the introduction of GX 211 on Confrontation Clause grounds. (ER 429.)

### 3. The Error Was Harmless

Consideration of the factors in Orozco-Acosta shows that the Confrontation Clause error was harmless.

First, the exhibit was not important to the government's case. Neither the EEA nor foreign agent charges required proof that any of the documents were subject to export controls. The EEA charges only required proof that defendant knowingly possessed, with the intent to benefit the PRC, trade secret information, which is defined as information the owner has taken reasonable measures to protect and which derives independent economic value from not being generally known. 18 U.S.C. §§ 1831, 1839(3). The foreign agent charge did not require proof of possession of either trade secret or export-controlled information. See United States v. Norwood, 603 F.3d 1063, 1069 (9th Cir. 2010) (error harmless where affidavit "not offered to prove an element of the offense").

Defendant's argument that both "the government and the district court emphasized that the alleged trade secret documents were export controlled" (AOB 48) is not supported by the record. In its decision, the district court made no reference to GX 211 or the fact that the Delta IV and Phased Array documents were export-controlled.<sup>13</sup> Likewise, the government did not mention GX

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<sup>13</sup> The only reference to export control laws in the court's decision was with respect to documents from the SDS. (ER 6.)

211 in closing argument nor did it argue that the trade secret documents charged in counts 2-7 were export-controlled.

Defendant cites to portions of the closing argument in which the government referred to the export-controlled status of other documents in defendant's possession. (AOB 48.) The first three citations concern the export-controlled status of the Shuttle Design System (ER 870, 874-75, and 878-79), which was established through other evidence (see note 13, supra). The government also cited the export-controlled status of technology relating to the Space Shuttle in the briefings defendant gave in the PRC. (ER 879.) Finally, the government referred to other documents that were export-controlled that were found in binders with the trade secret documents. (ER 881, 883.) In sum, the references in closing arguments to export controls all related to documents other than the trade secret documents.

Second, although there was no other evidence introduced at trial that the trade secret documents were export-controlled, there was ample evidence establishing them as trade secrets. Indeed, defendant did not contest at trial that the Delta IV Documents contained trade secrets. The experts on the Delta IV

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The export controlled-status of the SDS documents defendant possessed was established through the testimony of Boeing employee John Harrington and agent Moberly, and several exhibits. (GER 373-74, 1005-07, 2084, 2369-71.) GX 211 did not refer to the SDS documents.

and Phased Array technologies testified that the information was not known outside of Boeing, derived independent economic value from not being publicly known, and should not have been divulged to anyone outside the company, let alone to the PRC. (GER 391-437, 479-86, 605-42, 692-96.) The Boeing employees charged with information security also testified that Boeing proprietary information should not be provided to the PRC. (GER 705-06, 715, 718, 770.) Although GX 211, combined with Dearth's testimony that there was an arms embargo against the PRC, showed an additional layer of restriction on the information, it was not a layer needed to establish that any of the charged documents were trade secrets.

Furthermore, defendant was given ample opportunity to, and did, cross-examine the government's witnesses on the question of whether the information in the trade secret documents, and other documents defendant possessed, was in the public domain. (GER 437-79, 642-92, 696-700.) Defendant also had an expert testify as to his belief that the information in the Phased Array documents and the briefings defendant gave in the PRC were in the public domain. (ER 550-630.)

Finally, there was overwhelming evidence of defendant's guilt. In its decision, the district court included the following findings regarding the strength of the government's case:

- [In his home defendant] had over 300,000 pages of sensitive and proprietary documents belonging to Boeing. More specifically, federal agents found a veritable treasure trove of Boeing's documents relating to the Space Shuttle, Delta IV Rocket, F-15 fighter, B-52 bomber, CH-46/47 Chinook helicopter, and other proprietary aerospace and military technologies. Federal agents also found numerous letters, tasking lists, and journals detailing [defendant's] communications with officials in the PRC. (ER 4.)

- The Court finds overwhelming evidence of [defendant's] guilt on the charge of acting as an agent for the PRC. The evidence presented at trial establishes without a doubt that Mr. Chung was collecting highly technical aerospace and military technology belonging to Boeing and then passing that technology to the PRC . . . [defendant] has no plausible explanation for misappropriating, cataloging, passing, and selectively destroying documents. (ER 15.)

With respect to the trade secret charges, as noted above, defendant did not dispute that the Delta IV Documents contained trade secrets. Two of the Phased Array Documents were marked proprietary, and the government's evidence that the trade secret contained therein -- namely, the number of elements (MMICs) -- was not in the public domain went uncontradicted at trial. Similarly, defendant did not present any evidence that the costing data in the documents underlying counts 2 and 4 was publicly available. The district court found that Boeing had taken "more than reasonable measures to protect the documents," the documents had independent economic value, and the information in the documents was not in the public domain. (ER 23.) Finally, the court found that there "was no doubt that

[defendant] knew he possessed trade secret information . . . [he] was well aware of the numerous security measures in place to protect all of Boeing's information." (ER 24.)

D. THE DISTRICT COURT DID NOT ERR IN ADMITTING GX 352

Defendant argues that the district court erred in admitting GX 352, a tasking list found in Chi Mak's home. (AOB 50-52.) At trial, defendant objected only on the ground that the list was hearsay because Shouling Barnes, whose name was on the return address of the envelope the list was found in, was not identified as a co-conspirator. (ER 72-73.) The district court overruled the objection, noting that the letter was found in Chi Mak's residence. (ER 73.) For the first time on appeal, defendant contends that the list was irrelevant because there was no evidence tying it to defendant, and it therefore should have been excluded under Federal Rules of Evidence 401, 402 and 403.

Defendant's claim that no evidence tied defendant to the list lacks merit. Ample evidence found in Chi Mak's and defendant's homes demonstrated defendant's association with Mak and defendant's acquisition of documents responsive to requests contained in the list. Furthermore, the list was not hearsay and, alternatively, was admissible under the co-conspirator exception.

1. Standard of Review

Although this Court generally reviews evidentiary rulings

for abuse of discretion, review is for plain error where defendant did not object at trial on the basis asserted on appeal. United States v. Gallenardo, 579 F.3d 1076, 1081 (9th Cir. 2009).

2. The District Court Did Not Plainly Err in Admitting GX 352 as Relevant

GX 352 was found in an envelope addressed to Mak from Shouling Barnes, Mak's sister, who owned aviation companies in both California and the PRC, and was known to have contacts with officials in the aviation industry in the PRC. (GER 18.) The list itself was not addressed to anyone. The list began "Urgently Need: Manufacturing and Process Standards for fighter planes (Process Standard of Process Specification)." (ER 2183.) Among the items requested were:

- McDonald Douglas Aircraft Company, Process Standards for the manufacturing of F-15 and F-18.
- Other Process Standards for fighter planes and carrier-based aircraft. Process Standards for any of the above aircraft. Complete sets are good, partial sets are also needed.
- Finite Element Analysis Software - NASTRAN - NASA Structural Analysis Program.
- Boeing Company's Technical Information on Chemical Milling. [McDonald] Douglas's Technical Information on Chemical Milling.

(ER 2183.)

Contrary to defendant's contention, there was ample evidence tying defendant to GX 352. First, documents corresponding to

each of the four items above were found in defendant's home. During searches of defendant's trash conducted in August 2006, agents found NASTRAN documents. (GER 49, 55, 66, 70, .) A manual from Rockwell entitled "Machining, Chemical Milling, and Metal Fabrication" and bearing a restriction that it contained Rockwell propriety information was found in defendant's home. (GER 314-17.) Also found in defendant's home was a manual containing technical material for the F-15 fighter. (GER 346.)

Second, abundant other evidence demonstrated that defendant and Chi Mak were jointly involved in spying for the PRC. In addition to GX 352, agents found in Mak's home a letter addressed to defendant from Gu Weihao of AVIC. (GER 10.) In the letter, dated May 2, 1987, Gu Weihao asked defendant to provide information on airplanes and the Space Shuttle, and referred to previous information provided by defendant. (ER 2197.) The letter also stated:

I am very excited to learn that my relative, Mr. Mak Chi, is in Los Angeles. (Mr. Mak studied electrical engineering. He is a Chinese-American, same as you working in the U.S. He has opportunities to come back often. He is a good person, loyal, dependable, and totally trustworthy). I have specially asked him to come visit you . . . and bring you a small present to show my and old Chen's appreciation . . . At present, China is in the process of discussing and approving for the trunkline airplanes (150 seats) and planning and arranging the space shuttle issues. I hope these products will be flying sky-high soon. There are some difficult technical issues that need your assistance. I hope to have a chance to consult with you in person. I was wondering if it is possible for you to help

collect some information on airplane design for the trunkline and the development of the space shuttle.

(ER 2197.) The letter then mentioned defendant coming to China, and that Gu Weihao would "arrange for a few colleagues to go down south to Guangzhou with me to discuss with you in a small setting, which is very safe." (Id.) The letter mentioned arranging for an invitation to defendant's wife from an art institute in Guangzhou for defendant to use as a reason for traveling to the PRC. (ER 2198.) The letter concluded:

To sum up, if you have any suggestion or if you have anything I can help you with here, you can have Mr. Mak convey it to me. Normally, if you have any information, you can also pass it on to me through Mr. Mak. This channel is much safer than others. It is your honor and China's fortune that you are able to realize your wish of dedicating yourselves to the service of your country.

(Id.) Gu reiterated in another letter to defendant that "it is faster and safer" to forward information through Chi Mak. (GER 2573) Also found in Mak's home were numerous documents containing defendant's contact information. (GER 19-27.)

In addition, defendant's journal entries showed meetings between defendant and Mak, including visits to each other's homes. (ER 2157, 2164, 2168, 2176-77; GER 2467.) In defendant's home, agents found a printout from the SDS containing defendant's log-in name, with Mak's name and work and home phone numbers written the upper corner of the document. (GER 306.) Agents also found contact information for Mak in a search of defendant's

workspace at Boeing on September 29, 2006.<sup>14</sup> (GER 378-78A.)

Finally, the case agent and the government's expert on counter-intelligence testified that foreign intelligence agencies tailor their requests for information based on the access a source has. (GER 378B, 873.) Mak was an electrical engineer who worked on power distribution systems for Power Paragon, a defense contractor that did 90% of its work for the Navy. (GER 17.) He did not have access to NASTRAN, chemical milling, or technology relating to the F-15. (GER 18.) Defendant did have such access, as shown by the technical documents on those subjects in his home.

Based on all of these facts, there was ample basis for the court to conclude that GX 352 was intended for defendant and was relevant. There was no error, let alone plain error. Furthermore, because GX 352 was adequately connected to defendant, its probative value was not "nonexistent" as defendant asserts, and the district court did not plainly err under Rule 403.

3. The District Court Did Not Abuse Its Discretion in Overruling Defendant's Hearsay Objection

The district court did not abuse its discretion by admitting GX 352 because it was not hearsay. The list was an instruction

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<sup>14</sup> Chi Mak was convicted of conspiring to export defense articles and acting as an unregistered agent of the PRC in 2007. (ER 1110.)

or request for information, not a declaration of fact capable of being proven true or false. United States v. Reilly, 33 F.3d 1396, 1410 (3d Cir. 1994) (“Instructions to an individual to do something are . . . not hearsay . . . because they are not declarations of fact and therefore are not capable of being true or false”).

If GX 352 is deemed hearsay, it was admissible as a co-conspirator statement. GX 352 was a request for information on United States military aircraft and space technology under a heading of “urgently need.” It was written in Chinese and found in Mak’s home with a letter addressed to defendant from a PRC official asking him to collect information on airplanes and the Space Shuttle. The contents of the list, and the circumstances in which it was found, show its illicit nature. That it was written in furtherance of the conspiracy is shown by the other letters and tasking lists from the PRC in defendant’s home, as well as the NASTRAN, chemical milling, and F-15 documents he had that were responsive to GX 352.

Defendant claims the list was authored by Shouling Barnes and argues there was no evidence she conspired with defendant. (AOB 51.) There is nothing in the record suggesting Barnes wrote the list. The author of the list is unknown. The identity of the author is irrelevant, however, because the list itself and the other evidence shows that the list was part of a conspiracy

to transfer technology to the PRC. See United States v. Cruz, 910 F.2d 1072, 1081 n.10 (3rd Cir. 1990) (unknown identity of declarant not important because evidence showed that declarant, whoever she was, was connected to defendant). Given this evidence, the district court did not abuse its discretion in admitting GX 352 over a hearsay objection.

4. Any Error Was Harmless

Finally, even if this Court were to determine that admission of GX 352 was error, such error was harmless. The list was one of several letters and tasking lists in this case, the majority of which were found in defendant's home. While the district court did cite GX 352 in its decision, it was in conjunction with another tasking list and the letters defendant received from the PRC. (ER 10-11.) The court's consideration of GX 352 took less than half a page in a 33-page decision. Given the district court's finding of overwhelming evidence of guilt, the inclusion of one more tasking list was harmless, as "it is more probable than not that [any] erroneous admission of the evidence did not affect the [factfinder's] verdict." Gallenardo, 579 F.3d at 1081.<sup>15</sup>

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<sup>15</sup> Defendant argues that the cumulative effect of this error and the erroneous admission of GX 211 requires retrial. Even assuming that admission of both exhibits was error, the overall effect of the errors is minimal given the overwhelming evidence of defendant's guilt. GX 352 was relevant to the foreign agent charge and to demonstrating defendant's intent to benefit the PRC

E. THE DISTRICT COURT DID NOT PROCEDURALLY ERR AT SENTENCING

1. Facts

The PSR grouped all of the counts together; thus, the offense level was determined by using the guideline resulting in the highest offense level. (ER 1113.) The PSR noted that while § 2B1.1 was the corresponding Guideline for the EEA convictions, there was no designated Guideline for the foreign agent charge and thus the most analogous guideline was to be used. The Probation Office concluded that “U.S.S.G. § 2M3.2 appears to be the most analogous guideline based on both the proscribed conduct and the statutory penalties provided for the two offenses.”

(Id.) The PSR found, however, that application of either § 2B1.1 or § 2M3.2 yielded the same offense level, 30. (ER 1113-14.) Under § 2B1.1, the PSR applied a base offense level of 6, a 22-level loss enhancement, and a 2-level enhancement for misappropriating a trade secret to benefit the PRC. With respect to loss, the PSR noted that the TSM technology was developed at a cost of approximately \$50 million and that Boeing spent \$1

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in connection with the EEA charges, but there was abundant other evidence on those matters. Because the government's case here was strong, the chance of prejudice from the cumulative effect of individually harmless errors is decreased. Cf. United States v. Berry, 627 F.2d 193 (9th Cir. 1980) (“In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors.”).

million on the phased-array antenna, but the PSR resolved any uncertainty in these figures in defendant's favor and applied a 22-level adjustment for loss exceeding \$20 million but not more than \$50 million. (ER 1114.)

The district court applied U.S.S.G. § 2M3.2, Gathering National Defense Information. (ER 1025.) The court found that the "information with respect to the Space Shuttle, certainly the Delta IV rocket, the F-15, B-52, B-1, and the Chinook helicopters" was national defense information. (ER 1027.) In response to defendant's arguments, the court explained that it was too difficult to calculate loss under § 2B1.1. Since the full extent of information defendant passed to the PRC was unknown, the court could not put a "price tag" on the harm to national security or to Boeing. (ER 1025-26.) The district court also stated that it gave defendant "the benefit of the doubt" by applying § 2M3.2 because under § 2B1.1 the loss could exceed \$50 million and result in a base offense level greater than 30. (ER 1036-37.)

## 2. Summary of Argument

Defendant argues that § 2M3.2 was not the most analogous guideline because this case did not involve classified information. (AOB 56-59.) Because national defense information is not limited to classified information, the district court did not abuse its discretion in selecting § 2M3.2.

3. Standard of Review

Where no guideline exists for a particular offense, U.S.S.G. § 2X5.1 provides that the most analogous offense guideline should be used. The most analogous guideline will vary depending on the facts of the case. United States v. Fisher, 137 F.3d 1158, 1167 (9th Cir. 1998). The district court's application of the Guidelines to the facts is reviewed for abuse of discretion. United States v. Van Krieken, 39 F.3d 227, 230 (9th Cir. 1994).

4. The District Court Did Not Procedurally Err In Using § 2M3.2

Contrary to defendant's claim, § 2M3.2 (Gathering National Defense Information) is not limited to classified information. The accompanying commentary states, "the statutes covered in this section proscribe diverse forms of obtaining and transmitting national defense information with the intent or reason to believe the information would injure the United States or be used to the advantage of a foreign government." U.S.S.G. § 2M3.2, comment. (backg'd.) Furthermore, the commentary to § 2M3.1 (which is incorporated into application note 1 to § 2M3.2) explains that the offense level distinctions for espionage-related offenses "are generally based on the classification of the information gathered or transmitted." Thus, the base offense levels for §§ 2M3.1-2M3.4 all provide a higher base offense level if "top secret" information was involved, and a lower base offense level

“otherwise.” These offense level distinctions demonstrate that application of these guideline sections is not limited to offenses involving classified information; instead, offenses involving top secret classified information are assigned a higher base offense level.

Since the Guidelines do not define “national defense information,” defendant cites cases interpreting similar language in 18 U.S.C. § 793 (gathering, transmitting or losing national defense information) to support his argument. In the context of § 793, however, “information relating to the national defense” is a “generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.” United States v. Abu-Jihaad, 600 F. Supp.2d 362, 385 (D. Conn. 2009) (quoting United States v. Gorin, 312 U.S. 19, 28 (1941)); accord United States v. Truong Dinh Hung, 629 F.2d 908, 918 (4th Cir. 1980) (“Congress intended ‘national defense’ to encompass a broad range of information and rejected attempts to narrow the reach of the statutory language.”). This Court has explicitly held that “there is no requirement in [§ 793] that . . . the documents be marked secret at all.” United States v. Lee, 589 F.2d 980, 990 (9th Cir. 1979) (defense expert challenging classification of documents properly excluded because proper classification of documents was “totally irrelevant”). The cases cited by defendant, United

States v. Squillacote, 221 F.3d 542 (4th Cir. 2000), and United States v. Rosen, 445 F.Supp.2d 602 (E.D. Va. 2006), do not require that the information be classified. Instead, they limit national defense information to information that is (1) closely held by the government, and (2) injurious to the United States or advantageous to a foreign government. Squillacote, 221 F.3d at 575-80; Rosen, 445 F. Supp. 2d at 620. In reaching its verdict on the EEA counts, the district court necessarily found that defendant took nonpublic information to benefit the PRC.<sup>16</sup> With respect to other documents found in defendant's home, evidence established that the documents pertaining to the X-37, F-15, and Chinook helicopter contained information not publicly known that the PRC sought to obtain. (GER 307-09, 345-46, 491-92, 598-99, 1020.) Accordingly, the district court did not abuse its discretion in finding that the documents in defendant's home contained national defense information and in choosing § 2M3.2 as the most analogous guideline.

Even if the court erred, any guideline calculation error did not affect the sentence. See United States v. Cantrell, 433 F.3d 1269, 1279, 1280 n.4 (9th Cir. 2006) (guideline calculation

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<sup>16</sup> The customer for the Delta IV project was the Air Force. (GER 397.) The customer for the Phased Array technology was NASA, and that technology is currently used in "black programs" which are highly classified programs that are unnamed. (GER 616, 627.)

errors subject to harmless review). The court indicated that it chose to apply § 2M3.2, which was more lenient than § 2B1.1. Furthermore, after a lengthy discussion of the aggravating and mitigating factors and the objectives of sentencing under 18 U.S.C. § 3553(a), the court applied a 2-level upward variance. (ER 1027-35.) Accordingly, any procedural error was harmless.<sup>17</sup>

#### IV

#### CONCLUSION

For the foregoing reasons, defendant's convictions and sentence should be affirmed.

DATED: August 13, 2010

Respectfully submitted,

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<sup>17</sup> Defendant states in passing that the sentence was also substantively unreasonable. This claim is not supported by argument or citation to the record or to pertinent authority, and is deemed abandoned. See Fed. R. App. P. 28(a)(9)(A); United States v. Velasquez-Bosque, 601 F.3d 955, 963 n.4 (9th Cir. 2010).

## STATUTORY INDEX

Title 18, United States Code, Section 1831, provides as follows:

(a) In general. Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly-

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret;

(3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in any of paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

shall, except as provided in subsection (b), be fined not more than \$500,000 or imprisoned not more than 15 years, or both.

Section 1839(3) defines "trade secret" as follows:

(3) the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if-

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public. . . .

Title 18, United States Code, Section 951 provides, in pertinent part, as follows:

(a) Whoever, other than a diplomatic or consular officer or attache, acts in the United States as an agent of a foreign government without prior notification to the Attorney General if required in subsection (b), shall be fined under this title or imprisoned not more than ten years, or both.

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(d) For purposes of this section, the term "agent of a foreign government" means an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official. . . .

Title 18, United States Code, Section 1001, provides, in pertinent part, as follows:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry. . . .

**STATEMENT OF RELATED CASES**

There are no known related cases.

**Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 10-50074**

**(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief***

I certify that: **(check appropriate option(s))**

1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

Proportionately spaced, has a typeface of 14 points or more and contains \_\_\_\_\_ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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August 13, 2010

\_\_\_\_\_  
Date

/s/ Gregory W. Staples

\_\_\_\_\_  
Signature of Attorney or  
Unrepresented Litigant

9th Circuit Case Number(s) 10-50074

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