No. 11-10058

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

NOSHIR S. GOWADIA,
Defendant/Appellant.

On Appeal from the United States District Court for the District of Hawai'i
D.C. No. 05-cr-00486-SOM-KSC-1
The Hon. Susan Oki Mollway, Chief Judge

Opening Brief for the Defendant Appellant Noshir S. Gowadia

Georgia K. McMillen, # 6422
Law Office of Georgia K. McMillen
P.O. Box 1512
Wailuku, Maui, HI 96793
Telephone: (808) 242-4343
gmcmillen@earthlink.net

Harlan Y. Kimura, # 3221
Law Office of Harlan Y. Kimura
220 S. King St., Ste. 1660
Honolulu, HI 96813
Telephone: (808) 521-4134
hyk@aloha.net

Attorneys for Defendant/Appellant Noshir S. Gowadia

TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

TABLE OF CONTENTS CONTINUED

TABLE OF AUTHORITIES

CASE LAW

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIES CONTINUED

STATUTES, REGULATIONS, COURT RULES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES CONTINUED

TABLE OF AUTHORITIES CONTINUED

I. JURISDICTIONAL STATEMENT.

This direct appeal concerns the 2010 conviction of defendant/appellant Noshir S. Gowadia for violations of the Federal Espionage Act, the Arms Export Control Act (AECA), Money Laundering and Filing False Tax Returns.

The United States District Court for the District of Hawai'i had original jurisdiction of this matter pursuant to 18 U.S.C. § 3231. This Court has jurisdiction to review Mr. Gowadia's conviction and sentence under 28 U.S.C. § 1291.

The district court imposed sentence on January 24, 2011, with the Judgment entered on February 4, 2011. ER1, 4-11.[1] Mr. Gowadia filed the Notice of Appeal on February 7, 2011. ER1, 1-3. Pursuant to Rule 4(b) of the *Federal Rules of Appellate Procedure* this appeal is timely.

II. ISSUES PRESENTED.

A. Whether the district court erred in denying Mr. Gowadia's Motion to Suppress his October 2005 statements, which error was not harmless?

---

[1] As used here "ER1", "ER2", "ER3", "ER4", "ER5", "ER6", "ER7" and "ER8" refer to the eight volumes of Excerpts of Record; "CR" refers to the district court clerk's record in ER8; and "CR Ninth Circuit" refers to the Ninth Circuit clerk's record in ER8.

B. Whether the district court erred in prohibiting Mr. Gowadia from challenging the classification decisions in this case of the pertinent documents and information alleged to contain derivative classification material?

C. Concerning the AECA offenses under Counts 2, 12, 13 and 14, whether the jury instructions unconstitutionally relieved the government of its burden to prove that the defense services and technical data Mr. Gowadia allegedly exported were not in the public domain?

D. Concerning the AECA offenses under Counts 12, 13 and 14, whether the jury instructions unconstitutionally omitted the government's burden to prove that the technical data at issue was not basic marketing information?

III. STATEMENT OF THE CASE.

On October 13, 2005, agents of the Federal Bureau of Investigation (FBI), the United States Air Force Office of Special Investigations (OSI), and the Bureau

of Immigration and Customs Enforcement (ICE), executed a search warrant on the rural Haiku Maui residence of Mr. Gowadia. ER8, 4-6, 32. After nine days of intense interrogation by the FBI and OSI, on October 26, 2005 the government filed a criminal complaint against Gowadia. CR 1. On that same day, the FBI arrested Gowadia pursuant to a warrant issued by the district court. CR 3. Later that afternoon Gowadia made his first appearance before a magistrate judge, now accompanied by a court-appointed attorney. CR 6.

The government secured an indictment against Mr. Gowadia on November 8, 2005, followed by a superseding indictment on November 8, 2006. CR 11, 92. Gowadia pleaded not guilty to both of those indictments. CR 14, CR 94. On October 25, 2007, the government filed a second superseding indictment (Indictment) alleging:

- **Count 1**, Conspiracy to Export Classified Defense Information to the People's Republic of China (PRC or China), in violation of 18 U.S.C. § 371;

- **Counts 2, 12, 13 and 14**, Violation of the Arms Export Control Act, 22 U.S.C. § 2778, 22 C.F.R. §§ 125.1, 125.2, 125.3, 126.1, 127.1 and 127.3;

- **Counts 6, 7 and 8**, Communicating National Defense Information to Aid a

Foreign Nation, here PRC, in violation of 18 U.S.C. § 794(a) and § 2;

- **Counts 3, 4, 5, 9, 10 and 11**, Communicating National Defense Information to a Person Not Entitled to Receive It, in violation of 18 U.S.C. § 793(e) and § 2;

- **Count 15**, Unlawful Retention of National Defense Information, in violation of 18 U.S.C. § 793(e) and § 2;

- **Counts 16, 17, 18 and 19**, Money-Laundering, in violation of 18 U.S.C. § 1957 and § 2;

- **Counts 20 and 21**, Filing a False Tax Return, in violation of 26 U.S.C. § 7206 (1); and

- Notices of Forfeiture.

ER 8, 122-173. Mr. Gowadia pleaded not guilty to the final version of the Indictment. CR 136.

Prior to the trial, the district court issued two orders that Mr. Gowadia challenges on appeal. The first order concerns Gowadia's motion to suppress statements that he made during nine interrogation sessions from October 13 to 24,

2005 (the October 2005 statements). ER8, 120-121. Gowadia sought suppression of the October 2005 statements on two grounds: (1) the statements were the result of psychological coercion and, therefore, involuntary; and (2) the statements were inadmissible under 18 U.S.C. § 3501(c) because they were taken more than six hours after Gowadia's initial detention, and before presentment to a magistrate judge (Motion to Suppress).[2] ER8, 120-121; CR 277, 283. The government opposed the Motion to Suppress. CR 235, 282.

For hearing purposes, the district court consolidated the Motion to Suppress with three other suppression motions. CR 214, 215, 217. The hearings on these motions were held on January 6, 7, 8, 9, 12 and 20, 2009. CR 256, 257, 258, 260, 261, 264.[3] On March 2, 2009, the district court issued a Minute Order denying the Motion to Suppress the October 2005 statements (ER1, 99), which ruling was followed by a lengthy written order filed on August 25, 2009.[4] ER1, 52-96.

---

[2] Mr. Gowadia challenges on direct appeal only the decision denying the Motion to Suppress the October 2005 statements pursuant to 18 U.S.C. § 3501(c).

[3] The government admitted in evidence the October 2005 statements during the January 2009 suppression hearings. ER7, 4, 17, 27, 37, 49, 55, 65, 72, 139-213; ER8, 43, 95-119. The government also admitted into evidence during the trial the same October 2005 statements. ER2, 26 (referred to as Exhibits S-2, S-3, S-4, S-5, S-6, S-7, S-8, S-9); ER6, 52.

[4] Mr. Gowadia challenges on direct appeal that portion of the district court's written decision applying § 3501(c) to deny the Motion to Suppress on the

The second order appealed concerns whether Mr. Gowadia could challenge the classification status of the relevant documents and information in this case. ER1, 97-98. This order was issued subsequent to the Section 6 (a) hearings held in accordance with the Classified Information Procedures Act, 18 U.S.C. App. §§ 1-16 (CIPA) to determine the use, relevance, or admissibility of classified information to be used during the trial and/or pretrial proceedings.[5] At first, the government in its filing on March 6, 2009 argued that Mr. Gowadia should not be permitted to contest the classification of various documents. ER6, 126-134.[6] On the other hand, Gowadia argued that he was entitled to contest the classification of certain trial information. ER6, 118-125. Without even holding a hearing, the district court issued a Minute Order on March 20, 2009, concluding as a matter of law that Gowadia was not permitted to challenge classification decisions of the

---

grounds that there was no unreasonable or unnecessary delay between his arrest or detention and his initial appearance before the court. ER1, 82-96.

[5] These hearings were brought by the government pursuant to its Motion For An In Camera Section 6(a) Hearing Pursuant To Classified Information Procedures Act filed on February 25, 2009. CR 295. The hearings lasted three days, beginning on March 2, 2009 and concluding on March 4, 2009. CR 311, CR 312, CR 313.

[6] According to the district court docket sheet, the second order appealed was issued without a hearing and therefore, the memoranda of law related thereto which are relatively brief have been included in the Excerpts of Record pursuant to Rule 30-1.5 of the *Ninth Circuit Rules*.

executive branch (Minute Order). ER1, 97-98.

On August 27, 2009, the district court reassigned the case from Judge Helen Gillmor to Chief Judge Susan Oki Mollway. CR 381. Shortly before trial commenced the district court granted for good cause shown the government's motion to dismiss Counts 5, 16, 17 and 18. CR 525; 529.

The 41-day trial began April 6 and ended July 29, 2010 (CR 617; 784), during which the government spent considerable time presenting testimony and evidence related to Mr. Gowadia's October 2005 statements, discussed at Section VII.A.2.e, *infra*. After six days of deliberation, on August 9, 2010, the jury returned verdicts acquitting Gowadia of Counts 3, 4 and 7, but convicting him of the remaining counts as charged. ER1, 4; CR 801, CR 802. On January 24, 2011, the district court imposed sentence against the then 66-year-old Gowadia[7], which sentence included a total of 32 years in prison. ER1, 7. This direct appeal follows.

IV. BAIL STATUS.

According the Federal Bureau of Prisons ("BOP") website (www.bop.gov), Noshir S. Gowadia, BOP No. 95518 – 022, is currently in BOP custody at USP

[7] Mr. Gowadia was born in 1944, in Bombay, India. ER2, 116.

Florence ADMAX - U.S. Penitentiary. His projected date of release according to the BOP website is September 11, 2033.

V. STATEMENT OF RELEVANT FACTS.

A. Stealth.

The underlying subject matter in this case concerns stealth technology used in military and civilian aircraft. Stealth technology is used to suppress aircraft observability with respect to five "signature" areas: (1) radar-cross-section; (2) infrared (also referred to in the record and herein as IR); (3) acoustic; (4) visual; and (5) electromagnetic. ER2, 158-159; ER3, 87-88. Much focus in this case was placed on infrared or IR signature. Infrared represents heat. ER2, 225. Military aircraft are particularly concerned with infrared signature because it represents a vulnerability that could be used to destroy the aircraft. ER3, 84-85.

In the early 1980s the United States corporation Northrop won a government contract to develop for the Air Force a stealth bomber which came to be known as the B-2 bomber, and which was described during the trial as a penetrating, survivable, strategic bomber. ER2, 140-141; ER6, 117. The purpose of the B-2 was to penetrate Soviet airspace at a high altitude while avoiding detection from sound-based radars, fly to the target, release weapons and return

home safely. ER2, 128. This goal was achieved by designing a low-observable aircraft with a radar-cross-section signature so low that it would not be detected by Soviet radar. ER2, 128.

Initially the B-2 project was a "black project", or a project so secret that individuals who worked on it could not even acknowledge its existence (B-2 Project). ER6, 102. Those who were involved with the B-2 Project were sworn to secrecy in order to protect the classified information used in its development. ER3, 78-83; ER6, 111. The B-2 was first shown to the public in 1989, and first flown in 1991. ER6, 102, 104, 113.

B. Noshir S. Gowadia.

Mr. Gowadia immigrated from India to the United States in 1963, eventually earning a Bachelor of Science degree in nautical and astronautical engineering, and a Master of Science degree in mechanical engineering. ER2, 117-118. He became a naturalized United States citizen in 1968. ER2, 119.

In 1968 he began working for the Northrop Corporation in California as a member of the engineering team involved with the B-2 Project. ER6, 114. To work on the B-2 Project, Mr. Gowadia executed a secrecy oath in 1979 promising to protect classified information disclosed to him in order to perform his duties, including an oath to protect the information after completion of his duties, and for

the rest of his life. ER6, 112. While at Northrop, Gowadia received favorable-to-excellent evaluations concerning his work integrating the B-2 propulsion system into the resulting design of the aircraft. ER6, 115-117.

In April 1986 Mr. Gowadia left Northrop due to health reasons. ER2, 67-68. At that time the B-2 was still in the developmental stage, and had not yet been flown or disclosed to the public. ER2, 69. From 1988 to 1995 he taught classes in infrared signature suppression at the Georgia Institute of Technology (GIT), which teaching involved materials containing classified information. ER2, 83-84; ER6, 107-109.

C. N.S. Gowadia, Inc.

After leaving Northrop, Mr. Gowadia and his wife Cheryl moved to Albuquerque, New Mexico. ER2, 67-68. In 1987 he started a business known as N.S. Gowadia Inc. (NSGI) that provided consulting services to the United States aerospace engineering industry. ER2, 69-76; ER3, 63. NSGI worked on United States government contracts that involved classified information, such as the DARPA-funded[8] report regarding suppression of aircraft contrail emissions. ER2,

[8] "DARPA" is the acronym for the "Defense Advanced Research Projects Agency", which agency is part of the United States Department of Defense and responsible for the development of new technologies for use by the military. ER2, 78.

76-82.

While residing in Albuquerque, Mr. Gowadia maintained a "secured facility" at his home office where he stored classified information concerning government contracts he worked on, including the DARPA project. ER2, 83. However, in 1997 the Office of Defense Security Services (DSS) closed Gowadia's secured facility because he was no longer working on government contracts that required access to, and use of, classified information. ER4, 256-258.

In the late 1990s Mr. Gowadia and his wife moved to Maui where, in 2002, they built a home in the rural area known as Haiku. ER2, 100-101. Around this time he began expanding NSGI's client base, focusing on foreign governments and companies. He marketed his expertise in aircraft infrared signature suppression and a system he developed called AIRSS, Advanced Infrared Suppression System. ER2, 86-88, 99. His marketing efforts included reaching out to individuals and corporations in Germany, Israel, and Switzerland, which entrepreneurial efforts underlie Counts 9, 10, 11, 12, 13 and 14 of the Indictment. ER2, 86-87, 94-97; ER8, 154-159.

Specifically, in 2002 Mr. Gowadia faxed a letter to Tony Busch of the Swiss Ministry of Defense proposing application of the AIRSS for helicopters his

government recently purchased. ER2, 86-87; ER6, 75-77. In 2004 Gowadia sent correspondence to Sabine Hipp of EADS aircraft company in Germany, and to Patrick Bar Avi of the Rafael company in Israel, with similar proposals concerning the AIRSS for commercial aircraft. ER2, 94-97; ER6, 78-84. Gowadia's ploy was to convince potential clients that his AIRSS system reduced the IR signature of the B-2 and improved survivability, and, therefore, could likewise reduce IR signature and improve survivability for their aircraft. Gowadia admitted during his trial testimony that these communications contained false claims concerning the effectiveness of the AIRSS in protecting the B-2 by reducing its "lock-on" range. ER2, 85, 90-92, 95, 99.

The government's trial witness Air Force Col. Roger Vincent testified that "lock-on" is a specific command that tells an IR-guided missile to follow an object emitting infrared energy. ER3, 89-90. Near the targeted aircraft, the missile will detonate its destructive payload. ER2, 85.

Mr. Gowadia's trial experts testified that the B-2 had no lock-on range. ER2, 104, 129-131. Moreover, the terms "lock-on" are not found in the B-2 classification guide. ER6, 103, 105-106. Gowadia made these false representations to market NSGI and his AIRSS system to foreign countries and individuals. ER2, 91-92, 95, 99.

In 2003 Mr. Gowadia began expanding NSGI into China, where he traveled from 2003 to 2005. ER2, 61, 102. His work in China underlies Counts 1, 2, 6 and 8 of the Indictment, in which the government alleged that Gowadia assisted the Chinese in developing their cruise missile program, as well as Count 19 concerning Money Laundering. ER8, 122-146, 150-153, 166-167.

During his trip in June 2004, Mr. Gowadia provided the Chinese with a document he had prepared entitled "Study 1", which underlies Count 6. ER6, 66-73; ER8, 150-151. On March 20, 2005, Gowadia e-mailed his liaison in China, Tommy Wong, an attached computer file identified as "Answers - 20 Mar 05.doc" which relates to Study 1 and underlies Count 8. ER6, 74; ER8, 152-153.

D. The Government's Investigation and Prosecution.

The investigation of Mr. Gowadia began in 1999. ER6, 92. Salient events included:

- in 2000 and 2001 ICE provided the FBI with records of Gowadia's foreign travel in 2000 and 2001 (ER5, 4);
- in December 2001 the FBI initiated a "mail cover" to review, without opening, mail going to Gowadia's residence on Maui (ER6, 93-94);
- in July and August 2003 the FBI began reviewing Gowadia's banking records (ER6, 96);

- in August 2003 ICE provided updated reports to the FBI on Gowadia's international travels (ER6, 96);
- in October 2003 the FBI began conducting physical surveillance of Gowadia's residence on Maui (ER6, 96);
- in March 2004 the U.S. Customs and Border Protection (CBP) searched a shipment container belonging to Gowadia that entered the Port of Honolulu (ER6, 97); documents seized from that container were sent to the Office of Defense Trade Control Compliance (DTCC) for analysis as to content and classification status (ER6, 97-99);
- in April and June 2004 CBP stopped Gowadia at the Honolulu Airport and searched his luggage prior to his departure on an overseas business trip (ER6, 98-99);
- on October 6, 2004 the lead FBI agent in the investigation of this case, Special Agent Thatcher Mohajerin, received a response from DTCC finding that none of the documents provided from Gowadia's shipping container were classified (ER6, 99-100).

In March 2005 Mohajerin took steps to move the case from investigation to criminal prosecution. ER6, 86. The steps included conducting a search pursuant to a warrant on "noshirg@aol.com", Mr. Gowadia's e-mail account, in May 2005.

ER6, 88. In July 20 05 Mohajerin obtained a warrant to monitor Gowadia's e-mail traffic. ER6, 90-91.

On October 12, 2005, Mohajerin applied for a search warrant on Mr. Gowadia's home in rural Haiku Maui, which application the district court issued on the same date. ER8, 29; *see* Application and Affidavit for Search Warrant, and Search Warrant.[9]

E. The Nine Days of Interrogation.

At 2:30 p.m. on Thursday, October 13, 2005, 15 federal agents descended upon Mr. Gowadia's Maui home to execute the search warrant. ER8, 15-16; ER6, 153. Two of those agents, Mohajerin and OSI Agent Joseph Williams, accompanied the search team for the exclusive purpose of interrogating Gowadia concerning espionage and violation of the AECA, which they did for more than five hours. ER6, 152-153, 219-220; ER7, 116; ER8, 34, 38-39. The result of that lengthy interrogation was a written statement by Gowadia in which he denied criminal wrongdoing, including possession of classified materials in his home

[9] Pursuant to *Ninth Circuit Rule* 27-13 (b), Gowadia files under seal with this Court a copy of the Application and Affidavit for Search Warrant, sealed by the district court and filed therein on October 13, 2005. The government entered into evidence this Application during the suppression hearing on January 6, 2009 as Exhibit 22. ER8, 30. Gowadia also files under seal the Search Warrant sealed and issued by the district court on October 12, 2005, and admitted into evidence at the suppression hearing as Exhibit 22a. ER8, 31.

office. ER8, 44-45, 95-119.

The agents left the home at 11:25 p.m. with 50 boxes containing, among other things, documents and equipment essential for Mr. Gowadia's international consulting business, NSGI. ER6, 2-24; ER8, 28. This voluminous seizure filled a van and required a Coast Guard C-130 aircraft for transport to Honolulu. ER6, 24-27.

The next day Mr. Gowadia accompanied Agents Mohajerin and Williams to the Maui Police Department at their suggestion, where they interrogated him for another six hours. ER8, 52-53, 57. At the conclusion of this day-long session on October 14, the agents permitted Gowadia to leave the police station and return home. ER7, 8.

Wanting to continue questioning Mr. Gowadia, Agent Mohajerin purchased a one-way ticket for Gowadia to travel from Maui to Honolulu. ER7, 94-95. Thereafter, in Honolulu at the FBI offices the agents interrogated Gowadia for seven more days – from October 17 to October 22, and on October 24. ER7, 21-24, 35-37, 47-49, 53-55, 62-65, 68-72; *and see* 139, 153, 163, 168, 178, 190, 199, 211; ER8, 94. Except for October 13th, during each session the agents confronted Gowadia with evidence of guilt and he, in turn, made numerous written and oral admissions. ER7, 140-152, 154-162, 164-167, 169-177, 179-189, 191-198, 200-

210, 212-213.. In their testimony at the suppression hearings and during the trial, Agents Mohajerin and Williams repeatedly stated that their goal during these sessions was to extract as much intelligence as they could from Gowadia before he stopped talking. ER3, 135-142; ER4, 94-95; ER5, 7-9; ER6, 202, 204, 207-208; ER7, 87, 89, 134, 136; ER8, 33-34. During the trial, Gowadia testified that his 'admissions' were the result of coercion and he denied their veracity. ER2, 32-35, 43, 47-48, 51-52, 55.[10]

On October 26, 2005, the government formally arrested Mr. Gowadia, at which time he requested an attorney. ER7, 81-82. Later the same day Gowadia made his initial appearance before Magistrate Judge Barry M. Kurren in his courtroom located just across the courtyard from the FBI offices in the same federal building complex. CR 6.

F. The Trial.

The trial commenced on April 6 and concluded 41 trial days later on July 29, 2010. CR 619, 623-25, 627, 631, 646-47, 649, 670, 672, 674-75, 693-95, 698, 700, 709-11, 719, 722-25, 727-29, 731, 733, 746, 748, 761, 763-65, 770-71, 780, 783, 784. During the trial the government relied heavily on Mr. Gowadia's October 2005 statements. *See testimony of Agent Thatcher Mohajerin*: ER5, 14-192; ER6,

[10] Mr. Gowadia did not testify at the suppression hearings in January 2009.

29-61; *testimony of Agent Joseph Williams*: ER3, 98-125, 150-267; ER4, 5-172, 179-251; *testimony of Col. Roger Vincent*: ER3, 65-76.1, 93; *testimony of Mark Amos*, ER3, 4-18, 56-59, 61-62; *testimony of Agent Bruce Carlson*, ER3, 22-37.

Both parties presented the testimony of experts, with the government's expert Mark Amos expressly relying on Gowadia's October 2005 statements to testify that his work in China concerned modifications and improvements to PRC's cruise missile system. ER3, 4-5. In contrast, Mr. Gowadia's expert Glenn Varney testified that the information he provided the Chinese represented fundamental university-level studies concerning flow field dynamics and rectangular "2-D" exhaust nozzles. ER2, 163-210, 217. Varney also pointed out that techniques to reduce infrared signature through exhaust nozzle modification have been discussed for decades in papers and articles available to the public, including prior to the B-2 Project. ER2, 165-210. Gowadia's technical experts also testified that his claims in his marketing correspondence concerning the B-2 and his AIRSS system represented meaningless hype designed to drum up business for NSGI. ER2, 133-138.

VI. SUMMARY OF ARGUMENTS.

A. The District Court Erred in Denying Mr. Gowadia's Motion to

Suppress His October 2005 Statements, Which Error Was Not Harmless.

Delaying a defendant's arraignment "specifically to provide federal officers with time to interrogate him . . . is one of the most patent violations of Rule 5(a) and suppression is required on the basis of that delay alone". *United States v. Alvarez–Sanchez*, 975 F.2d 1396, 1405 (9th Cir.1992), *rev'd on other grounds*, 511 U.S. 350, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994). That is what happened in this case.

During the execution of the search warrant on October 13, 2005, Agents Mohajerin and Williams detained and interrogated Mr. Gowadia for more than five hours, then continued the detention and interrogation the next day at the Maui Police Department and for another seven days in Honolulu. They did this to extract as much information as they could from Gowadia. Except for October 13, during each session the agents confronted Gowadia with evidence of his guilt and, in turn, he provided detailed written admissions. On October 26, 2005, the government finally arrested Gowadia and brought him before a magistrate judge for his initial court appearance.

Section 3501 (c) creates a six-hour safe harbor during which a confession given by a person under arrest or detention will not be excludable solely because of

delay in bringing such person before a magistrate judge. 18 U.S.C. § 3501(c).[11] In reliance on § 3501(c), the district court denied Mr. Gowadia's Motion to Suppress his October 2005 statements, erroneously finding that he was not under arrest or detention until October 26, the same day he was brought before a magistrate. ER1, 91, 95-96. Accordingly, the court determined that there was no unreasonable delay between his arrest and his initial appearance in court and, therefore, his October 2005 statements were admissible. ER1, 96.

On appeal Mr. Gowadia argues that the district court's findings of fact as to detention were clearly erroneous. Further, under *de novo* review he argues that the prescribed objective standard, and the totality of the circumstances, demonstrate that from October 13 to October 26, 2005, the government detained him, and the resulting delay in presentment to the court was unreasonable and unnecessary under § 3501(c).

The district court's failure to suppress the October 2005 statements was not harmless in two respects. First, under § 3501(c) once detention is established the analysis turns to whether the delay in presentment was unreasonable and unnecessary. Had the court found detention as of October 13th, which detention

[11] Mr. Gowadia conceded in his Motion to Suppress that his October 13 statement was admissible because it was made within the six-hour safe harbor of § 3501(c). ER1, 82.

continued through October 26th, the record clearly shows one missed opportunity after another for the federal agents to transport and/or present Mr. Gowadia to the on-duty magistrate judge who was located in the same federal complex as the FBI offices where he was interrogated. Moreover, given Agents Mohajerin and Williams' expressed purpose in detaining Gowadia in order to extract intelligence and a confession, the delay in presentment was unquestionably unreasonable and unnecessary. "[D]elay for the purpose of interrogation is the epitome of 'unnecessary delay.' " *Corley v. United States*, 556 U.S. 303, 308, 129 S.Ct. 1558, 1563, 173 L.Ed.2d 443 (2009), *citing Mallory v. United States*, 354 U.S. 449, 455-56, 77 S.Ct. 1356, 1360, 1 L.Ed.2d 1479 (1957).

Second, the error was not harmless because the record shows that the October 2005 statements became the cornerstone of the government's case, without which conviction would not have been achieved for the AECA offenses under Counts 2, 12, 13 and 14, and the Federal Espionage offenses under Counts 6, 8, 9, 10 and 11.

B. The District Court Erred In Prohibiting Mr. Gowadia From Challenging The Classification Decisions in this Case Because the Pertinent Documents and Information Are Alleged to Contain Derivative Classification Material.

The second order appealed concerns the district court's prohibition against

Mr. Gowadia challenging the classification status of certain documents and information in this case. ER1, 97-98. Without first determining whether the documents or information in question concerned original classification or derivative classification[12], the district court ordered that Gowadia "may not argue at trial that a classified document or piece of information should not have been classified by the executive branch". ER1, 98. However, the district court permitted Gowadia to "attempt to rebut the various elements of a charged offense other than the classification." *Id.* Hence, Gowadia could contest whether the classified information was "closely held" or to be used "to the injury of the United States or the advantage of a foreign nation." *Id.* And he could advance the theory that the classified information was "in the public domain" or " basic marketing information on function or purpose or general system descriptions." *Id.*

The interpretation and application of the Executive Orders is in question and, therefore, *de novo* review by this Court is the designated standard of review in determining whether the district court erred in preventing Mr. Gowadia from challenging whether the pertinent documents relied upon by the government met the requirements of classification pursuant to the Executive Orders.

---

[12] Material as defined in Executive Order 12958, 60 Fed.Reg. 19825 (Apr. 17, 1995), as amended by Executive Order 13292, 68 Fed.Reg. 15315 (Mar. 25, 2003) (Executive Orders, unless otherwise specified to the contrary).

Since the documents and information relied upon by the government were prepared by Mr. Gowadia, rather than the government, case law examining derivative classification materials as defined in the Executive Orders applies and not the original classification cases relied upon by the district court. In that event, the cases uniformly hold that judicial review is permitted to examine executive branch decisions determining whether material generated by former employees of the government contains classified information. The test in that circumstance is whether those decisions by the executive branch are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

As applied to this case, the executive branch's determination that documents and other information generated by Mr. Gowadia contained classified information should have meant that he could challenge that determination because the documents were derivatively classified. Had Gowadia done so and been successful, whether in whole or in part, he could have argued to the jury that the documents and information he provided to foreign countries did not contain any classified information. In that event, he could not be guilty of espionage or in violation of the AECA Offenses.

C. Concerning the AECA Offenses under Counts 2, 12, 13 and 14, the Jury Instructions Unconstitutionally Relieved the Government of its Burden to Prove That the Defense Services and Technical Data

Mr. Gowadia Allegedly Exported Were Not in the Public Domain.

Under Count 2 of the Indictment the government accused Mr. Gowadia of exporting or causing to export to China defense services and related technical data in violation of the AECA. Under Counts 12, 13 and 14, the government accused Gowadia of exporting or causing to export technical data listed on the United States Munitions List (USML) in his correspondence with Ms. Hipp from Germany, Mr. Bar Avi from Israel and Mr. Busch from Switzerland, all in violation of the AECA.

Among the elements of these offenses, the government was required to prove that Mr. Gowadia exported technical data and USML items not in the public domain. *United States v. Posey*, 864 F.2d 1487, 1492 (9th Cir. 1989); 22 C.F.R. § 120.10(a)(5). Gowadia's defense against the AECA charges was that the services and technical data he provided were in the public domain.

The jury instructions at issue were constitutionally defective with respect to the public domain element: they permitted the jury to convict if the technical data at issue constituted classified information, or a defense article listed in the USML, without making the requisite finding as to public domain. ER1, 27-31, 33-34. This was plain error because even if technical data is classified or listed in the USML, the government must still prove beyond a reasonable doubt that it is not in the

public domain. *Posey,* 864 F.2d at 1492; 22 C.F.R. § 120.10(a)(5).

The instructions at issue affected Mr. Gowadia's Fifth Amendment due process right that protects him against being deprived of his liberty unless the government proves beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970). Further, the Fifth and Sixth Amendments guarantee every criminal defendant the right to a jury determination of every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 2355-56, 147 L.Ed.2d 435 (2000). The jury instructions failed to fulfill these undisputed requirements, thus depriving Gowadia of his constitutional rights to due process and a fair jury trial. His convictions must be vacated.

D. Concerning the AECA Offenses under Counts 12, 13 and 14, the Jury Instructions Unconstitutionally Omitted the Government's Burden to Prove That the Technical Data at Issue Was Not Basic Marketing Information.

In Counts 12, 13 and 14 of the Indictment, the government accused Mr. Gowadia of exporting or causing to export technical data listed on the USML in his correspondence with Ms. Hipp, and Messrs. Busch and Bar Avi, all in violation of the AECA. ER6, 75-84; ER8, 157-159. To convict, the government was required to prove in relevant part that these transmittals were not "basic marketing on

function or purpose, or general system descriptions of defense articles" pursuant to 22 C.F.R. § 120.10(a)(5). Gowadia's defense at trial was that the services and technical data he communicated constituted basic marketing concerning his AIRSS system. The jury instructions failed to adequately instruct with respect to §120.10 (a)(5)'s marketing requirement. ER1, 27, 33-34.

This was plain error because the instructions permitted the jury to convict on Counts 12, 13 and 14, without requiring that the government prove beyond a reasonable doubt that the alleged technical data was not marketing material. 22 C.F.R. § 120.10(a)(5). For the same Fifth and Sixth Amendment considerations set forth in the previous summary for Section C, *supra* at 25, the jury instructions at issue failed to fulfill these undisputed constitutional requirements, thus depriving Gowadia of his rights to due process and a fair jury trial. Again, his convictions must be vacated.

VII. ARGUMENTS.

A. The District Court Erred in Denying Mr. Gowadia's Motion to Suppress His October 2005 Statements, Which Error Was Not Harmless.

1. Standards of Review.

With respect to the district court's "in custody" determination, "[a]lthough it

has been a subject of some confusion in the past, it is now clear that a district court's 'in custody' determination is a 'mixed question of law and fact warranting *de novo* review.'" *United States v. Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009), *quoting United States v. Kim*, 292 F.3d 969, 973 (9th Cir. 2002) (italics in original). Likewise, the district court's construction of 18 U.S.C. § 3501(c) is reviewed *de novo*. *United States v. Wilson*, 838 F.2d 1081, 1083 (9th Cir. 1988). Finally, a district court's conclusions of law regarding a motion to suppress are also reviewed *de novo*. *United States v. McCarty,* 648 F.3d 820, 824 (9th Cir. 2011).

On the other hand, "[t]he factual findings underlying the district court's decision ... are reviewed for clear error." *Kim* , 292 F.3d at 973. "These factual findings include 'scene and action-setting questions,' as well as 'the circumstances surrounding the interrogation.'" *Bassignani,* 575 F.3d at 883, *quoting Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 465, 133 L.Ed.2d 383 (1995). Under the applicable clearly erroneous standard, so long as "the district court's finding is 'plausible in light of the record viewed in its entirety,' we may not reverse … simply because we 'would have weighed the evidence differently.'" *United States v. Murdoch*, 98 F.3d 472, 475-476 (9th Cir. 1996) *cert. denied*, 521 U.S. 1122, 117 S.Ct. 2518, 138 L.Ed.2d 1019 (1997), *quoting Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

2. Discussion.

a. The Prompt Presentment Rule.

Rule 5(a) of the *Federal Rules of Criminal Procedure* states that "[a] person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge." Fed.R.Crim.P. 5(a)(1)(A). In *McNabb v. United States* and *Mallory v. United States* the Supreme Court generally rendered inadmissible confessions made during periods of detention that violate the prompt presentment requirements of federal statutes, including Fed.R.Crim.P. 5(a) (the McNabb-Mallory rule). *McNabb v. United States*, 318 U.S. 332, 347, 63 S.Ct. 608, 616, 87 L.Ed. 819 (1943) (police detention of defendants beyond the time when a committing magistrate was readily accessible constituted willful disobedience of law); *Mallory,* 354 U.S. at 455-456, 77 S.Ct. at 1360 (a confession which had been made several hours after arrest was inadmissible due to unnecessary delay). "[T]he plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to 'secret interrogation of persons accused of crime.'" *Upshaw v. United States*, 335 U.S. 410, 412-413, 69 S.Ct. 170, 171, 93 L.Ed. 100 (1948), *citing McNabb,* 318 U.S. 332, 63 S.Ct. 608.

In response to *McNabb* and *Mallory*, Congress enacted 18 U.S.C. § 3501(c)

which governs the admissibility of confessions in federal prosecutions. *Corley*, 556 U.S. at 309, 129 S.Ct. at 1563. Section 3501(c) states that:

> ***a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible*** solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and ***if such confession was made or given by such person within six hours immediately following his arrest or other detention***: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

18 U.S.C. § 3501(c) (emphasis added). This Court has explained that the "clear effect of § 3501(c) is to create a six-hour safe harbor during which a confession will not be excludable solely because of delay." *United States v. Van Poyck*, 77 F.3d 285, 288 (9th Cir. 1996) (internal marks and citation omitted).

Section 3501(d) requires a finding that the person giving the confession[13] was under arrest or other detention because:

> Nothing contained in this section shall bar the admission in evidence of any

[13] "As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." 18 U.S.C. § 3501(e).

> confession made or given voluntarily by any person to any other person ***without interrogation*** by anyone, or at any time at which the person who made or gave such confession ***was not under arrest or other detention***.

18 U.S.C. § 3501(d) (emphasis added). "[T]he presentment rule does not begin to operate, and the six-hour safe harbor period is not implicated, until a person is arrested for a federal offense." *United States v. Smith*, 606 F.3d 1270, 1278 (10th Cir. 2010), *citing Alvarez–Sanchez*, 511 U.S. at 358, 114 S.Ct. at 1604. Therefore, the issue is whether Mr. Gowadia was subjected to "arrest or other detention" under § 3501(c), and if he was, when did that occur?

b. Arrest and Detention.

The definitions of arrest and detention overlap. The Supreme Court has noted that an "arrest" occurs when, in view of all the circumstances, a reasonable person would have believed he was not free to leave. *Florida v. Royer*, 460 U.S. 491, 503, 103 S.Ct. 1319, 1327, 75 L.Ed.2d 229 (1983). Under the Fourth Amendment this Court has equated "arrest" with "seizure" and concluded:

> a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, ***a reasonable person would have believed that he was not free to leave***. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (internal marks, citations and footnote omitted; emphasis added).

Black's Law Dictionary[14] suggests that "arrest" differs from "detention" to the extent that arrest refers to "a seizure or forcible restraint" or "the taking or keeping of a person in custody by legal authority, ***especially in response to a criminal charge***." *United States v. Leal-Felix*, 625 F.3d 1148, 1159 (9th Cir. 2010) (Bennett, J., dissenting), *citing* Black's Law Dictionary, 116 (8th ed. 2004) (emphasis added). In this appeal, assuming "arrest" refers to the taking into custody by legal authority "in response to criminal charges", Mr. Gowadia acknowledges that he was not arrested until October 26, 2012.

The next inquiry is whether the federal agents "detained" Mr. Gowadia at some earlier point in time. Section 3501 refers to "detention" as "in the ***custody*** of any law-enforcement officer or law-enforcement agency". 18 U.S.C. § 3501(c) (emphasis added). For a suspect to be in custody "in the absence of actual arrest something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so." *United*

---

[14] "[D]ictionary definitions are cognizable as tools for determining the ordinary meaning of words used in a statute." *United States v. Maciel-Alcala*, 598 F.3d 1239, 1242 (9th Cir. 2010).

States v. Hall, 421 F.2d 540, 545 (2nd Cir. 1969), *cert. denied*, 397 U.S. 990, 90 S.Ct. 1123, 25 L.Ed.2d 398 (1970).

Analysis of whether a suspect is detained is based on the totality of the circumstances and whether, "a reasonable person in such circumstances would conclude after brief questioning [that] he or she would not be free to leave." *United States v. Hudgens*, 798 F.2d 1234, 1236 (9th Cir. 1986), *quoting United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981).

> Pertinent factors to be considered include (1) the language used to summon the individual, (2) the extent to which the defendant is confronted with evidence of guilt, (3) the physical surroundings of the interrogation, (4) the duration of the detention, and (5) the degree of pressure applied to detain the individual.

United States v. Wauneka, 770 F.2d 1434, 1438 (9th Cir. 1985). Mr. Gowadia contends that the five factors in *Wauneka* (the *Wauneka* Factors), as applied to the facts in this case, show that he was detained from October 13 until his official arrest on October 26, 2005.

c. Errors in the District Court's Findings of Fact and Conclusions of Law.

(1) The District Court's Conclusions of Law.

The district court appeared to rely upon *United States v. Mendenhall* in determining whether Mr. Gowadia was "detained". ER1, 83-84, *citing*

Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).[15] In *Mendenhall* the Supreme Court found that a person is seized or detained "only if, in view of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*, at 554, 100 S.Ct. at 1877.

Notwithstanding the citation to *Mendenhall*, virtually in the next breath the district court referred to the Fifth Circuit case of *United States v. Doe,* 882 F.2d 926, 927 (5th Cir. 1989), which involved juvenile detention. ER1, 84. In reliance on that case, the court concluded as a matter of law that detention is "'almost invariably[,] ... used as a term of art to mean physically restrictive custody, confinement within a specific institution." ER1, 84*, quoting Doe*, 882 F.2d at 927. Clearly, the district court was in error because neither the language of § 3501(c) nor the Supreme Court in *Mendenhall* support such a restrictive view of "detention."

---

[15] The district court also found that it was required to rely on state law to determine whether an individual is in custody when first detained, citing *Call v. United States*, 417 F.2d 462, 464 (9th Cir. 1969). ER1, 83. *Call* and the cases *Call* relied upon concerned arrests by local or state police, and not federal agents. *See United States v. Di Re*, 332 U.S. 581, 588, 68 S.Ct. 222, 225-226, 92 L.Ed. 210 (1948); *Wilson v. Porter*, 361 F.2d 412, 416 (9th Cir. 1966); *Wartson v. United States*, 400 F.2d 25, 27 (9th Cir. 1968). In this case, no local or state officers detained or arrested Mr. Gowadia; FBI agents officially arrested him on October 26, 2005. ER7, 81; ER8, 27-28. Thus, the district court's decision to rely on Hawai`i case law is not supported by the record.

First, the statute broadly defines detention as being in "custody of any law-enforcement officer or law-enforcement agency". 18 U.S.C. § 3501(c). The district court's narrow definition that required "physically restrictive custody, confinement within a specific institution" conflicts with § 3501(c), which does not require a "physically restrictive" custodial component, or custody in an institution. Under *de novo* review, *Wilson*, 838 F.2d at 1083, *McCarty,* 643 F.3d at 824*,* the district court's construction of § 3501(c) is erroneous.

Second, the district court's reliance on the Fifth Circuit's definition of detention in *Doe* completely ignores the governing Ninth Circuit case law that requires application of the *Wauneka* Factors to determine detention. *Wauneka*, 770 F.2d at 1438. Thus, the district court analyzed the issue of Gowadia's detention under the inapplicable definition in *Doe*. In effect, the court failed to take into account the totality of the relevant circumstances from the prescribed perspective of a reasonable person standing in Gowadia's shoes from October 13 to October 26, 2005. *Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877; *Hudgens*, 798 F.2d at 1236.

(2) The District Court's Findings of Fact.

We review the district court's findings of fact concerning detention from October 13th to October 24th under the clearly erroneous standard.

(a) October 13, 2005.

The district court found that the agents did not restrict Mr. Gowadia's liberty when they searched his Maui home on October 13th, based upon Agents Mohajerin and Williams' testimony at the suppression hearing that he was free to leave his residence at any time, and that they advised him of his *Miranda* rights both orally and in writing before speaking with him. ER1, 88. Application of the *Wauneka* Factors, however, clearly shows detention. *See Wauneka*, 770 F.2d at 1438.

i) Physical Surroundings of the Interrogation.

Mr. Gowadia's rural Haiku Maui home was situated on a bluff bordered on the north by a cliff that plunged into the ocean below. ER8, 19. Ingress and egress to his residence was through a single long driveway. ER6, 28; ER8, 18-19.

In executing the search warrant, 15 armed federal agents descended upon this residence. ER8, 15-16. The agents parked their 10 vehicles in the driveway blocking Mr. Gowadia's car that was also identified in the search warrant and parked in the garage. ER6, 153, 155-156. Without use of his car, the then 61-year-old Gowadia could not have left his home and his wife unless on foot, with the main highway one mile away. ER6, 28.

Both Mr. Gowadia and his wife remained in their home during the execution

of the search warrant. ER1, 55-56; ER8, 11. Gowadia, however, was isolated from his wife and interrogated in a separate room, referred to as the "crafts room", for more than five hours. ER7, 115; ER8, 26. He was not permitted to freely move about his home from the time the agents arrived at 2:30 p.m. until they departed nine hours later at 11:25 p.m. ER7, 119; ER8, 25-27. In response to the question whether Gowadia was "never out of sight or custody of an agent?", FBI Agent James Tamura-Wageman responded, "[t]o the best of my knowledge, no." ER8, 26. Tamura-Wageman, who was the lead search warrant agent that day, testified at the suppression hearing that Gowadia was never left alone the entire nine hours, even when he went to the bathroom. ER8, 26. Given this record, the district court's finding that Gowadia was "free to take breaks and leave the crafts room ***at any time***" (ER1, 57, emphasis added), and the implication that he was not in custody and at his liberty, is not plausible. *Murdoch*, 98 F.3d at 475-476. Gowadia could not leave the crafts room (i.e. the room he was interrogated in) except under agent escort. ER8, 26.

ii) Duration of Interrogation.

The district court's finding that the agents interrogated Mr. Gowadia for "several hours" is also not plausible given the record. ER1, 57. Actually, the agents interrogated Gowadia for five hours and 49 minutes, from 2:58 p.m. until

8:47 p.m. ER6, 167; ER8, 47. In addition to the nine-hour detention from 2:30 p.m. until 11:25 p.m. while other agents executed the search warrant, the five-hour-plus interrogation underscored the severity of Gowadia's legal predicament.

iii) Degree of Pressure Applied to Detain Mr. Gowadia.

With the exception of Agents Mohajerin and Williams, the other agents wore bulletproof vests prominently identifying themselves as federal officers, and carried firearms in plain view. ER6, 157; ER8, 16. As they entered Mr. Gowadia's home, those agents drew their guns in a display of deadly force in order to "clear" the home of possible threats. ER6, 158. This show of lethal force had a profound effect on Gowadia. Upon locating him, Agent Tamura-Wageman prepared to handcuff Gowadia[16] but decided otherwise because Gowadia was shaking with fear. ER8, 22-23. Tamura-Wageman concluded that Gowadia was not a threat to the team and put away the handcuffs. ER8, 9-10, 23. Tamura-Wageman then gave Gowadia an opportunity to review the search warrant, which advised that the search pertained to the serious crimes of espionage under 18 U.S.C. § 794 and arms

[16] Such physical contact, albeit slight, may constitute "constructive detention." *California v. Hodari D.*, 499 U.S. 621, 625, 111 S.Ct. 1547, 1550, 113 L.Ed.2d 690 (1991) ("[M]erely touching, however slightly, the body of the accused, by the party making the arrest for that purpose, although he does not succeed in stopping or holding him even for an instant; . . .[constitutes] an arrest . . .").

export violations under 22 U.S.C. § 2778. ER6, 203-204; ER8, 35; Search Warrant, at 27.

In light of the record, the district court's finding that Mr. Gowadia was free from pressure and in control of the circumstances is not plausible. Specifically, the district court erroneously found that: (1) Agent Tamura-Wageman "acquiesced" to Gowadia's wish not to be handcuffed; (2) Gowadia "led" the agents into the home and the crafts room where they interrogated him; and (3) Gowadia was "relaxed, cordial" and "eager to question the agents" about the purpose of the search. ER1, 71-88.

In reality the record shows that the agents controlled application of the handcuffs as a normal matter of search protocol. ER8, 9-10, 23. The agents, not Mr. Gowadia, found the crafts room for interrogation. ER8, 12-13, 36. Far from being relaxed and cordial, Gowadia was literally shaking with fear (ER8, 23), then expressed anger because he believed a vindictive business competitor was responsible for the search and that the government's actions were racially motivated. ER6, 204; ER7, 114; ER8, 40. Moreover, the record clearly shows that it was Mohajerin and Williams – not Gowadia – who did the questioning. ER6, 152-153; ER7, 116; ER8, 34. The district court's conclusion that Gowadia questioned the agents represents a forced, implausible interpretation of the

encounter. ER1, 88.

iv) Language Used to Summon Mr. Gowadia.

Agent Tamura-Wageman and three other agents located Mr. Gowadia in his backyard. ER1, 56. Tamura-Wageman advised Gowadia that he had an "important matter of national security" to discuss and directed Gowadia to the front of the house. ER8, 20-21. Tamura-Wageman's testimony is silent as to whether he informed Gowadia that he had the option to disregard their instructions. ER8, 7-8. The district court's finding Gowadia "agreed" to accompany the agents (ER1, 87) – inferring that he actually had the option of telling the four armed agents 'no thanks' and return to his gardening – is not plausible.

After Agents Mohajerin and Williams located a cleared room in the house, they sat with Mr. Gowadia in that room and reiterated the serious charges listed in the search warrant. ER7, 116. The agents then provided Gowadia with an Advice of Rights form, which stated:

> YOUR RIGHTS. Before we ask you any questions, you must understand your rights. ***You have the right to remain silent***. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer any questions now without a lawyer present, ***you have the right to stop answering at any time***. WAIVER OF RIGHTS. I have read the statement of

> my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present.

ER 8, 94, emphasis added.[17]

The district court's suggestion that this form advised Mr. Gowadia that he could terminate the interview at any time and leave the premises is clearly erroneous. ER1, 88. The form's terms only provided notice of the right to remain silent and stop answering questions; the terms did not provide Gowadia with the option of terminating the session, or simply getting up and leaving. *See* ER8, 94.

The district court also relied upon the agents' conflicting testimony that they orally advised Mr. Gowadia he was free to leave. *See* ER1, 88. Actually, Agent Tamura-Wageman never informed Gowadia that he could leave, and instead testified that Gowadia was never out of sight or custody of an agent on October 13th. ER8, 26-27. On the other hand, Agent Williams could not recall informing Gowadia that he could leave, but insisted during his testimony that Gowadia could have left if he wanted. ER7, 118-119. Only Agent Mohajerin testified without qualification at the suppression hearing that he told Gowadia he was free to leave.

---

[17] Mr. Gowadia signed the Advice of Rights form on October 13, 2005 which form he would sign at the start of each interrogation session thereafter over the next two weeks. ER7, 139, 153, 163, 168, 178, 190, 199, 211; ER8, 94.

ER8, 37, 48.[18]

When the agents departed at 11:25 p.m., Agent Mohajerin informed Gowadia that they wanted to talk to him further. ER8, 50. Moreover, the agents had seized Gowadia's six computers that were indispensable to NSGI, as well as computer media, cell phones, passport, foreign currency and all of his business files and documents. ER6, 2-24; ER8, 28. These items represented his livelihood and sole means of support.[19] A reasonable person standing in Gowadia's shoes after the agents left – his livelihood gone, and under notice of further questioning – would have surmised that he remained under detention and was to await further direction from the agents. *Hudgens*, 798 F.2d at 1236.

(b) October 14, 2005.

The district court found that the agents did not restrict Mr. Gowadia's liberty when they questioned him at the Maui Police Department on October 14, 2005. ER1, 72, 74. All five *Wauneka* Factors, however, weigh in Gowadia's favor as to

---

[18] During the trial, Agent Mohajerin provided contradictory testimony. He testified that he did NOT tell Mr. Gowadia he was free to leave, while in the next breath he testified that he told Gowadia he was free to leave. *See* ER5, 5-6.

[19] According to the Uniform Residential Loan Application completed by Mr. Gowadia and his wife on March 5, 2005, only Gowadia had income to pay for their Maui residential mortgage of over $14,000.00 per month, and other living expenses. ER3, 50.

the October 14th encounter.

i) Language Used to Summon Mr. Gowadia.

Before leaving the residence on October 13th, Agent Mohajerin said that he would call Mr. Gowadia the next day, which call Mohajerin made the following morning and directed Gowadia to meet him at the Sears store in Kahului, Maui. ER7, 90-91; ER8, 51. The district court's finding that Gowadia suggested meeting at Sears, which infers that he was in control of the meeting, is not plausible given the record. *See* ER1, 58.

Agents Mohajerin and Williams selected a neutral meeting place, first at the Sears store, then a nearby Starbucks' coffee shop, even though they had already pre-arranged to interrogate Mr. Gowadia at the local police station[20] and confront him with documents seized from his home the day before. ER6, 171-173; ER7, 93. Since neither Sears nor Starbucks was suitable for their unspoken agenda, after meeting Gowadia the agents told him to follow them to the Maui Police Station. ER8, 52-53. When questioned during the suppression hearing, neither Mohajerin nor Williams testified that they affirmatively provided Gowadia with the option of not meeting at Sears or Starbucks, or not going to the police station. ER7, 122;

[20] The local police station is the Maui Police Department's Station in Kahului, Maui, Hawai`i.

ER8, 52-53. As expected, once the agents persuaded Mr. Gowadia to go to the police station room, they provided him with the same Advice of Rights form that was silent as to whether he was free to terminate the interrogation at any time and walk away. ER8, 54-55.

ii) Confrontation with Evidence of Guilt.

Unlike October 13th, Agent Williams testified that their plan on October 14th was to challenge Mr. Gowadia with material showing that he had been lying the day before, and that he had to be truthful. ER6, 174-175; ER8, 55. Throughout the session the agents confronted him with classified documents seized from his home. ER7, 125-126; ER8, 55. Faced with such damning evidence that challenged his statements made the day before that he possessed no such material, Gowadia admitted to: (1) illegally possessing the seized documents (ER6, 175; ER7, 126); (2) cutting the word "secret" out of one of the documents and acknowledging that his alteration was improper (ER6, 175); (3) improperly attempting to downgrade the classification of the classified documents from a GIT course he had taught (ER6, 175-176; ER7, 4); and (4) disclosing classified information orally and in writing to individuals in foreign countries to further his international consulting business. ER7, 6, 141.

iii) Physical Surroundings and Duration of the Interrogation.

Once inside the Maui Police Station, Mr. Gowadia found himself isolated from his family and seated in a small room, at a small table, with Agents Mohajerin and Williams. ER6, 168; ER7, 123. He was escorted each time he left the interrogation room for bathroom breaks.[21] ER7, 127. This pre-planned interrogation session started at 10:40 a.m. and did not conclude until 5:15 p.m., six hours and 35 minutes later. ER1, 59-60; ER8, 57.

iv) Pressure Applied to Detain Mr. Gowadia.

The pressure applied to detain Mr. Gowadia was twofold. First, as a result of the sweeping search conducted the day before, irreplaceable equipment and information vital to the operation of NSGI and Gowadia's ongoing international consulting business were no longer available to him. ER7, 86. Unlike a typical wage earner or other salaried employee, the electronic files and folders contained in Gowadia's six computers, the paper files and documents, his passport enabling him to travel internationally, foreign currency to operate in those business venues, and other fundamental tools of his profession, represented the lifeblood to support him

[21] This is also the same procedure used on Gowadia when his home was searched the day before. ER8, 26.

and his wife. Their seizure effectively held Gowadia hostage to the government.

This impending economic devastation compelled Mr. Gowadia to meet with Mohajerin and Williams on October 14th. At that time he inquired whether he could call certain people, and whether he could finalize his business travel plans to Europe. ER6, 170. The agents acknowledged during their testimony that Gowadia believed he could not travel. ER6, 170.

Second, Mr. Gowadia's children had been interrogated.[22] Before meeting the agents on the morning of October 14th, Gowadia spoke with his children who lived in California. ER2, 112, 113.1. Daughter Tanzi Gowadia was frightened and confused because FBI agents had interrogated her at home the night before about her father, his associates, and a joint checking account she held with him. ER2, 107.1-111, 113. Similarly, son Ashton Gowadia reported that FBI agents questioned him at home about his father's activities. ER2, 113.1. The agents testified at the suppression hearing that on October 14th Gowadia asked them at the outset of the interrogation whether they would question his children further. ER6, 169. Mohajerin and Williams responded that it was likely they would. ER6, 169. Given this seizure, deprivation of his livelihood, and threat against his children, no

[22] The district court did not have the benefit of the testimony of Tanzi Gowadia and Ashton Gowadia, who testified at the trial, but not at the suppression hearings.

reasonable person in Gowadia's position could conclude he had any other option than to yield to the instructions of the agents and proceed to the police station for more interrogation.

Furthermore, at the end of this six-hour session on October 14th, Agent Williams told Mr. Gowadia that they would continue reviewing the information seized from his home and definitely have many more questions for him. ER7, 128. Gowadia replied that he understood the interrogation would continue. ER7, 7. No reasonable person would have concluded otherwise, on pain of continued harassment of his family and financial ruin.

(c) October 14 to 24, 2005.

The district court made other findings of fact concerning events from October 14th to October 24th that are implausible in light of the record. The court found that Agent Mohajerin asked Mr. Gowadia to "consider" flying to Honolulu for more discussions. ER1, 60. No testimony from the suppression hearing, however, indicated that Gowadia had an option to "consider" whether or not he wanted to travel to Honolulu for further interrogation. Rather, at the conclusion of the October 14th session, Agent Williams informed Gowadia that they had many more questions for him. ER7, 128. A reasonable person in Gowadia's position would have believed that he was under detention and had no alternative but to

comply with agents' dictates given: the six-hour interrogation that had just ended; the confrontation of evidence of guilt and Gowadia's corresponding admission of wrongdoing; the loss of ability to earn a living; and the unannounced interrogation of his children in California.

On October 15, 2005, Agent Mohajerin purchased a one-way ticket to Honolulu for Mr. Gowadia in order to continue their interrogation. ER7, 94-95, 129-130. On Sunday October 16th Gowadia flew to Honolulu under FBI surveillance, with one agent seated right next to him during the flight, and another seated ten rows back. ER3, 127-129. Agents Mohajerin and Williams met him at the airport and drove him to the Ala Moana Hotel where they had reserved a room.[23] ER7, 9-10. Mohajerin escorted Gowadia to his room. ER7, 10. The district court's finding that the agents "dropped [Gowadia] off at the hotel" (ER1, 61) is clearly erroneous against this record, as is the implication that the agents were not exercising control over Gowadia's movements. Mohajerin paid for this hotel room, as well as the two subsequent hotel rooms, with a covert credit card in an alias name. ER7, 19, 104.

---

[23] On October 21st, when the reservation at the Ala Moana Hotel expired, Mohajerin reserved another room for Gowadia at the Ohana Maile Sky Court Hotel; when Gowadia complained about the Ohana Maile Hotel, Mohajerin reserved and paid for a room at the Hawai`i Prince Hotel. ER7, 58-60.

Throughout his stay in Honolulu, a four-member surveillance team was positioned at each hotel where Mr. Gowadia stayed to monitor his whereabouts and contacts. ER7, 98-99, 102, 105, 109. An additional contingent of seven agents supplemented the surveillance team from October 20th until his official arrest. ER3, 130-131; ER6, 201. Agent Mohajerin testified that the surveillance team was instructed to notify him, or any other FBI agent, if Gowadia left his room or "did anything". ER7, 100. With the exception of October 21st and October 24th, Mohajerin and Williams transported Gowadia to and from his hotel each day, or at least arranged for other FBI agents to do so. ER7, 11-12, 21, 31, 34, 44-46, 51-52, 61-62, 66, 69.

Agents Mohajerin and Williams interrogated Mr. Gowadia at the FBI's Honolulu offices, located in the secured federal building equipped with surveillance cameras at its entrances and exits. ER6, 189; ER7, 107. According to the district court's finding, prior to each interrogation session Agent Mohajerin took Gowadia to the federal building cafeteria and bought him breakfast. ER1, 61. Again, this finding is clearly erroneous because there is no such testimony to that effect. Furthermore, the court's finding that the interrogation sessions from October 18th to October 22nd and on October 24th concluded before 4:30 p.m., is similarly erroneous. ER1, 62-66. Each of those sessions concluded at around 5

p.m. ER7, 31, 49-51, 55.

Finally, the court's finding that Mr. Gowadia "would often make phone calls" during these sessions using a telephone in the FBI interrogation room, and that the agents stopped their questioning whenever Gowadia asked to use the phone, is not supported by the record. ER1, 61, 73. The record from the suppression hearing shows that Gowadia asked only **once** to use the telephone in the interrogation room. ER6, 224-225. Since that phone was not working, Agent Mohajerin loaned his cell phone to Gowadia. ER6, 224-225. The district court's finding that the broken FBI telephone was repaired shortly thereafter is similarly unsupported. ER1, 73. No testimony from the suppression hearings indicates that the telephone was repaired and available for use during any of the interrogation sessions. ER6, 225.[24]

In isolation, each of these erroneous findings of fact may appear *de minimus* at first glance. However, examination of the totality of the circumstances shows that the district court developed "facts" to justify its conclusion that Mr. Gowadia was not in custody until his arrest on October 26th. Those "facts" are implausible in light of the record viewed in their entirety, and therefore clearly erroneous.

---

[24] Agent Williams testified that the phone was "modified" to make outside calls, but he did not testified when this occurred. ER6, 225.

Murdoch, 98 F.3d at 475-476.

(3) *De Novo* Review of the District Court's In-Custody Determination.

The district court found that Mr. Gowadia understood he was free to leave. ER1, 74. Gowadia did not testify at the suppression hearings. Moreover, this determination was reached without analysis of the *Wauneka* Factors, without application of the objective person standard, and without taking into account the totality of the circumstances. *Wauneka*, 770 F.2d at 143; *Hudgens*, 798 F.2d at 1236. Reviewing the circumstances surrounding the nine days of interrogation under *de novo* review, *Bassignani*, 575 F.3d at 883, the record shows that the agents detained Mr. Gowadia beginning on October 13th until his official arrest on October 26th.

(a) Language Used to Summon Mr. Gowadia.

The Advice of Rights form signed by Mr. Gowadia before each session advised him only of the right to remain silent and stop answering questions. *See e.g.* ER8, 94. These rights are different from the right to terminate an interrogation, get up and leave, which option was not articulated in the form. Agent Williams admitted that the form did not advise Gowadia that he was free to leave, or indicate that he was not in custody. ER6, 160-161. Moreover, while

Gowadia had the right to stop answering questions, the agents could still continue asking them.

Agent Mohajerin testified that before each interrogation session he provided the *Miranda* warnings in the Advice of Rights form out of an "overabundance of caution" to make sure Mr. Gowadia understood that he was not under arrest. ER8, 38. *Miranda* warnings, however, indicate custody. *See United States v. Crawford,* 372 F.3d 1048, 1060 (9th Cir. 2004) (en banc) (explaining that when the police officer read defendant his *Miranda* rights the defendant stopped the officer and said, "Oh, I'm under arrest?"). "An officer's obligation to give a suspect *Miranda* warnings before interrogation extends only to those instances where the individual is 'in custody.'" *Kim*, 292 F.3d at 973, *quoting Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977) (per curiam).

This Court has consistently held that "a defendant is not in custody when officers tell him that he is not under arrest and is free to leave at any time." *Bassignani*, 575 F.3d at 886. But the Court has also acknowledged that the custody determination is objective and is not based upon the subjective views of the officers or the individual being questioned. *Id.* at 883. In this case we have conflicting testimony concerning the agents' advice to Gowadia. While Agent Mohajerin testified that he told Gowadia he could leave, Williams testified that he

could not recall an affirmative statement "like 'you are free to leave'" and nothing in his notes reflected that Gowadia could do so. ER6, 197-198, 235.[25] Indeed, Williams wanted to know where Gowadia was at all times (ER6, 202), and therefore, such freedom would be impossible if Gowadia was truly at his liberty.

Moreover, the agents' conflicting testimony – or even their consistent testimony, had that been the case – is not the determining factor. The objective standard looks beyond the agents' recollections and state of mind; it asks whether a reasonable person in Mr. Gowadia's position would understand that he could simply get up and leave his home, or the Maui Police Station, or the FBI interrogation room. *Hudgens*, 798 F.2d at 1236. The weight of the record confirms that Gowadia did not believe he was free to leave from October 13, 2005. In fact, the weight of the record shows that the agents, as well, did not believe he was free to leave: Williams wanted to know where Gowadia was at all times and the surveillance agents were to notify him if Gowadia went anywhere, met anyone or did anything. ER6, 202.

Despite the above evidence, the district court relied upon the agents' testimony that they did not possess a warrant for Gowadia's arrest during the

[25] At the trial Williams testified similarly that he could not recall specifically telling Gowadia that he was free to leave. ER3, 145.

interrogation sessions, or wish to arrest him, with the arrest decision not made until the evening of October 25, 2005 by senior FBI personnel and Department of Justice attorneys. ER1, 73, 90. The court relied upon this testimony to justify its finding that Gowadia was not in "physically restrictive custody" until the day of his actual arrest on October 26, 2005. ER1, 94.

These determinations are irrelevant. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Yarborough v. Alvarado*, 541 U.S. 652, 662, 124 S.Ct. 2140, 2148, 158 L.Ed.2d 938 (2004) (internal marks and citation omitted). Based upon Mr. Gowadia's previous 2004 encounters with law enforcement, in October 2005 he knew or at least operated with the understanding that once contact is made with law enforcement he is not free to leave. For instance, CBP Officer Eduardo Meza testified at the suppression hearing that Gowadia was "detained" at the Honolulu Airport on April 19, 2004, as he was leaving the country. ER6, 216, 218. Although not told he was under arrest, Officer Meza testified that if Gowadia had tried to walk away during this encounter he (Meza) would have been stopped Gowadia and said, "Hold on, where are you going?" ER6, 217. CBP Officer Erickson Padilla also testified that during his outbound examination of Gowadia at the airport on June 7, 2004, Gowadia was not free to leave. ER6, 141.

As with his 2004 CBP encounters, Mr. Gowadia's statements and actions in October 2005 indicated that he believed he was under detention. On Friday, October 14th, he sought the agents' permission to call certain individuals, and permission to go on a scheduled overseas business trip. ER6, 170. The agents testified that Gowadia did not believe he was free to go on the business trip. On Thursday, October 20th, Gowadia again sought the agents' permission to send a facsimile concerning a scheduled business trip. ER2, 37, 41; ER4, 99-100. A person operating free of official custody and at his liberty does not seek permission to make a telephone call, send a facsimile, and go on a previously scheduled business trip. Gowadia testified at trial that he believed he was in custody. ER2, 53-54, 56-58.

(b) Confrontation of Evidence of Guilt.

Confrontation with substantial evidence of guilt is significant because it may represent a means of preventing the suspect from terminating the interview or leaving. *United States v. Blanford*, 467 Fed.Appx. 624, 625 (9th Cir. 2012). Except for October 13th, during each interrogation session Agents Mohajerin and Williams confronted Mr. Gowadia with seized documents showing evidence of espionage and violation of the AECA, including documents printed from a computer they brought into the FBI interrogation room containing files from his previously seized

computers. ER6, 194. The interrogation format was to review the material, discuss it, then Gowadia wrote a statement about it. ER6, 187-188, 194.

The confrontation was significantly aided by Air Force technology experts who, upon Agent Williams' request, had flown to Hawai`i to assist with the interrogation. ER6, 184; ER7, 110-111. Retired FBI Special Agent Hiram Au testified at trial that Agent Mohajerin directed him to set up video and audio monitoring equipment in the interrogation room with a feedline to an adjacent monitoring room.[26] ER2, 114-115. Suppression hearing testimony revealed that up to five Air Force experts were stationed in the adjacent monitoring room observing and listening to the interrogation, and coaching Mohajerin and Williams with the technical documents and terms. ER 7, 110-113. We now review each session with respect to confrontation of evidence.

i) Monday, October 17, 2005.

Agents Mohajerin and Williams confronted Mr. Gowadia with documents taken from his Maui home that contradicted his October 13th statement that he possessed no classified documents. ER6, 185-188. Since the proverbial cat was

[26] Retired special Agent Au denied that the sessions were recorded. ER2, 114.

out of the bag[27], Gowadia admitted in his written statement that he: (1) used his technical expertise gained while working on classified United States defense articles in his dealings with foreign governments and foreign companies (ER7, 133, 154-162); and (2) sent communications to Patrick Bar Avi in Israel, Sabine Hipp in Germany, and Tony Busch in Switzerland, concerning "classified B2 technology know-how [that] was transferred as AIRSS mechanism". ER6, 75-84; ER7, 155-157, 160.[28]

ii) Tuesday, October 18, 2005.

The agents continued the confrontation with evidence of guilt, resulting in Mr. Gowadia outlining his assistance to China in developing a low-observable cruise missile. ER7, 27-28, 136-137.

iii) Wednesday, October 19, 2005.

The agents brought a computer into the interrogation room with a copy of the hard-drive from Gowadia's business computers, and used the computer files in it to

---

[27] *See Wauneka,* 770 F.2d at 1439 *citing Oregon v. Elstad,* 61 Or.App. 673, 677-78, 658 P.2d 552, 554-55 (1980) (the coercive impact of the unconstitutionally obtained statement remains because in the defendant's mind his fate is sealed since the cat is out of the bag.)

[28] Remarkably, notwithstanding the confrontation of such evidence of guilt and Mr. Gowadia's admissions of serious wrongdoing, Agents Mohajerin and Williams still maintained during their testimony that Gowadia could have gotten up and walked away. ER7, 14, 25, 36, 131.

continue confronting him with evidence of guilt. ER6, 192-193; ER7, 138. When faced with this proof and unyielding questioning, Gowadia's only choice was to select certain computer files, print them out, and then explain what was selected. ER6, 194-195.

During this session Mr. Gowadia wrote "China Part 1", the first of a three-part, detailed description of his work in China. ER7, 169-177. "China Part 1" included a discussion of his negotiations with the Chinese concerning payment for his work on an exhaust nozzle, his discussions with the Chinese concerning classified information related to the B-2 bomber, identification of individuals he met in China, and observations concerning his PRC liaison Tommy Wong with whom he communicated via e-mail concerning the exhaust nozzle work. ER6, 223-224, 242; ER7, 169-177.

iv) Thursday, October 20, 2005.

The agents confronted Mr. Gowadia with his PowerPoint presentation entitled Study 1. ER3, 143-144; ER6, 66-73. Gowadia explained in his statement that the Chinese had asked him to assess their weapon system against United States' short-range IR missile sensors. ER6, 66-73; ER7, 186. In response, he produced and provided Study 1. ER7, 186. In addition, Gowadia wrote "China Part 2", in which he continued describing his involvement with China's cruise

missile project. ER6, 199-200, 223. In his statement, Gowadia admitted that his recommendation improved PRC's missile thrust and fuel consumption. ER7, 176, 187.

v) Friday, October 21, 2005.

The agents continued to confront Mr. Gowadia with inculpatory documents found in his seized business computers. ER6, 228. Agent Williams asked him "pretty tough questions" to ensure that he understood the gravity of the situation and his admissions. ER6, 230. Gowadia wrote "China Part 3", in which he described his fifth and sixth trips to China. ER4, 158-159, 170-171; ER6, 226. Important details included descriptions of his visit to a test facility at a university in Beijing for work on a cruise missile exhaust nozzle, his e-mail communications with China, and his liaison Tommy Wong's opinion that the United States would attack China. ER4, 167; ER6, 226-228.

Agent Williams also asked Mr. Gowadia if he understood that what he did was wrong. ER6, 203. When Gowadia began orally responding Williams directed that he write down his response. ER6, 203. Gowadia then wrote:

> what I did was wrong to help PRC make a cruise missile. What I did was espionage and treason because I shared military secrets with PRC and shared my technical knowledge which I have acquired over many years working with U.S. systems like the B-2…

ER 7, 56, 198. Gowadia further acknowledged that he understood he would be held accountable for his actions. ER6, 229.

vi) Saturday, October 22 and Monday, October 24, 2005.

On these two days Mr. Gowadia discussed in his statements the contracts he entered with the Singapore government to perform military and defense services. ER6, 233-234, 238.

(c) Physical Surroundings of the Interrogation.

As to October 13th, the district court relied upon the agents' testimony and found that Mr. Gowadia could have left his home. ER1, 88-90. However, this finding fails *de novo* review in two respects. First, the court's reliance on the agents' testimony fails to appreciate the unique circumstances involved in an interrogation conducted within a suspect's home. In *United States v. Craighead*, this Court explained:

> If a reasonable person is interrogated inside his own home and is told he is 'free to leave,' where will he go? The library? The police station? He is already in the most constitutionally protected place on earth. ***To be 'free' to leave is a hollow right if the one place the suspect cannot go is his own home***. . . . Similarly, a reasonable person interrogated inside his own home may have a different understanding of whether he is truly free 'to terminate the interrogation' if his home is crawling with law enforcement agents conducting a warrant-approved search. ***He may not feel that he can successfully terminate the interrogation if he knows that he cannot empty***

his home of his interrogators until they have completed their search.

United States v. Craighead, 539 F.3d 1073, 1083 (9th Cir. 2008) (emphasis added).

In addition to these considerations discussed in *Craighead*, for the then 61-year-old Gowadia leaving would have meant walking off his property (and leaving his wife alone with 15 federal agents), or calling for transportation since his car was blocked by the agents' vehicles and to be searched. ER6, 153, 155-156.

The district court's reliance on the Supreme Court's finding in *Michigan v. Summers* – for the proposition that officers executing a search warrant have the authority "to detain the occupants of the premises while a proper search is conducted" to ensure the safety of the agents and maintain the integrity of the search process – fails to identify the applicable issue, which is whether a reasonable person in Gowadia's position believed he was in custody or free to leave. *See* ER1, 89, *citing Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). "[T]he fact that these precautions may be necessary to the successful lawful search does not lessen their tendency to make a reasonable person believe he is in custody." *Craighead*, 539 F.3d at 1086.

The court also found that the government's surveillance of Mr. Gowadia before and after the execution of the search warrant did not support the conclusion that he was placed in "physically restrictive custody", as discussed in the Fifth

Circuit *Doe* case concerning juvenile detention. ER1, 94; *Doe,* 882 F.2d at 927. Aside from the district court relying on the wrong definition of detention, the court erred in disregarding the significance of the surveillance testimony. The suppression hearing record shows that surveillance agents monitored Gowadia at each hotel in Honolulu to see if he left, where he went and who he met. ER6, 201-202; ER7, 96, 105.

Further, trial testimony showed that controlling Gowadia's movement was so important that on October 20th the four-member surveillance team was expanded to include another seven members flown in from Seattle Washington and Portland Oregon in order to provide 24-hour surveillance. ER3, 130-131. Additionally, lead surveillance agent Tom Kim testified at the trial that he and his team were to immediately notify Agent Mohajerin if Gowadia went anywhere. ER3, 126. Standing alone, surveillance does not equate to custody; yet it is surely a factor under *de novo* review, and in considering the totality of the circumstances.

(d) Duration of the Detention.

The interrogation had no end-point. On October 16, 2005, Mr. Gowadia flew to Honolulu on a **one-way** ticket (ER7, 94-95), a clear indication he would never return home again. Thereafter, the seven Honolulu interrogation sessions began in the morning and lasted until the end of each business day. ER5, 10.

Agent Williams testified at the suppression hearings and at the trial that they had a "benchmark" of concluding the sessions each day at 5 p.m. ER5, 10; ER7, 31, 50-51. While the agents testified that Gowadia could have stopped whenever he was tired, the record shows this did not happen: four sessions lasted more than seven hours; and three sessions lasted from six to seven hours.[29] Specifically, the sessions were conducted as follows:

- Monday 10/17, 10:37 a.m. to 5 p.m., for **six hours, 23 minutes** (ER7, 13, 18);
- Tuesday 10/18, 10 a.m. to 5 p.m., for **seven hours** (ER7, 97);
- Wednesday 10/19, 9:33 a.m. to 5 p.m., for **seven hours, 27 minutes** (ER7, 35);
- Thursday 10/20, 9:35 a.m. to 5 p.m., for **seven hours, 25 minutes** (ER7, 49);
- Friday 10/21, 9:40 a.m. to 5 p.m., for **seven hours, 20 minutes** (ER7, 53, 55);
- Saturday 10/22, 10:45 a.m. to 5 p.m., for **six hours, 15 minutes** (ER7, 62, 236); and
- Monday 10/24, 9:36 a.m. to 5 p.m., for **seven hours, 24 minutes** (ER7, 73).

In addition, the session at Gowadia's home on October 13th lasted for **five hours**

[29] These time periods include the time during which Mr. Gowadia had lunch each day in the federal building cafeteria. *See* ER1, 61; ER7, 55, 134.

and 49 minutes, from 2:58 p.m. until 8:37 p.m.; and the session at the Maui Police Station lasted for **six hours and 35 minutes**, from 10:40 a.m. until 5:15 p.m. [ER 8, 49, 57.

This Court has previously suggested that a two-and-a-half hour interrogation is at the high end. *Bassignani*, 575 F.3d at 886. Elsewhere, the Court has found a defendant in custody when she was interrogated for 45 to 90 minutes. *Kim*, 292 F.3d at 972. In stark contrast, Mr. Gowadia spent **more than 61 hours total** with the agents before they finally arrested him. If the interrogations in *Kim* and *Bassignani* were deemed custodial, certainly the unprecedented circumstances of this case warrant a finding of custody because the agents interrogated Gowadia for nine days, in the day-long "marathon session[s] designed to force a confession". *Davis v. Allsbrooks*, 778 F.2d 168, 171 (4th Cir. 1985).

The custodial nature of Mr. Gowadia's interrogation did not end at the conclusion of each day's session when he walked out the FBI offices and returned to his hotel room, only to begin anew the following morning when the next session began. The departure each day was an orchestrated event designed to appear as if Gowadia was at his liberty. This contrivance permitted the government to interrogate him indefinitely in order to extract a detailed confession, all the while maintaining that he was not in custody. This was a violation of the McNabb-

Mallory rule, Fed.R.Crim.P. 5(a), and § 3501(c).

(e) Degree of Pressure Applied.

The district court's conclusion that Mr. Gowadia enjoyed his liberty because he slept in his own bed on October 13th completely ignores the pressure weighing upon him. ER1, 85. Gowadia now had notice of the serious pending criminal charges given execution of the search warrant and the five-hour interrogation. ER6, 167; ER8, 47.

Further, the agents had seized everything he needed to operate NSGI, including his computers, computer media, cell phones, passport, foreign cash, and his files and documents. ER6, 2-24; ER8, 28. That seizure carried irrevocable and irreparable consequences. Gowadia no longer had the ability to continue previously scheduled business travel and, hence, earn a living. In effect, Gowadia's home was taken over by the government with the seizure of his business tools and assets depriving him of generating sufficient income to pay for, among other things, the mortgage payments on his rural Haiku Maui home of more than $14,000 per month. ER2, 39; ER3, 53. As they departed, the agents told Gowadia they wanted to talk again; the next day they called and told him to meet them. ER7, 90-91; ER8, 50. A reasonable person in Gowadia's shoes would have felt overwhelming pressure to submit to further questioning at that point.

The mode of interrogation on Friday October 14th shifted into the format that would dominate the sessions thereafter. The agents began confronting Mr. Gowadia with evidence of serious criminal wrongdoing, and as a result Gowadia began making admissions. Moreover, by now Gowadia had learned that his children in California had been interrogated and the government intended to do so again. ER2, 107.1-111, 113-113.1; ER6, 169. Such impermissible psychological pressure may include direct or indirect threats to either the defendant or the defendant's family members. *United States v. Tingle*, 658 F.2d 1332, 1336 (9th Cir 1981).

Standing alone, Mr. Gowadia's departure from the police station late in the day on October 14th might indicate that he was not in custody. However, the tremendous pressure the agents were now applying for Gowadia to submit to further interrogation must be considered under the totality of the circumstances standard in determining whether he was detained. *Hudgens*, 790 F.2d at 1236. When the interrogation sessions shifted to Honolulu the agents ramped up the pressure. Gowadia was now isolated from his home. In addition to continuing to confront him with more and more evidence of guilt, including the documents and files from one of his business computers, Agent Williams challenged Gowadia for lying. ER6, 192-193; ER8, 55-57.

Further, Agent Williams identified and employed the REID method of interrogation, which he vaguely described as a technique to solicit statements from individuals. ER6, 161-162. Whatever the technique may be, Williams testified that he used a conversational tone, inquiring about Mr. Gowadia's health and welfare and his family, and feigning respect. ER3, 139; ER6, 166, 207. Williams also admitted to manipulating the use of the Advice of Rights form, providing it to Gowadia at the beginning of each session because it was "a good technique … as part of gaining his cooperation". ER6, 159-160.

The Supreme Court has found such techniques no less coercive than deliberate physical abuse. "The blood of the accused is not the only hallmark of an unconstitutional inquisition. The question in each case is whether a defendant's will was overborne at the time he confessed." *Reck v. Pate*, 367 U.S. 433, 440, 81 S.Ct. 1541, 1546, 6 L.Ed.2d 948 (1961) (internal marks and citations omitted). Here, the agents' techniques were designed to overcome Mr. Gowadia's will in order to extract information – and the techniques were highly effective. With each day, Gowadia provided more and more inculpatory detail, including the highly damaging admissions entitled China Part 1, China Part 2 and China Part 3. ER7, 169-177, 179-189, 191-198.

Rhetorically, we may ask what reasonable person in these circumstances –

put in an interrogation room, questioned for nine days in day-long sessions, confronted with strong evidence of serious criminal acts that he admitted committing – could have thought to himself, "Well, anytime I want to leave I can just get up and walk out"? *Alvarado*, 541 U.S. at 670-671, 124 S.Ct. at 2153 (Breyer, J., dissenting). If Mr. Gowadia harbored any doubts, would he still have thought he was free to leave after the government seized all the means for conducting his business, which also allegedly constituted the instrumentalities of his crimes? Would he still think that he, rather than the agents, controlled the situation? *Id.* No reasonable person would answer in the affirmative and, therefore, the fifth factor concerning degree of pressure weighs in Gowadia's favor.

Under *de novo* review, *Bassignani*, 575 F.3d at 883, the district court's in-custody determination was erroneous. All five *Wauneka* Factors weigh in Mr. Gowadia's favor. The totality of the circumstances show that no reasonable person in his position would have believed he was free to leave any of the interrogation sessions, or Honolulu, or the Maui Police Station, or his home on October 13th. Gowadia was sufficiently restrained to be considered "in custody" and detained for the purposes of § 3501(c) analysis.

d. The Presentment Delay.

If a "confession occur[s] before presentment and beyond six hours ... the

court must decide whether delaying that long was unreasonable or unnecessary under the McNabb–Mallory rule, and if it was, the confession is to be suppressed." *United States v. Liera*, 585 F.3d 1237, 1242 (9th Cir. 2009), *quoting Corley*, 556 U.S. at 322, 129 S.Ct. at 1563. "[E]ven voluntary confessions are inadmissible if given after an unreasonable delay in presentment." *Corley*, 556 U.S. at 308, 129 S.Ct. at 1563 (*citing Upshaw*, 335 U.S. at 413, 69 S.Ct. at 171-72). "We look to § 3501(c) to determine whether an otherwise voluntary confession made during a period of unnecessary delay must be excluded." *United States v. Michaud,* 268 F.3d 728, 733 (9th Cir. 2001).

The record in this case demonstrates detention from October 13th and that Mr. Gowadia's confession occurred before presentment and beyond six hours following his detention. The analysis now turns to whether delaying Gowadia's presentment "was unreasonable or unnecessary under the McNabb-Mallory cases, and if it was, the confession must be suppressed." *Corley*, 556 U.S. at 322, 129 S.Ct. at 1571.

(1) As to Transportation and Distance.

Section 3501(c) provides that the six-hour safe harbor will not apply in cases in which the delay in bringing the defendant before the magistrate judge is found by the trial judge to be reasonable, considering the means of transportation

and the distance to be traveled to the nearest available magistrate. 18 U.S.C. § 3501(c). In this case the delay until October 26, 2005, in presenting Mr. Gowadia to the nearest available magistrate could not have been the result of transportation and distance issues.

Since detention began on October 13th at 2:30 p.m. when the agents arrived at Mr. Gowadia's Maui residence, the agents could have arrested and transported him to Honolulu for presentment to the magistrate judge at the United States Courthouse the following day, Friday, October 14th, rather than keeping him on Maui for further interrogation. Alternatively, the agents could have arrested Gowadia on October 14th after their interrogation of him at the Maui Police Station and transported him to Honolulu either that afternoon, or over the weekend, in order for him to appear before a duty magistrate judge on Monday, October 17, 2005.

The purpose of the McNabb-Mallory rule is not merely to "avoid all the evil implications of secret interrogation of persons accused of crime." *McNabb*, 318 U.S. at 344, 63 S.Ct. at 614-15. The McNabb-Mallory rule was also designed to insure that a defendant is brought "before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined." *Mallory*, 354 U.S. at 454, 77 S.Ct. at 1359.

In *Wilson*, a case involving a charge of second-degree murder on an Indian reservation, this Court found clearly erroneous a trial court's finding that delay in bringing defendant before the magistrate was reasonable. This Court found persuasive the fact that the defendant was being interrogated in the same building in which court was being held, and delay beyond the court's scheduled arraignment calendar occurred due to the questioning of the defendant. *Wilson*, 838 F.2d at 1085. Similarly, in this case the interrogation sessions were unnecessary to timely presenting Mr. Gowadia to a magistrate judge whose courtroom is located in the same federal building complex in Honolulu as the FBI interrogation room. We note *Mallory's* grounding in the proposition, established by *McNabb*, that "police detention of defendants beyond the time when a committing magistrate was readily accessible constituted 'willful disobedience of law.' " *Mallory*, 354 U.S. at 451-453, 77 S.Ct. at 1358–59.

Further, the record indicates that the government could have arraigned Mr. Gowadia before execution of the search warrant on October 13, 2005. Agent Mohajerin, who was also an attorney, testified at the suppression hearing that he believed there was probable cause to arrest Gowadia on October 13th. ER7, 85, 108. He articulated the evidence against Gowadia in his affidavit to establish probable cause in support of the search warrant on Gowadia's home, which

included a detailed recitation of the investigation of Gowadia going back to 2000. *See* Application and Affidavit for Search Warrant, at 10-24.

(2) As to Purpose.

Agents Williams and Mohajerin testified at the suppression hearing, and later at trial, that their intention in delaying Mr. Gowadia's presentment was to interrogate him and extract a confession. *See* ER6, 241; ER8, 41. The district court failed to appreciate the significance of the agents' illicit purpose under the McNabb-Mallory rule, erroneously finding that the desire to obtain intelligence demonstrated a lack of motive to coerce a confession from Gowadia. *See* ER1, 73, 79. The Supreme Court has told us, however, that a delay is unreasonable and unnecessary when it is "of a nature to give opportunity for the extraction of a confession." *Mallory*, 354 U.S. at 455, 77 S.Ct. at 1360. The record clearly demonstrates that this was precisely what happened in this case.

As to October 13th, Williams testified at trial that he wanted to discuss Gowadia's understanding of the B-2 lock-on range and he sought a confession. ER3, 135-136. Williams wanted Gowadia to know that he appreciated his cooperation because Williams wanted to keep Gowadia talking. ER3, 137, 138. The agents needed accurate intelligence and therefore, they had Gowadia write his statement to gain an accurate record of his comments. ER8, 41. When he left

Gowadia that night, Williams testified at trial that he was not satisfied with Gowadia's answers and felt he was at a disadvantage because he did not have the results of the house search, thus he wanted to keep Gowadia talking. ER3,140-142. As a result, Williams testified at the hearing that he arranged an interrogation of Gowadia the following day so additional information could be extracted. ER7, 127.

Concerning October 17th, Williams testified at the hearing that he wanted Mr. Gowadia to continue talking because they were learning information helpful to the OSI, and "[o]ur motive, obviously, was to continue the conversation in that we were learning considerable information". ER7,134. On October 18th, the agents inquired about Gowadia's health and his family ostensibly to show concern, but in fact as a means to continue the discussion. ER7, 136. They tried to learn as much as they could every day because they didn't know when Gowadia would stop talking. ER6, 202. With respect to October 19th, Williams testified at trial that he wanted to continue meeting to find out exactly what had happened and determine the "intelligence value" of Gowadia's work. ER4, 94-95.

Moving to October 21st, Williams testified at the suppression hearing that he felt they did not have the level of detail they needed to appreciate Mr. Gowadia's conduct overseas and needed to continue the interrogation sessions. ER6, 204.

While Williams denied dictating Gowadia's statement, he instructed Gowadia to capture in writing that what Gowadia had done was wrong. ER6, 230-231. This led to Gowadia writing the stunning admission that he committed "espionage and treason because I shared military secrets with PRC". ER7, 56, 198.

Focusing on October 22nd, and particularly after the China revelations, Williams testified that Mr. Gowadia demonstrated tremendous value to the government and he wanted to keep him talking. ER6, 207. Williams agreed that he was "trying to get as much information as he could." ER6, 208. "I wanted [Gowadia] to know that I genuinely cared that he was healthy and that he was feeling all right." ER6, 207. Turning to October 24th, Williams testified that even though Gowadia claimed he was depressed and not feeling well, they continued to interrogate him given the tremendous value his admissions represented to the OSI. ER6, 240.

Likewise, Agent Mohajerin testified that he wanted Mr. Gowadia's "cooperation" as long as they could have it and, therefore, they did not want to arrest him and disrupt the "cooperation". ER7, 89. As of October 13th, the government did not intend to arrest Mr. Gowadia, according to Mohajerin; rather, they hoped Gowadia would speak with them so they could learn about his activities. ER7,64, 89; ER8, 33-34. Illustrative of this intent is the exchange at the

suppression hearing when Mohajerin was testifying:

> Q: So, as of the date of the search warrant, it was your intent or the intent of the government to arrest Mr. Gowadia at some future point?
>
> A: You can say that, yes, sir.
>
> Q: Would it be fair to say that the reason you didn't arrest Mr. Gowadia is because you wanted his cooperation?
>
> A: Yes, he was cooperating with us.
>
> Q: So as long as he continued to cooperate with you and give you statements, you did not want to take him into custody and arrest him?
>
> A: There was no reason to, no, sir.
>
> Q: Okay. So as long as he was cooperating with you and giving you a statement, you didn't want to arrest him?
>
> A: Correct.

ER 7, 89.

In particular, Mohajerin wanted intelligence concerning the PRC cruise missile program. ER5, 7-9. Once arrested, like Williams he did not think Mr. Gowadia would talk again. ER7, 87. In fact, even after Gowadia wrote on October 21st that he had committed espionage and treason in assisting PRC's cruise missile program, the government still delayed presenting him to the magistrate in hopes of extracting even more information from him. Consequently, the agents interrogated him again on October 22nd and on October 24th. ER1, 65-66; *see* ER6, 232, 236-

237; ER7, 58, 68-69.

Denying that the sessions were "interrogation", Agent Mohajerin mockingly testified that the meetings were "a conversation with a purpose". ER7, 100-101. "'Interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297 (1980) (internal footnote omitted) *citing Miranda v. Arizona*, 384 U.S. 436, 474, 86 S.Ct. 1602, 1627, 16 L.Ed.2d 694 (1966). Here, there can be no dispute that the agents' questions to Mr. Gowadia from October 13 to October 24, 2005, were reasonably likely to elicit incriminating responses. This was demonstrated beginning on Friday, October 14th, with Gowadia's written admissions at the Maui Police Station, and continued with every lengthy interrogation session thereafter.

Assuming for the sake of argument that these interrogation sessions were merely "conversations", they were highly unusual and Mr. Gowadia was certainly not an equal party. His opponent, the federal government, had a secret team of experts eavesdropping on the conversation for the purpose of supporting Agents Mohajerin and Williams – whose expressed purpose was to elicit intelligence and

inculpatory statements. ER6, 179-184.

What is more, Mohajerin testified during the trial that he conferred with the Assistant U.S. Attorney during the interrogation sessions concerning the intelligence they were obtaining from Mr. Gowadia. ER5, 7-8. The implication of this testimony was that the U.S. Attorney either directed or agreed to continue interrogating Gowadia to extract more detail, and delay presenting him to a magistrate judge located just across the courtyard in the federal building.

This is not allowed. Delay for the purpose of interrogation "is the epitome of 'unnecessary delay.'" *Corley*, 556 U.S. at 308, 129 S.Ct. at 1563 (*citing Mallory*, 354 U.S. at 455–56, 77 S.Ct. at 1360). This Court has stated that, "[t]he desire of the officers to complete the interrogation is, perhaps, the most unreasonable excuse possible under § 3501(c)". *Wilson*, 838 F.2d at 1085.

Given the totality of the circumstances that clearly indicate detention, albeit under an artificial contrivance of liberty that included housing in a hotel room, the unavoidable conclusion is that the government flagrantly disregarded its obligations under Fed.R.Crim.P. 5(a), McNabb-Mallory and § 3501(c). "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law."

McNabb, 318 U.S. at 345, 63 S.Ct. at 615.

e. Harmless Error Analysis.

(1) Standard of Review.

An error is harmless if, "it is more probable than not that the error did not materially affect the verdict." *See United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002), *cert. denied*, 538 U.S. 953, 123 S.Ct. 1644, 155 L.Ed.2d 500 (2003); *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc). The government bears this burden of persuasion and "'we must reverse ... unless it is more probable than not' that the error was harmless." *Seschillie*, 310 F.3d at 1215 (*quoting Morales*, 108 F.3d at 1040). "[I]n cases of 'equipoise,' we reverse." *Id.* (*quoting United States v. Mitchell*, 172 F.3d 1104, 1111 (9th Cir. 1999).

At trial the government admitted into evidence the October 2005 statements, which evidence became the foundation to its case against Mr. Gowadia. ER2, 26 (referred to as Exhibits S-2, S-3, S-4, S-5, S-6, S-7, S-8, S-9); ER6, 49-52. Out of the 20 days the government used to present its case, during 8 of those 20 days it presented the testimony of at least five key witnesses who acknowledged reliance on the October 2005 statements. *See Agent Mohajerin*: ER5, 14-192; ER6, 29-61; *Agent Williams*: ER3, 98-125, 150-267; ER4, 5-172, 179-251; *Col. Vincent*: ER3, 65-76.1, 93; *Mark Amos*, ER3, 4-18, 56-59, 61-62; *Agent Carlson*, ER3, 22-37.

Indeed, both Agents Mohajerin and Williams actually read much of Gowadia's October 2005 statement into the record as part of their trial testimony. *See* , e.g. ER4, 36-37, 41, 53-58; ER5, 55-63, 76-85, 87-90, 95-102, 107-114, 117-120, 125-126, 132-137, 139-151, 157-163, 166-170, 178-185, 186-188. As a result, and by the government's design, Gowadia's October 2005 statements became the centerpiece of the government's case against him, and key in achieving his conviction.[30] As keenly observed by the Supreme Court:

> ***A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.*** The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, ***confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.*** While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime ***may tempt the jury to rely upon that evidence alone in reaching its decision.***

Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991) (emphasis added).

(2) Counts under 22 U.S.C. § 2778.

The AECA requires a person or company to obtain a valid export license

---

[30] During the trial, Gowadia testified that these admissions were the result of coercion and he denied their veracity. ER2, 32-35, 43, 47-48, 51-52, 55.

from the Office of Defense Trade Controls of the U.S. Department of State before exporting defense articles and services from the United States. 22 U.S.C. § 2778. The AECA is implemented by regulations known as the International Traffic in Arms Regulations or ITAR, set out in Title 22, Code of Federal Regulations, Parts 120 - 130. Part 120 of ITAR sets forth the purpose and background of the regulations and provides definitions for the terms used; Part 121 contains the USML (United States Munitions List) which enumerates, by category, defense articles and services subject to export controls.

Under Counts 2, 12, 13 and 14 of the Indictment, to convict Mr. Gowadia the government was required to prove beyond a reasonable doubt that:

- he exported or caused to be exported defense services or related technical data on the USML on the dates alleged in the Indictment;
- he failed to obtain a license from the Department of State to export the defense service or related technical data;
- he acted willfully; and
- the defense services and technical data were not in the public domain.

ER1, 31, 33-34. The AECA is a specific intent crime, requiring that defendant "knew he was violating the law". *Posey*, 864 F.2d at 1493; *United States v. Covarrubias*, 94 F.3d 172, 175 (5th Cir. 1996) (§ 2778 requires the government to prove that the defendant acted with specific intent to violate a known legal duty).

(a) Count 2 and China.

Under Count 2 of the Indictment the government alleged that Mr. Gowadia designed and exported a low-IR signature exhaust nozzle to China, which signature control design methodology was listed in the USML. ER8, 145-146. Therefore, to export that information he needed a license issued by the State Department. ER8, 145-146.

In his October 14th statement, Mr. Gowadia wrote that he met with PRC representatives and discussed classified information relating to IR suppression techniques. ER7, 148. In his October 17th statement, he wrote that the signature management principles and airflow design techniques utilized in his business came from work on the B-2, which signature principles and techniques were classified, and that he knew they were classified given his past experience and training. ER7, 154.

In the October 18th statement, Mr. Gowadia wrote that he knew his work on exhaust nozzles in China concerned a cruise missile. ER7, 164, 166. Concerning his October 19th statement, Gowadia provided a description of his activities in China that began "China Part 1", in which he described, among other details, one of his presentations to PRC representatives in which he utilized a B-2 lock-on range for the purpose of demonstrating his technical background. ER7, 172. He

also described in "China Part 1" his agreement to assist a PRC representative with exhaust nozzle research, and he described payment negotiations for this work with PRC. ER7, 172, 174-175.

On October 20th he wrote that: PRC provided him with parameters for a weapon system concerning a low-signature cruise missile; he believed PRC's cruise missile system had matured sufficiently to begin flight testing; and he identified Study 1 and its purpose. ER6, 66-73; ER7, 182-183, 186-189.

On October 21st he wrote: "what I did was wrong to help PRC make a cruise missile. What I did was espionage and treason because I shared military secrets with PRC and shared my technical knowledge which I have acquired over many years working with US systems ... ." ER7, 198.

Aside from Mr. Gowadia's above-referenced statements, no other evidence demonstrated beyond a reasonable doubt that Gowadia knew that he was violating the AECA and ITAR with respect to Count 2.

(b) Counts 12, 13 and 14 – the Marketing Attempts.

These counts alleged that Mr. Gowadia willfully exported or attempted to export classified technical data in his correspondence to Tony Busch of the Swiss Ministry of Defense, Sabine Hipp of EADS in Germany and Patrick Bar Avi of

Rafael in Israel. ER8, 157-159. All three transmittals admitted into evidence during the trial by the government concerned Gowadia's efforts to market his AIRSS system. ER6, 75-84.[31] Gowadia's sales pitch to Mr. Busch focused on protecting Swiss TH-98 transport helicopters; his pitches to Ms. Hipp and Mr. Bar Avi concerned protecting civilian aircraft. ER6, 75-84.

In the faxed letter to Mr. Busch, Gowadia wrote that the AIRSS:

> ha[d] worked quite effectively when properly designed, e.g. for the B-2. The B-2 suppressor decreases the lock-on range of an advanced missile from M - 4 without suppressor to less than M - 2 (!) with. The results are based on actual measurements.

ER6, 76.[32]

In the email letter to Ms. Hipp he wrote that the:

> AIRSS has the capability to eliminate the MANPADS[33] threat to within less than M - 3 (flight test data on B-2 indicated that AIRSS reduced the lock-on range of the most advanced heat seeking missile from M - 4 to less

---

[31] The district court received each of these transmittals into evidence at trial under two different exhibit numbers: the 10/23/2002 Busch transmittal was admitted as Exhibit S-16 and as Exhibit A-75 (ER2, 3, 26); the 11/21/2004 Bar Avi transmittal was admitted as Exhibit S-17 and as Exhibit K-7 (ER2, 16, 26); the 9/6/2004 Hipp transmittal was admitted as Exhibit S-18 and as Exhibit K-18. ER2, 16, 26.

[32] "M - 2", "M -3", "M - 4", "% - 12 %", represent substitutions resulting from hearings in the district court pursuant to CIPA.

[33] The government's witness Col. Vincent testified during the trial that MANPADS stands for "surface-to-air missile, man portable". ER3, 91.

than M - 3 ...).

ER6, 82.

In the email presentation to Mr. Bar Avi, Gowadia wrote that the:

> most famous example of the aircraft incorporating this technology is USAF B-2 bomber, where the measured reduction was greater than %-12 %, which allow the aircraft to fly [redacted].

ER6, 81 (underline in original).

In his October 2005 statements, Mr. Gowadia wrote that these transmittals contained B-2 classified information, and when he sent them he knew he was violating the law. ER7, 141, 149-151, 154. At trial, Agents Mohajerin and Williams testified that Gowadia acknowledged in his statements that the transmittals contained classified information. ER4, 8-10; ER5, 77-80, 82.

In contrast, Mr. Gowadia's defense experts uniformly testified at trial that the correspondence was merely a marketing effort based upon fabricated claims. Mr. Robert Skulsky[34] testified that the B-2 had no lock-on range because its IR signature, from which lock-on is derived, was eliminated in the design by placing the engine inlets and exhaust on the top of the aircraft, which design meant infrared could not be detected from underneath the aircraft. ER2, 104, 129-131. With

[34] Robert Skulsky testified during the trial as an expert with respect to low-observable technology and B-2 survivability issues. ER2, 126.

infrared minimized, any IR-based attack would have to occur from above the already high-flying aircraft, a scenario that was "slim to none" and would only happen if there was a random search for the B-2. ER2, 105-106, 129-130. "The probability for intercept by an IR missile from a fighter is nonexistent", Mr. Skulsky testified. ER2, 107. Accordingly, Gowadia's B-2 lock-on claims in the marketing letters at issue were meaningless and the information was neither harmful to the United States nor helpful to any other country. ER2, 133-138.

Similarly, Mr. Leslie Spence[35] testified that the B-2 was designed to eliminate radar detection, not infrared, and Mr. Gowadia's B-2 representations were "meaningless". ER2, 145-148. Furthermore, even if the B-2 had IR signatures from which lock-on range could be derived, Gowadia testified at trial that he did not attend the B-2's conceptualization and design meetings and, therefore, had no access to that signature information. ER2, 65-66, 69, 95, 119.1-122.

Defense expert Mr. Glenn Varney[36] agreed with Skulsky and Spence

---

[35] Leslie Spence testified during the trial as an expert concerning low-observable technology and B-2 survivability. ER2, 142-143.

[36] Mr. Glenn Varney testified during the trial as an expert with respect to infrared suppression, radar cross section reduction, aircraft signatures and infrared-guided missiles. ER2, 228.

concerning Gowadia's meaningless B-2 lock-on range claims. ER2, 219. Moreover, Mr. Varney testified that even if the B-2 had a lock-on range, the numbers Gowadia provided were "ridiculous" because they ignored an enemy missile's kinematic zone. ER2, 152. Varney explained that infrared-guided missiles are designed to prevent detonation when the pilot is too close to a target; this is achieved by programming the arming device in the missile warhead to activate only when the missile has accelerated to a particular speed and has reached a safe distance from the missile's launching aircraft and the pilot. ER2, 154-156, 226. The zone within which the warhead is armed, and within which the pilot cannot fire the missile, is referred to as the kinematic zone or kinematic boundary. ER2, 220.

The B-2 lock-on range Mr. Gowadia provided was nonsensical because it was within the kinematic boundary of infrared-guided missiles. ER2, 153-156. In other words, if Gowadia's B-2 lock-on range was true, no pilot could fire his or her missile at the B-2 because once lock-on was achieved, the pilot would be too close to the B-2 target. ER2, 153-156. At that short distance, the missile could not arm itself and launch, and even if it could, both aircraft would be destroyed.

While Mr. Varney agreed that lock-on range for military aircraft is classified and must be protected, he testified that Gowadia's B-2 lock-on representations

were marketing hype and otherwise "ridiculous". ER2, 152, 219, 222-223, 229.

Finally, Mr. Gowadia denied at trial that he intended to violate AECA, testifying that the B-2-related claims in the Busch, Hipp and Bar Avi correspondence were "strictly a marketing statement" drafted and sent to establish NSGI's credibility and capability. ER2, 89-91, 95, 99.

Aside from Mr. Gowadia's October 2005 statements, no other proof demonstrated beyond a reasonable doubt that he knew he was violating the AECA when he tried to export his services to Busch, Hipp and Bar Avi. *Posey*, 864 F.2d at 1493.

(3) Counts under 18 U.S.C. § 794(a).

Section 794(a) prohibits communication, delivery or transmittal to any foreign government or its representative, of any document or information, among other items, relating to national defense, with the intent or reason to believe that it is to be used to the injury of the United States or the advantage of a foreign nation. 18 U.S.C. § 794(a). Under Count 6 of the Indictment the government alleged that Mr. Gowadia violated § 794(a) by delivering to PRC a presentation he created entitled "Study 1", in which he disclosed information concerning the application of low-observable technology for the exhaust nozzle of a PRC cruise missile, and evaluated the effectiveness of his redesign . ER8, 150-151. Under Count 8 of the

Indictment the government further alleged that Gowadia violated § 794(a) when he created and delivered to PRC a computer file entitled "Answers - 20 Mar 05.doc", which was related to Study 1 and concerned infrared signature predictions of the PRC cruise missile outfitted with his modified exhaust nozzle and associated lock-on range predictions against a United States air-to-air missile. ER6, 74; ER8, 152-153.

To convict under § 794(a) the government needed to prove that:

- Mr. Gowadia had the ***intent or reason to believe the information in question was to be used to the injury of the United States or to the advantage of PRC***;
- he communicated, delivered or transmitted information relating to national defense to PRC or its representatives or agents; and
- he acted willfully with respect to the communication, delivery or transmission of the information relating to national defense.

See ER1, 36-37.

Focusing on the first element, to convict Mr. Gowadia of Counts 6 and 8 the government was required to show that he intentionally performed the acts charged, and that he did so with "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign government." *United States v. Miller*, 874 F.2d 1255, 1277 (9th Cir. 1989); *United States v. Truong Dinh Hung*, 629 F.2d 908, 918 (4th Cir. 1980) (under § 794(a) and

§ 794(c), the prosecution must prove that the defendant acted with intent or reason to believe that transmission of the information will injure the United States or aid a foreign nation).

To prove that Mr. Gowadia acted with intent or reason to believe that Study 1 and "Answers - 20 Mar 05.doc" injured the United States or assisted PRC when he provided the same, the government relied heavily on his October 2005 statements and the corresponding testimony of Agents Mohajerin and Williams. In his October 20th statement Gowadia wrote that he provided a hard copy of Study 1 to a Mr. Li at a university in Beijing, which study provided his recommendations for improvement to PRC's weapons systems, and an analysis of United States short-range IR missile sensor performance against PRC weapon systems. ER7, 186-187. Gowadia acknowledged in his October 21st statement that "Answers - 20 Mar 05.doc" was a response to PRC's questions about Study 1. ER7, 196-197.

Mr. Gowadia also wrote in his October 2005 statements that: (1) his recommendations could improve engine thrust and fuel consumption of the PRC cruise missile (ER7, 176, 187]); (2) the improved missile would fly at a low altitude and could be launched from mainland China to targets in the Strait of Taiwan, or Taiwan (ER7, 187); (3) the improved missile could be used to deter United States naval interference and intimidate Taiwan into reunification with PRC

(ER7, 187); and (4) he had a "gut feeling" that the PRC's cruise missile program had matured sufficiently to have a test flight within three years. ER4, 136-137, 147; ER5, 143-150; ER7, 189.

Government trial witness Col. Vincent relied heavily on the October 2005 statements in testifying that Mr. Gowadia possessed detailed and classified United States' AIM-9 short-range missile sensor information that he utilized in Study 1. ER3, 92, 93. As to "Case 1" and "Case 2" in Study 1, reading from the statement during his trial testimony, Col. Vincent confirmed Gowadia's admission that those cases illustrated United States short-range IR missile sensor performance against PRC's weapon system. ER3, 73-75; *see* ER6, 71-72.

The government's jet propulsion and infrared expert Mark Amos testified that he relied on Mr. Gowadia's October 2005 statements, among other documents. ER3, 56-57. Mr. Amos determined that Study 1 concerned a cruise missile application, the purpose of which was to show that improvements could be achieved by changing a round exhaust nozzle to a rectangular "2-D" nozzle. ER3, 59-60. Amos came to this conclusion in direct reliance on the October 2005 statements. He testified that he used the statements to provide the "context" for assessing Gowadia's work in China. ER3, 58. To find documentation, Amos utilized a computer file directory identified in Gowadia's statement, which

directory was related to his work in China. ER3, 59. Amos also determined that PRC provided Gowadia with data for his work, "per the notation [ ] in the statement." ER3, 59. Further, he testified that Gowadia's work in China was defense-related, "based on Gowadia's statement initially that it was a cruise missile engine". ER3, 62.

The government trial expert concerning PRC intelligence gathering, retired FBI Agent Bruce Carlson, also relied heavily on Mr. Gowadia's October 2005 statements. ER3, 20-22. Referring to those statements, Agent Carlson testified that PRC operatives Tommy Wong and Henri Nyo had "spotted", "assessed", and "developed' Gowadia as an agent to assist PRC. ER3, 22-25. In particular, Carlson relied upon Gowadia's description in his October 2005 statements of his six trips to China, and the relationship that developed between Gowadia, Henri Nyo and Tommy Wong. ER3, 26-27.

The October 2005 statements were also essential for Agent Carlson to understand Mr. Gowadia's activities during his later trips to China because the passport entry and exit stamps reflected only his first and second trips there. ER3, 32. Where Gowadia's statements indicated travels in China but there were no related passport stamps, Carlson testified that those omissions supported the inference that PRC was involved in moving Gowadia in and out of China without

anyone else knowing about his travel in that country. ER3, 32. Carlson testified that PRC was known to engage in this pattern in other counterintelligence cases. ER3, 32.

Without the October 2005 statements, Agent Carlson testified that it would not have been clear that Mr. Gowadia visited Chengdu, a city in Sichuan province dominated by PRC's military and aviation industries, and where Gowadia had his first meeting with PRC officials. ER3, 22, 29-30. Without the statements it would only have been evident that Gowadia went to the city of Shenzhen near Hong Kong, given the visa stamp on his passport permitting a five-day stay in the Shenzhen Economic Zone (SEZ), which zone is a part of that city. ER3, 29. Agent Carlson further testified that Gowadia needed PRC complicity to leave the SEZ, enter China proper and travel to Chengdu. ER3, 29-30. In other words, only with the authority of PRC's intelligence services, whether express or implied, was Gowadia able to cross the SEZ border and travel to Chengdu without a visa. ER3, 29-30.

The October 2005 statements additionally revealed that Tommy Wong was an authority in either the PRC intelligence service or the PRC military because he was able to move Mr. Gowadia across the border without official processing. ER3, 34-35; ER7, 147, 164, 169, 180. Based upon these statements, Agent Carlson

testified that Tommy Wong: was a "facilitator" who took care of the "agent," Gowadia; passed communication between Gowadia and PRC representatives in Chengdu and Beijing; facilitated payment to Gowadia for his services; and paid for Gowadia's travel and accommodations. ER3, 36-37.

The trial record shows the tremendous reliance the government placed on the October 2005 statements to prove, under Counts 6 and 8, that Mr. Gowadia performed the acts charged with "intent or reason to believe that the information provided was to be used to the injury of the United States, or to the advantage of any foreign government." *Miller*, 874 F.2d at 1277.

(4) Counts under 18 U.S.C. § 793(e).

Section 793(e) prohibits, in relevant part, anyone having unauthorized possession or access to any document or information relating to national defense, which the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, from willfully communicating or delivering the same to any person not entitled to receive it, or willfully retaining the same and failing to deliver it to an officer or employee of the United States entitled to receive it. 18 U.S.C. § 793(e).

Counts 9, 10 and 11 charged violations of § 793(e) based upon the same marketing correspondence underlying Counts 12, 13 and 14. ER8, 154-157. To

convict Mr. Gowadia under § 793(e) the government had to prove that he:

- knowingly had unauthorized possession of information he knew was related to national defense;
- had ***reason to believe*** that information could be used to harm the United States or benefit a foreign nation;
- communicated, delivered or transmitted that information to a person not entitled to receive it; and
- acted willfully.

See ER1, 41. Section 793(e) does not contain the same strong scienter language of § 794(a), requiring only that the defendant have "reason to believe" the national defense information could be used to harm the United States or aid a foreign nation. *See Truong Dinh Hung*, 629 F.2d at 919.

Trial defense experts Skulsky, Spence and Varney all testified that Mr. Gowadia's B-2 claims as to lock-on range represented pure fabrication, and had no basis in reality. ER2, 133-138, 145-148, 219. As such, the fabricated B-2 attributes he provided in the underlying correspondence could not have harmed the United States or aided a foreign nation. ER2, 135-138, 148-151, 223.

Only Mr. Gowadia's October 2005 statements demonstrated that he had "reason to believe" the alleged national defense information he possessed could be used to harm the United States or aid a foreign nation. In his statement Gowadia

wrote that he proposed to Busch, Hipp and Bar Avi infrared suppression techniques that contained classified information from his work on the B-2 in order to aid the governments of Switzerland, Germany and Israel: "I wanted to help [these] countries to further their aircraft self protection system." ER7, 141, 149-151, 154, 156. Without the October 2005 statements, no reasonable juror could have found that Gowadia had reason to believe that his marketing letters containing meaningless fabricated B-2 attributes, could be used to harm the United States or aid a foreign nation.

(5) Not Harmless Error.

The October 2005 statements represented the foundation of the government's case to establish Mr. Gowadia's criminal intent. Without those statements, the government's evidence did not demonstrate that Gowadia acted with the specific intent required under AECA; the necessary criminal intent under § 794(a) that he willfully communicated national defense information he believed could hurt the United States or benefit a foreign nation; or, under § 793(e), the necessary reason to believe that the national defense information he possessed could be used to harm the United States or benefit a foreign nation.

B. The District Court Erred In Prohibiting Mr. Gowadia From Challenging The Classification Decisions in this Case Because the Pertinent Documents and Information Are Alleged to Contain Derivative Classification Material.

1. Standard of Review.

The district court's decision in issuing the Minute Order involves the construction, interpretation, and application, of the Executive Orders and thereby, affects Mr. Gowadia's fundamental right of Due Process Clause of the Fifth Amendment. In that event, *de novo* judicial review is the applicable standard in this appeal. *See Gonzaga-Ortega v. Holder*, 694 F.3d 1069, 1073 (9th Cir. 2012) *citing Cruz Rendon v. Holder,* 603 F.3d 1104, 1109 (9th Cir. 2010) and *Hamazaspyan v. Holder,* 590 F.3d 744, 747 (9th Cir. 2009). However, this Court's task concerning the underlying agency's classification decision "is not to second-guess [that agency], but simply to ensure that its reasons for classification are rational and plausible ones." *Wilson v. Central Intelligence Agency*, 586 F.3d 171, 185-86 (2nd Cir. 2009) (internal quotations omitted) *citing McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983) (footnote omitted). In other words, that *de novo* judicial inquiry[37] is whether the agency's decision in classifying a document or

[37] Judicial review of an agency's classification decisions are to be conducted *de novo*, while giving deference to its' reasoned and detailed explanations for them. *McGehee*, 718 F.2d at 1148. As applied, "[o]nce satisfied that the proper procedures have been followed and that the information logically

certain piece of information is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *Klamath Siskiyou Wildlands Center v. Grantham*, 424 Fed.Appx. 635, 636 (9th Cir. 2011), *quoting Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010).

2. Discussion.

Subsequent to the CIPA Section 6(a) hearings the government raised the argument in its' filing on March 6, 2009, that Mr. Gowadia should not be permitted to challenge the determinations by the executive branch in this case that certain documents or information were classified (Government's CIPA Memorandum). ER6, 126-134. In the Government's CIPA Memorandum it contended that the Executive Orders, and relevant decisions of the federal courts, do not permit "judicial review of nor defense challenges to classification decisions by executive branch officials." ER6, 127. Additionally, according to the government classified information is information in any form that:

> (1) is owned by, produced by or for, or is under the control of the United States government;

---

falls into the [classification category claimed], the courts need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." *Id.* (Internal quotations omitted), *quoting Gardels v. Central Intelligence Agency,* 689 F.2d 1100, 1104-05 (D.C. Cir. 1982), *quoting Weissman v. Central Intelligence Agency,* 565 F.2d 692, 697, (D.C. Cir. 1977).

> (2) the information falls within one or more of the categories of information listed in section 1.4 of the Executive Order (including intelligence sources and methods, cryptology, military plans, weapons systems and vulnerabilities or capabilities of systems, installations, projects, or plans relating to the nation security[)]; and
>
> (3) is classified by an original classification authority who determines that its unauthorized disclosure reasonably could be expected to result in damage to the national security.

ER6, 129.

In the Government's CIPA Memorandum, however, it did not advise the district court that this case involved documents largely generated by Mr. Gowadia which allegedly contain classified information,[38] rather than documents originating from the Air Force. ER6, 126-133. Therefore, the derivative classification provision of the Executive Orders controlled. *See generally Wilson v. McConnell,* 501 F.Supp.2d 545, 553 (S.D.N.Y. 2007) *citing* Executive Order 13292 at § 6.1(n) ("Documents that reproduce, extract, or summarize classified information are defined as 'derivative classifications.'"), *aff'd, Wilson,* 586 F.3d 171.

Executive Order 13292 provides in relevant part:

> Sec. 2.1. *Use of Derivative Classification.* (a) Persons who only reproduce, extract, or summarize classified information, or who only apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.

---

[38] *See* Indictment for detailed description of the documents the government relied upon as the basis for the charges against Mr. Gowadia. ER8, 122-173.

> (b) Persons who apply derivative classification markings shall:
>
> (1) observe and respect original classification decisions; and
>
> (2) carry forward to any newly created documents the pertinent classification markings. For information derivatively classified based on multiple sources, the derivative classifier shall carry forward:
>
> (A) the date or event for declassification that corresponds to the longest period of classification among the sources; and
>
> (B) a listing of these sources on or attached to the official file or record copy.

Id. at § 2.1.

Secondly, the government also did not advise the district court as to whether the information was originally classified, or derivatively classified, or whether any authorized holder of classified information may challenge its' classification status pursuant to the Executive Orders. In that regard, Executive Order 13292 provides that:

> Sec. 1.8. *Classification Challenges.* (a) Authorized holders of information who, in good faith, ***believe that its classification status is improper are encouraged and expected to challenge the classification status of the information*** in accordance with agency procedures established under paragraph (b) of this section.
>
> (b) In accordance with implementing directives issued pursuant to this order, an agency head or senior agency official shall establish procedures under which authorized holders of information ***are encouraged and expected to challenge the classification of information that they believe is improperly classified or unclassified.*** These procedures shall ensure that:

> (1) individuals are not subject to retribution for bringing such actions;
>
> (2) an opportunity is provided for review by an impartial official or panel; and
>
> (3) individuals are advised of their right to appeal agency decisions to the Interagency Security Classification Appeals Panel (Panel) established by section 5.3 of this order.

Id. at § 1.8 (emphasis added).

Without advising the district court of the above two relevant provisions essential in considering the issue requested by the government, the government emphatically stated "In CIPA, neither judicial review of nor defense challenges to classification decisions by executive branch officials are permitted." ER6, 130. In support of this bold statement the government directed the district court's attention to three federal cases which involved original classification, rather than derivative classification, documents and information. ER6, 130. The first case cited by the government was *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), *cert. denied,* 544 U.S. 931, 125 S.C.t. 1670, 161 LE.2d 496 (2005), where the defendant sought access to several captured leaders of al Qaeda.[39] 382 F.3d at 457-58. However, the earlier unpublished related case that was also cited by the

[39] This type of information is clearly original classification material. *See* Executive Order 13292 at § 1.1.

government and relied upon by the district court involved a consortium of media companies seeking to intervene in that case (Moussaoui Intervenors), but disavowed any desire to obtain the release of classified information. *See* ER1, 97; ER6, 130; *both citing United States v. Moussaoui*, 65 Fed.Appx. 881, 884-88 (2003).[40] Nonetheless, the Moussaoui Intervenors maintained that the trial court "need not defer to the classification decisions of the Government. Implicit in this assertion is a request for the [trial court] to review, and perhaps reject, classification decisions made by the executive branch. This [the trial court will] decline to do." *Id.* at 887, n.5.

The second case referenced by the government was *United States v. Rosen*, 520 F.Supp.2d 786 (E.D. Va. 2007), which concerned several individuals cultivating sources of information within the United States government to obtain national defense information and then disclose the same to a variety of other individuals not authorized to receive it. *Id.* at 789. To prevent the defendant from obtaining original classification information for use at trial, the government

[40] This unpublished case is only being discussed because it was cited by the government and relied upon by the district court in its Minute Order. Except for the aforesaid, Mr. Gowadia would not have cited or discussed this unpublished case because of the prohibition in Rule 32.1 of the *Federal Rules of Appellate Procedure.*

asserted the Classified Information Privilege.[41] *Id.* at 800-01. It was against this backdrop that the trial court stated "it is not for the court to review and second guess the government's decision to classify a document or information; that decision is committed to the sole discretion of the Executive Branch." *Id.* at 801 *citing Moussaoui*, 382 F.3d at 470.

The third case, *United States v. Collins*, 720 F.2d 1195 (11th Cir. 1983), was decided during the infancy of CIPA. 720 F.2d at 1196. In that case a retired Air Force general officer was indicted for alleged misuse of money belonging to the United States and its Air Force. *Id.* at 1197. The original classified information sought by that defendant concerned "activities of the U.S. Government with respect to joint Intelligence/Military operations and the utilization of secret overseas bank accounts to finance said operations." *Id.* In ruling on the admissibility of the classified information concerning the aforesaid activities, the trial court noted "It is an Executive function to classify information, not a judicial one." *Id.* at 1198, n.2, *citing S.Rep. No. 823,* 96th Cong., 2d Sess. 4 (1980), *reprinted in* 1980 U.S. Code

---

[41] The "Classified Information Privilege" is a common law privilege the government would assert in preventing the disclosure of classified information because the risk of harm in that disclosure would outweigh the defendant's right to receive it. *Rosen,* 520 F.Supp.2d at 800-02. However, "[n]otwithstanding [that] privilege, once the [trial court] determines that an item of classified information is relevant and material, that item must be admitted unless the government provides an adequate substitution." *Id.* at 801 *quoting Moussaoui,* 382 F.3d at 476.

Cong. & Ad.News 4294, 4304.

In contrast to these cases, here the information alleged by the government to be classified was contained in documents generated by Mr. Gowadia. ER8, 134-145, 150-151, 152-153, 154-159. As further alleged by the government, the classified information Gowadia gained while working at Northrop, as well as when he still held a security clearance serving as an independent defense contractor for the government, was disclosed by him in the form of emails, computer programs, spreadsheets, and Power Point Presentations, to persons not having authorization to receive them. ER8, 154-156. This is clearly derivative classification material. *McConnell,* 501 F.Supp.2d at 553 ("Documents that reproduce, extract, or summarize classified information are defined as 'derivative classifications.'").

Since derivative classified information is at issue in this case, and not documents and information which received original classification status, a different line of cases is applicable to this issue and supports Mr. Gowadia's position that he should have been permitted to challenge the classification of information as it relates to the elements of the charges set forth in the Indictment. *See* ER6, 118-125. Specifically, even if the information in question may be classified, Gowadia should have been permitted to put forth evidence and argue that the classified information was in the public domain and therefore, not "closely held". ER6, 121.

Next, when an item of information is classified, "the implication is that the information could cause damage to the national security."[42] ER6, 122. However, "information related to national defense [and/or national security] typically cannot qualify as such if it is in the public domain; it must be closely held by the government." *United States v. Rosen,* 445 F.Supp.2d 602, 621 (E.D. Va. 2006), *aff'd*, 557 F.3d 192 (2009). Therefore, Mr. Gowadia argued that, "this is one way that the classification determination can be challenged by the defense." ER6, 121. If information is in the public domain then it is not "closely held" and therefore cannot be related to "national defense," even though the Air Force may have classified that piece of information. ER6, 121. It would be in this "manner [that Mr. Gowadia] would be 'challenging' the classification of information." ER6, 123.

In the prepublication review cases[43], agencies' decisions to censure selected material asserting they contain classified information receive regular judicial

---

[42] According to the Jury Instructions, "classified information" is to be protected against unauthorized disclosure for reasons of "national security." ER1, 27. In turn, "national security" is defined as the "national defense" or foreign relations of the United States. ER1, 27. Finally, documents, writings, or information relate to "national defense" if the disclosure of that "material would be potentially ***damaging to the United States or might be useful to a foreign nation [and] . . . is 'closely held' by the United States government***." ER1, 42-43 (emphasis added).

[43] The manuscripts in these cases are being reviewed for "Derivative Classification" materials. *See* Executive Order 13292 at § 2.1

scrutiny. *See Snepp v. United States,* 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) (per curiam); *Wilson,* 586 F.3d 171; and *McGehee,* 718 F.2d 1137. For instance, in the *McGehee* case a former CIA agent sought declaratory relief that the CIA classification and censorship scheme violated his First Amendment rights and his proposed publication did not contain any classified material. The District of Columbia Circuit noted judicial review of this matter is *de novo* and limited to inquiring whether the proper procedures have been followed, and there is a logical connection between the item classified and the categories enumerated in the Executive Orders. *McGehee,* 718 F.2d at 1148. *See also Wilson,* 586 F.3d at 185 (If an agency censors a manuscript because it contains classified information, the author is entitled to judicial review of that decision to ensure the information in question is properly classified under the standards set forth in the applicable executive order.); and *Snepp,* 444 U.S. at 513 n.8, 100 S.Ct. at 767 (observing that CIA clearance procedure is "subject to judicial review").

The *de novo* judicial review of derivative classification material in the prepublication cases:

> is necessarily deferential because the designation and protection of classified information must be committed to the broad discretion of the agency responsible. ***Deferential review, however, does not equate to no review.*** A court must satisfy itself from the record, *in camera* or otherwise, that the [agency involved] in fact had ***good reason to classify***, and therefore, censor

> the materials at issue. To that end, ***a court may require the [agency's] explanations justify censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification.*** The court's task is not to second guess the Agency, but simply to ensure that its reasons for classification are ***rational and plausible ones***.

Wilson, 586 F.3d at 185-86 (internal quotations and citations omitted; emphasis added).

Even the *Marchetti* case cited by the government involved the Fourth Circuit acknowledging that judicial review is permitted concerning the Central Intelligence Agency's anticipated decision to censor on grounds the proposed publication contained classified information. ER6, 131. That judicial review is limited to whether the proposed redacted material contains classified information obtained by the former employee during the course of his employment which is not already in the public domain. *United States v. Marchetti*, 466 F.2d 1309, 1317 (9th Cir. 1972), *cert. denied,* 409 U.S. 1063, 93 S.Ct. 533, 34 L.Ed.2d 516 (1972). However, the **"**system of classification of documents and information [as well as] the process of classification is part of the executive function beyond judicial review**.**" *Id.* at 1317. It is this "function of classification", rather than the justification of such classification, that is not subject to *de novo* judicial review. *Id.* Therefore, the government was in error to state unequivocally to the district court that "neither

judicial review of nor defense challenges to classification decisions by executive branch officials are permitted." ER6, 127. More correctly, with respect to derivative classification material judicial review of an agency's justification for such classification is regularly subject to judicial review. *Marchetti*, 466 F.2d at 1317. In fact, it would appear that this same inquiry may also apply to original classification material, at least by authorized holders of such material. *See* Executive Order 13292 at § 1.8.

The government may argue that the aforesaid prepublication cases are inapplicable to the issue of whether the district court's Minute Order may stand on grounds that those cases involve the civil and contractual rights of the former employees of the classification authorities. However, if the right of judicial review is allowed in those cases, it is inconceivable that Mr. Gowadia should not be afforded at least the same protection. *Cf. United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 834, 119 S.Ct. 90, 142 L.Ed.2d 71 (1998) (A defendant is entitled to the admission of classified information if demonstrated that the same is at least "helpful to the defense of the accused."). "A court applying this rule should, of course, err on the side of protecting the interests of the defendant." *Rezaq*, 134 F.3d at 1142. "It is a fundamental guarantee of the Sixth Amendment to the Constitution that [Mr. Gowadia] has the right to present a

defense to the charges he is facing." *United States v. Libby,* 467 F.Supp.2d 20, 26 (D.C. 2006) *citing Taylor v. Illinois,* 484 U.S. 400, 409, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988). That defense includes, among other things, challenging the classification decisions in this case as they relate to the elements of the charges in the Indictment. *See* ER6, 118-125.

C. Concerning the AECA Offenses under Counts 2, 12, 13 and 14, the Jury Instructions Unconstitutionally Relieved the Government of its Burden to Prove That the "Defense Services" and "Technical Data" Mr. Gowadia Allegedly Exported Were Not in the Public Domain.

1. Standard of Review.

Where the defendant did not object to the jury instruction, review is for plain error. *United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2010). To reverse under this standard, "there must be (1) error, (2) that is plain, and (3) that affects substantial rights." *Id.* (internal quotation marks and alterations omitted). If these three conditions are met, this Court may exercise its discretion to reverse if the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

2. Discussion.

a. Elements of the AECA Charges.

The AECA is implemented through ITAR, 22 C.F.R. §§ 120-130. *See* 22 C.F.R. § 120.1(a). ITAR has ten subparts, including the USML found in 22 C.F.R. § 121.1. The USML consists of those items designated as defense articles by the president, whose authority to do so is provided by the ACEA. 22 U.S.C. § 2778 (a)(1).

The USML organizes defense articles under a variety of categories, with each category identifying systems, components, and items specifically designated as defense articles or services. *See* 22 C.F.R. § 121.1. Relevant to this case are Category VIII, "Aircraft and Associated Equipment", and Category XIII, "Auxiliary Military Equipment". *See* 22 C.F.R. § 121.1, Categories VIII & XIII.

The AECA makes it a criminal offense for someone to willfully export without a license items that have been designated defense articles by the president. 22 U.S.C. § 2778 (c). Defense articles include technical data. 22 C.F.R. § 120.6. In turn, technical data includes in relevant part:

> (1) Information . . . which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.
>
> (2) Classified information relating to defense articles and defense services;

22 C.F.R. §120.10(a)(1) & (2).

> Technical data does ***not*** include information in the public domain:
>
> This definition does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities ***or information in the public domain*** as defined in §120.11. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

22 C.F.R. § 120.10(a)(5)(emphasis added).

To convict, the government was required to prove "that [Mr. Gowadia] actually export[ed] Munitions List items not in the public domain, *see* 22 C.F.R. § 125.1." *Posey*, 864 F.2d at 1492. Section § 125.1 states in relevant part:

> The controls of this part apply to the export of technical data and the export of classified defense articles. ***Information which is in the public domain*** (see §120.11 of this subchapter and §125.4(b)(13)) ***is not subject to the controls of this subchapter.***

22 C.F.R. § 125.1(a) (emphasis added).

b. Relevant Jury Instructions.

At the close of all the evidence, the district court charged the jury in relevant part as follows[44]:

> As to "technical data":
>
> The [ITAR] define the term "technical data" in pertinent part as: 1) Information which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles. This includes information in the form of

[44] The court's instructions to the jury were not numbered.

> blueprints, drawings, photographs, plans, instructions, and documentation; 2) classified information relating to defense articles and defense services; 3) ***this definition does not include information*** concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information ***in the public domain*** as defined in these instructions. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

ER1, 27 (emphasis added).

As to "classified information":

> Classified information is information or material that has been determined by the United States government pursuant to an executive order, statute, or regulation to require protection against unauthorized disclosure for reasons of national security. "National security" is defined as the national defense or foreign relations of the United States. Accordingly, classified information is defined by Executive Order 12958, as amended by Executive Order 13292, as information in any form that: 1) is owned by, produced by or for, or under the control of the United States government; 2) falls within one or more of the categories set forth in Section 1.4 of the Executive Order, including . . . weapons systems, and vulnerabilities or capabilities of systems . . . ; and 3) is classified by an original classification authority who determines that its unauthorized disclosure reasonably could be expected to result in damage to the national security.
>
> Where the unauthorized disclosure of classified information could reasonably result in serious damage to the national security, the information may be classified "secret." Where such damage is exceptionally grave, the information may be classified "top secret."

ER1, 27-28.

As to the USML:

> In the [USML] the President designated categories of defense articles, defense services, and technical data which cannot be exported from the

United States without a license issued by the United States Department of State. In category VIII, the President designated the following defense articles and related technical data and defense services as controlled for export as Significant Military Equipment under the Arms Export Control Act: Aircraft which are specifically designed, modified, or equipped for military purposes. It also includes technical data and defense services directly related to the defense articles.

In category XIII, the President designated the following defense articles, defense services, and related technical data as controlled for export as Significant Military Equipment under the Arms Export Control Act: Hardware and equipment which has been specifically designed or modified for military applications, that is associated with the measurement or modification of system signatures for detection of defense articles. This includes but is not limited to signature measurement equipment; prediction techniques and codes; signature materials and treatments; and signature control design methodology.

ER1, 29-30.

As to Count 2, it:

charges the defendant with willfully exporting ***a defense service and related technical data*** to the People's Republic of China without first obtaining a license from the United States Department of State, Directorate of Defense Trade Controls, in violation of Title 22, United States Code, Section 2778, and the [ITAR].

In order for the defendant to be found guilty of this charge, the government must prove each of the following four elements beyond a reasonable doubt:

First, on the dates alleged in the indictment, the defendant exported or caused to be exported a defense service or related technical data, with all of you agreeing as to the defense service or technical data exported; and

* * *

Second, the defendant failed to obtain a license from the Department

of State to export the defense service or related technical data; and

Third, the defendant acted willfully; and

Fourth, the defense services and technical data were not in the public domain.

ER1, 30-31 (emphasis added).

As to "public domain", the district court instructed the jury that "[p]ublic domain means information which is published and which is generally accessible or available to the public" (ER1, 31), with the court providing nine categories of public domain circumstances that included information available at public libraries and through fundamental research at accredited colleges and universities.[45]

---

[45] The nine categories the court instructed the jury on were:

1. Through sales at newsstands and bookstores;
2. Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;
3. Through second class mailing privileges granted by the United States government;
4. At libraries open to the public or from which the public can obtain documents;
5. Through patents available at any patent office;
6. Through unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the public, in the United States;
7. Through public release; i.e., unlimited distribution in any form; e.g., not necessarily in published form, after approval by the cognizant United States government department or agency;
8. Through fundamental research in science and engineering at accredited institutions of higher learning in the United States where

As to Counts 12, 13, and 14, the court instructed the jury:

[T]he indictment charge[s] the defendant with willfully exporting ***classified technical data*** without first obtaining a license from the Department of State, in violation of the . . . Arms Export Control Act and the [ITAR].

In order for the defendant to be found guilty of this charge, the government must prove each of the following four elements beyond a reasonable doubt:

> First, on or about the dates charged in the indictment, the defendant exported or caused to be exported technical data on the United States Munitions List, with all of you agreeing as to the technical data exported; and
>
> Second, the defendant failed to obtain a license from the Department of State to export the technical data; and
>
> Third, the defendant acted willfully; and

> the resulting information is ordinarily published and shared broadly in the scientific community. "Fundamental research" is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific United States government access and dissemination controls. University research will not be considered fundamental research if:
>
> 1) The university or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity; or
>
> 2) The research is funded by the United States government and specific access and dissemination controls protecting information resulting from the research are applicable.
>
> 9. Through information available through the internet.

ER1, 31-33.

Fourth, the technical data was not in the public domain.

ER1, 33-34 (emphasis added).

c. Plain Error.

(1) Classified Information.

The instructions described classified information as unique information requiring protection "against unauthorized disclosure for reasons of national security". ER1, 27-28. Classified information deserved special handling among the categories of technical data in § 120.10(a) because an original classification authority had already determined that "unauthorized disclosure reasonably could be expected to result in damage to the national security". ER1, 27-28. The instructions further defined "secret" and "top secret" as pertaining to information that could cause either serious (secret) or grave (top secret) damage to national security. ER1, 28.

A juror could reasonably interpret these instructions as directing that "technical data" deemed classified, including data marked "secret" or "top secret", cannot be a part of the public domain because such availability would harm national security. An original classification authority has already determined that unauthorized disclosure of the classified information would result in damage to national security. ER1, 28; *see also McGehee,* 718 F.2d at 1143 ("Information

properly classified as "secret" does possess such importance by virtue of its potential for causing "serious damage to the national security."). Further, if the technical data has been marked "secret" or "top secret", the disclosure could result in either serious damage to national security or exceptionally grave damage. ER1, 28.

This was particularly the case with respect to Counts 12, 13 and 14, wherein the Indictment alleged that Mr. Gowadia exported "classified technical data" that was either classified at the "TOP SECRET" (Counts 12 and 14) or the "SECRET" level (Count 13) because:

- Count 12 charged Gowadia with exporting "classified technical data" when he faxed correspondence to Mr. Busch in Switzerland proposing his AIRSS system for the CH-98 Eurocopter, which correspondence allegedly contained technical data concerning a United States defense system classified at the "TOP SECRET level". ER8, 157;

- Count 13 charged Gowadia with exporting "classified technical data" by sending an email presentation to Mr. Bar Avi in Israel concerning using the AIRSS for commercial aircraft, which presentation allegedly contained technical data concerning a United States defense system classified at the

"SECRET level". ER8, 158; and

- Count 14 charged Gowadia with exporting "classified technical data" by emailing correspondence to Ms. Hipp in Germany, wherein he proposed developing the AIRSS system for commercial aircraft, which correspondence allegedly contained technical data concerning a United States defense system classified at the "TOP SECRET level." ER8, 159.

A juror could reasonably conclude that given the "SECRET" or "TOP SECRET" status, wherein disclosure could cause either serious damage or exceptionally grave damage to national security, the information could not possibly fall within the public domain.

Even the government concluded that classified information was necessarily outside the public domain, and eliminated its burden of proof for this element of the offense. At the close of the government's case Mr. Gowadia moved for acquittal. ER3, 38-40; CR 719, 771. As to Counts 2, 12, 13 and 14, Gowadia argued that the government failed to prove beyond a reasonable doubt that the technical data at issue was not in the public domain. ER3, 39-40. The government agreed "[w]e strongly, of course, agree that we have not met the public domain burden." ER3, 41. The government argued that because

substantial evidence demonstrated that Gowadia provided classified information, "the public domain is not implicated". ER3, 41-42.

As is readily apparent from the above misunderstanding of the government, the jury also needed additional guidance instructing them that "technical data" containing classified information did not eliminate the government's burden. That instruction would have advised the jury that:

> Even if you find that the technical data at issue contains classified information, or is marked classified, or secret, or top secret, the government must still prove beyond a reasonable doubt that the technical data is not in the public domain.

Without the guidance this proposed jury instruction would provide, a reasonable juror could find that "classified technical data", and especially data classified as "secret" or "top secret", could not, by definition, be available in the public domain.

(2) The USML.

A similar issue impacts the instruction regarding the USML. Count 2 of the Indictment alleged that Mr. Gowadia exported to China technical data relating to an exhaust nozzle for a cruise missile designed to reduce its infrared signature. ER8, 145-146. Counts 12, 13 and 14 alleged export of technical data related to the B-2 aircraft survivability. ER8, 157-159.

The instructions informed the jury that the technical data at issue related to Category VIII of the USML concerning aircraft for military purposes, and Category XIII of the USML concerning hardware and equipment for military application associated with signature control design methodology. ER1, 29-30. Regarding the USML, the instructions stated: "[i]n the [USML] the President designated categories of defense articles, defense services, and technical data which cannot be exported from the United States without a license issued by the United States Department of State." ER1, 29.

This instruction impacted Count 2 that alleged Mr. Gowadia exported to China the design, development, testing and analysis of an exhaust nozzle to reduce the infrared heat signature of a PRC cruise missile. ER8, 145-146. Gowadia's expert Glenn Varney testified at trial that services and data concerning Gowadia's exhaust nozzle work in PRC had been discussed in publically disseminated papers for decades. ER2, 177-210. If the jury evaluated Gowadia's design, development and testing of the exhaust nozzle as falling within the public domain, then, on the one hand, the instructions required a verdict of acquittal. 22 C.F.R. § 125.1; *Posey*, 864 F.2d at 1492.

On the other hand, any finding of "in the public domain" would have conflicted with the jury instruction that the president had already determined that

technical data falling under the USML could not be exported from the United States without a license. ER1, 29-30.

Therefore, a reasonable juror could have found that because the technical data fell within Categories VIII and XIII of the USML, regardless of the availability in the public domain, he or she must convict because the president has already decided that the data could not be exported.

The instructions for Counts 2, 12, 13 and 14 should have clarified that:

> Even if you find that the defense services and technical data at issue fall within Categories VIII and XIII of the USML, the government must still prove beyond a reasonable doubt that the technical data is not in the public domain

Failure to include such an instruction was plain error.

d. The Plain Error Affected Mr. Gowadia's Substantial Rights, And The Fairness, Integrity, Or Public Reputation Of The Judicial Proceedings.

The Due Process Clause of the Fifth Amendment forbids the government from depriving an accused of liberty unless it proves beyond a reasonable doubt every element of the charged offense. *Winship*, 397 U.S. at 364, 90 S.Ct. at 1072-73 . Jury instructions affect substantial due process rights if they relieve the government of the burden of proving every element of the offense beyond a reasonable doubt. *Carella v. California*, 491 U.S. 263, 265, 109 S.Ct. 2419,

2420, 105 L.Ed.2d 218 (1989). Further, the Fifth and Sixth Amendments guarantee every criminal defendant the right to a jury determination of every element of a crime beyond a reasonable doubt. *Apprendi,* 530 U.S. at 476-77, 120 S.Ct. at 2355-56. However, the jury instructions at issue failed to fulfill these undisputed requirements, thus depriving Mr. Gowadia of his constitutional rights to due process and a fair jury trial. His convictions must be vacated.

The issue whether Mr. Gowadia was accorded his Fifth Amendment right to proof of every element of the charged offense depends upon the way in which a reasonable juror could have interpreted the instruction. *Francis v. Franklin*, 471 U.S. 307, 315, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344 (1985). Here, a reasonable juror could have concluded that if the "defense services and technical data" involved classified information or were listed in the USML, then he or she was to disregard testimony and evidence concerning Gowadia's public domain defense, and return a verdict of conviction. In the alternative, a reasonable juror could have believed Gowadia's public domain defense, but still convicted him of the AECA offenses given the instructions that suggested that classified information was by definition outside the public domain, and likewise data and items enumerated in the USML. In this way the instructions had the effect of "omitt[ing] an element of the offense as surely as if the district court had failed to

mention the element altogether." *United States v. Stein,* 37 F.3d 1407, 1410 (9th Cir. 1994).

Jury instructions that have "reduce[d] the level of proof necessary for the Government to carry its burden . . . [are] plainly inconsistent with the constitutionally rooted presumption of innocence . . . ." *Cool v. United States*, 409 U.S. 100, 104, 99 S.Ct. 354, 357, 34 L.Ed.2d 335 (1972). Such directions "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." *Carella*, 491 U.S. at 265, 109 S.Ct. at 2420. This error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Consequently, this Court must reverse on plain error.

D. Concerning the AECA Offenses under Counts 12, 13 and 14, the Jury Instructions Unconstitutionally Omitted the Government's Burden to Prove That the Technical Data at Issue Was Not Basic Marketing Information.

1. Standard of Review.

Where the defendant did not object to the instruction, review is for plain error. *Bear*, 439 F.3d at 568.

2. Discussion.

a. Plain Error.

(1) Mr. Gowadia's Marketing Statements.

Mr. Gowadia relies upon the description of the AECA, ITAR and the USML previously set forth in Section VII.C.2, as well as the definition of defense articles and technical data. Here, Gowadia focuses on the marketing exemption in the definition of technical data. Technical data "does not include . . . basic marketing information on function or purpose or general system descriptions of defense articles." 22 C.F.R. §120.10(a)(5).

Recently, the Court considered this same issue in *United States v. Chi Mak,* 683 F.3d 1126 (9th Cir. 2012). This Court found that Chi Mak failed to proffer as a defense that the information in the charged documents was marketing information and therefore, the trial court was under no obligation to include the exceptions in its instructions. *Id.* at 1139. Unlike that case, here Mr. Gowadia proffered this defense theory and evidence to support it.

The Indictment alleged that Mr. Gowadia exported "classified technical data" concerning correspondence to Busch of the Swiss Ministry of Defense (Count 12), to Bar Avi in Israel (Count 13), and Hipp in Germany (Count 14). ER8, 157-159. In each communication Gowadia sought to market his AIRSS system. ER2, 59, 91-92. His focus in the Busch letter was marketing the AIRSS

to protect the Swiss TH-98 transport helicopters. ER6, 75-77. His focus in the email to Hipp, and in the presentation to Bar Avi, was marketing the AIRSS to protect civilian aircraft. ER6, 78-84.

Mr. Gowadia's marketing pitch was based upon the admittedly sham claim that the AIRSS was integrated into the B-2 design, and was effective in protecting the B-2 from missile attack. ER2, 91-92. Additionally, the marketing effort included fabricated B-2 attributes, including a fictional B-2 lock-on range. ER2, 44-45. In the Busch letter Gowadia stated:

> the results [of AIRSS] are based on actual measurements. B-2 flies [redaction] against the world's worse threats [redaction]. For lowest signatures ever achieved for RCS and IR, the performance penalty was only 1 percent based on measurements.

ER4, 18-19; ER6, 76.

In the Bar Avi presentation, Gowadia represented that the:

> most famous example of the aircraft incorporating this technology [AIRSS] is USAF B-2 bomber, where the measured reduction was greater than %-12 %, which allow the aircraft to fly [redacted].

ER6, 81 (underline in original).

In the email to Hipp, Gowadia promised that the:

> AIRSS has the capability to eliminate the MANPADS threat to within less than M - 3 (flight test data on B-2 indicated that AIRSS reduced the lock-on range of the most advanced heat seeking missile from M - 4 to less than M - 3 ...).

ER6, 82.

Mr. Gowadia and his experts at trial testified that the B-2 representations concerning lock-on range were "meaningless" (ER2, 62-63, 133-134, 147-148, 155, 223), "preposterous" (ER2, 147), "ridiculous" (ER2, 124-125, 152), and Gowadia was simply trying to sell his AIRSS system in other countries. ER2, 221-222. The B-2 had no lock-on range. ER2, 146. Even if it did, aerospace engineering expert Glenn Varney explained that the lock-on variables Gowadia provided could not function within the missile's kinematic zone. *See supra*, at 84-85.

Likewise, Mr. Gowadia testified that the B-2 representations were meaningless, and "strictly a marketing statement." ER2, 59, 91-92. He "made up the numbers" for the B-2 lock-on range believing the numbers were so low people would know they were not real. ER2, 44-45. Furthermore, Gowadia testified that "anybody looking at it would know it's not [a] realistic number". ER2, 49; *and see* ER2, 36, 42, 44-45, 62-63. Gowadia further explained that he was trying to sell the AIRSS system, and "wanted to make it look really unbelievable". ER2, 91. He did not believe this to be a criminal violation of AECA because he understood ITAR did not require a license a license for marketing information. ER2, 50.

(2) The Relevant Jury Instructions.

To be sure, the jury instructions defining "technical data" set forth the marketing material exemption:

> this definition does not include information concerning general ... information in the public domain as defined in these instructions. It also does not include ***basic marketing information on function or purpose or general system descriptions of defense articles***.

ER1, 27 (emphasis added).

However, the instructions concerning Counts 12, 13, and 14 eliminated the marketing exemption for technical data because it informed the jury, in relevant part, that under the AECA and ITAR:

> ... the government must prove each of the following four elements beyond a reasonable doubt:
>
> > First, on or about the dates charged in the indictment, the defendant exported or caused to be exported technical data on the [USML], with all of you agreeing as to the technical data exported; and
> >
> > Second, the defendant failed to obtain a license from the Department of State to export the technical data; and
> >
> > Third, the defendant acted willfully; and
> >
> > Fourth, the technical data was not in the public domain.

ER1, 33-34. As to the fourth element, by these instructions the government only had to prove that the information was not in the public domain as provided in the

fourth element.

That was not enough. Section 120.10(a)(5) requires as a matter of law that the government prove beyond a reasonable doubt that the information Mr. Gowadia attempted to export was not basic marketing information on function or purpose, or general system descriptions of defense articles. 22 C.F.R. §120.10(a)(5). The fourth element should have included language, in addition to technical data being outside the public domain, that it could not be basic marketing information on function or purpose, or general system descriptions of defense articles. Pursuant to § 120.10(a)(5), if the correspondence underlying Counts 12, 13 and 14 met either of these elemental criteria then those documents could not be export-controlled. The instructions eliminated the government's burden of proof in this regard, which was error that was plain.

b. The Plain Error Affected Mr. Gowadia's Substantial Rights, And The Fairness, Integrity, Or Public Reputation Of The Judicial Proceedings.

The Due Process Clause of the Fifth Amendment forbids the government from depriving an accused of liberty unless it proves beyond a reasonable doubt every element of the charged offense. *Winship*, 397 U.S. at 364, 90 S.Ct. at 1072-73. The Fifth and Sixth Amendments guarantee every criminal defendant the right to a jury determination of every element of a crime beyond a reasonable

doubt. *Apprendi*, 530 U.S. at 476-77, 120 S.Ct. at 2355-56. Mr. Gowadia was deprived of his constitutional rights to due process and a jury trial, and therefore, his convictions must be vacated.

The error seriously affected the fairness, integrity and public reputation of judicial proceedings. Section 120.10 specifically defines what technical data is not by declaring technical data "does not include . . . information in the public domain . . . . It also does not include basic marketing information on function or purpose, or general system descriptions of defense articles." 22 C.F.R. § 120.10(a)(5). As the government was required to prove beyond a reasonable doubt that the documents in Counts 12, 13 and 14 were outside the public domain, it likewise was required to prove that the documents were not basic marketing information on function or purpose, or general system descriptions of defense articles, in order to find Mr. Gowadia criminally liable under § 2778. Only in this way would § 2778 and ITAR uphold their intended purpose.

As the regulation is written, there is no logical reason to require proof that the information is outside the public domain, while not requiring proof of lack of a marketing purpose. Conversely, there is no logic to requiring proof of the lack of marketing, while not requiring proof that the information is outside the public domain. The exemptions are found in the subsection that begins by announcing

the intent of the paragraph as "does not include…" 22 C.F.R. § 120.10(a)(5). By law all the exceptions described should have been considered by the jury.

The district court was obligated to instruct the jury that the government had to prove beyond a reasonable doubt that the information was not basic marketing – in addition to being outside the public domain. The instructions, however, only included the public domain exemption. This was erroneous because it effectively omitted an element of the offense. The error has constitutional magnitude because it relieved the government of its burden to prove all the elements of the offense beyond a reasonable doubt, and therefore, denied Mr. Gowadia the right to a jury trial pertaining to all the elements of the charges. Consequently, the convictions under Counts 12, 13 and 14 must be reversed.

VIII. CONCLUSION.

This Court should reverse Mr. Gowadia's convictions under 22 U.S.C. § 2778, 18 U.S.C. § 794(a) and § 793(e) because:

1. In response to the Motion to Suppress, the district court made clearly erroneous findings of fact as to detention, and under *de novo* review erred in its custody determination and in its construction of 18

U.S.C. § 3501;

A. the errors were not harmless because they permitted the district court to erroneously conclude that Mr. Gowadia was not detained until his official arrest on October 26, 2005;

B. the errors were not harmless because they allowed the government to admit into evidence at trial the October 2005 statements that supported the elements of criminal intent under the AECA counts and the Federal Espionage Act counts.

2. The district court's Minute Order prohibiting Mr. Gowadia from contesting classification of pertinent documents and evidence used against him by the government to secure the convictions was, as a matter of law, erroneous, because derivative classification was at issue and is regularly subject to judicial review, albeit with deference.

This Court should reverse Mr. Gowadia's convictions under 22 U.S.C. § 2278 because:

1. The jury instructions eliminated the government's burden of proving

beyond a reasonable doubt that the technical data it accused Mr. Gowadia of transmitting or communicating was not in the public domain;

2. Concerning Counts 12, 13 and 14, the jury instructions eliminated the government's burden of proving beyond a reasonable doubt that the technical data it accused Mr. Gowadia of communicating was not marketing information.

This case should be remanded for further proceedings consistent with this Court's decision as requested above.

DATED: Honolulu, Hawai`i, November 9, 2012.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA

Attorneys for Defendant-Appellant
Mr. Noshir S. Gowadia

STATEMENT OF RELATED CASES

Upon information and belief, there are no other cases in this Circuit, or elsewhere, relating to the defendant-appellant and the matters discussed herein.

DATED: Honolulu, Hawai`i, November 9, 2012.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA

Attorneys for Defendant-Appellant
Mr. Noshir S. Gowadia

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 11-10058

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (check appropriate option):

[] This brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5)and (6). This brief is ____ words, ____lines of text or ____ pages, excluding the portions exempted by Fed.R.App.P.32(a)(7)(B)(iii), if applicable.

[] This brief complies with the enlargement of brief size granted by court order dated _____ . The brief's type size and type face comply with Fed. R.App. P. 32(a)(5) and (6). This brief is _____ words, _____lines of text or ____ pages, excluding the portions exempted by Fed.R.App.P. 32(a)(7)(B)(iii), if applicable.

[] This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 32-2 and is _____ words, _____ lines of text or _____ pages, excluding the portions exempted by Fed. R.App.P. 32(a)(7)(B)(iii), if applicable.

[x] This brief is accompanied by a motion for leave to file an oversize brief pursuant to Circuit Rule 29-2(c)(2) or (3) and is 28,897 words, 2839 lines of text or 130 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

[] This brief complies with the length limits set forth at Ninth Circuit Rule 32-4. The brief's type size and type face comply with Fed.R.App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: /s/ Georgia K. McMillen

Date: November 9, 2012

[1] If filing a brief that falls within the length limitations set forth at Fed. R. App. P.32(a)(7)(B), use Form 6, Federal Rules of Appellate Procedure.

C.A. No. 11-10058

CERTIFICATE OF SERVICE
When All Case Participants Are Registered for the
Appellate CM/ECF System

I hereby certify that on (date) November 9, 2012, pursuant to this Court's Order of May 17, 2012, I filed the foregoing with Winfield S. "Scooter" Slade, Classified Information Security Officer, United States Department of Justice, or his designee, as the designee of the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit.

I certify that all participants in the case are registered CM/ECF users, but that service will be accomplished by hand delivery as instructed by Classified Information Security Officer Slade.

Signature: /s/ Harlan Y. Kimura

****

CERTIFICATE OF SERVICE
When Not All Case Participants Are Registered for the
Appellate CM/ECF System

I hereby certify that on (date) _____, I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the system who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature: _____