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 Honorable Susan Oki Mollway, Chief Judge

Reply Brief for the Defendant Appellant Noshir S. Gowadia

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ARGUMENT

A. Under 18 U.S.C. § 3501(c) the District Court Erred in Denying Gowadia's Motion to Suppress His October 2005 Statements.

1. The Government Does Not Dispute The Dispositive Error in the District Court's Conclusions of Law Concerning Detention.

The threshold question under this issue is whether the defendant-appellant Noshir S. Gowadia ("Gowadia") was detained pursuant to § 3501(c). Gowadia argues in the opening brief that the district court's order denying the motion to suppress his confession (the "Order") applied an irrelevant definition of "detention" from the Fifth Circuit decision in *United States v. Doe*, 882 F.2d 926, 927 (5th Cir. 1989), involving a juvenile's detention in an institution. OB[1] 33-34. Relying on *Doe* the district court concluded that "detention" under § 3501(c) refers to physically restrictive custody, or custody in an institution. *See* ER1, 84, *quoting Doe*, 882 F.2d at 927.

This legal conclusion fails to apply § 3501(c)'s broad use of the term detention: "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

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[1] As used herein "OB" refers to Gowadia's opening brief; "AB" refers to the government's answering brief; "ER1", "ER2", "ER3", "ER4", "ER5", "ER6", "ER7" and "ER8", refer to Gowadia's excerpts of record; "GER" refers to the government's supplemental excerpts of record; "SER" refers to Gowadia's Supplemental Excerpts of Record.

law-enforcement officer or law-enforcement agency ..." 18 U.S.C. § 3501(c). Unlike *Doe*, § 3501's definition neither requires confinement in an institution nor views detention as a form of "physically restrictive custody" as, for example, the application of handcuffs.

Plaintiff-appellee the United States of America ("government") does not dispute Gowadia's argument that the district court reached an erroneous legal conclusion by adopting the Fifth Circuit's irrelevant definition of "detention" in the Order. Indeed, the government's answering brief is silent on this issue, electing not to discuss or even cite *United States v. Doe*. *See* AB, Table of Authorities.

The district court's application of the wrong definition concerning this threshold issue is dispositive. In selecting the wrong law the district court failed to apply the correct standards for analyzing the detention question:

- Ninth Circuit authority requiring consideration of the totality of relevant circumstances from the perspective of a reasonable person standing in Gowadia's shoes and whether he felt at liberty to terminate the interrogation and leave (*see* OB 32, *quoting United States v. Hudgens*, 798 F.2d 1234, 1236 (9th Cir. 1986)); and
- the five factors used to analyze detention identified in *United States v.*

Wauneka, 770 F.2d 1434, 1438 (9th Cir. 1985) (*see* OB 32).

Under *de novo* review[2] given the government's election not to dispute this dispositive legal error, as well as its concession that any error in failing to suppress the Gowadia's statements cannot be deemed harmless (AB 77), the Order must be reversed and all convictions based upon those statements and confessions vacated.

2. The Government Does Not Dispute The Essential Facts Demonstrating Detention under § 3501(c).[3]

Ninth Circuit precedent provides five nonexclusive factors to consider in determining the detention question: (A) the language used to summon the individual; (B) the extent to which the defendant is confronted with evidence of guilt; (C) the physical surroundings of the interrogation; (D) the duration of the

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[2] *United States v. Wilson*, 838 F.2d 1081, 1083 (9th Cir. 1988); *United States v. McCarty,* 648 F.3d 820, 824 (9th Cir. 2011).

[3] Further, the government does not dispute as clearly erroneous a series of ancillary district court findings as to Gowadia's detention in Honolulu that are not supported by the record: (1) FBI Agent Thatcher Mohajerin bought Gowadia breakfast in the federal building cafeteria before each interrogation session (OB 48); (2) the sessions from October 18 to 22 and on October 24, 2005, concluded before 4:30 p.m. (OB 48); (3) Gowadia "often" made telephone calls from the FBI interrogation room (OB 49); and (4) the agents stopped interrogation whenever Gowadia asked to use the phone (OB 49). These erroneous findings may appear of minimal consequence; however, when considered with the other erroneous findings of fact, they demonstrate the district court's pervasive misstatement of the record.

detention; and (E) the degree of pressure applied to detain the individual.

Wauneka, 770 F.2d at 1438; *see also United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002).

A. Language.

The Order reads:

> "The Court finds that the Government Agents did not restrict Defendant's 'liberty' when conducting the interview on Thursday, October 13, 2005. [Citation omitted]. Agent Mohajerin clearly advised Defendant, prior to the start of the interview, that he could "disregard the questions and walk away." (*See* Government Hearing Ex. 8, Advice of Rights form, dated October 13, 2005.)"

ER1, 88. While the district court appears to be quoting the Advice of Rights form, that form in fact contains no language advising Gowadia that he could disregard questions and walk away. At best the form advised Gowadia he could stop answering questions, but it certainly did not state he could disregard questions and walk away. *See, e.g.,* ER8, 94 (Advice of Rights form[4]).

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[4] "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

The government does not dispute as clearly erroneous this unsupported finding of the district court. Rather, downplaying this critical issue it argues: "[i]t should not matter, then, that the advice-of-rights form that Agents Mohajerin and Williams used did not articulate Gowadia's option to get up and leave". AB 71 n.24 (internal marks and brackets omitted). The district court's reliance on this unsupported finding of fact, however, cannot be minimized. The Advice of Rights form is referenced immediately after the district court's determination, clearly representing the basis for its finding that the agents did not restrict Gowadia's liberty.

Additionally, reliance on the form's actual *Miranda* warnings to support the district court's free-to-leave finding is debatable. Recent case law indicates that advisement of *Miranda* rights demonstrates a ***loss of freedom***. In *United States v. Barnes* a federal agent testified that: "when you Mirandize somebody ... they think they're under arrest because they equate being Mirandized with being under arrest". *United States v. Barnes*, 713 F.3d 1200, 1205 (2013).[5]

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answer questions without a lawyer present."

ER 8, 94.

[5] *And see, Guam v. Ichiyasu*, 838 F.2d 353, 358 (9th Cir. 1988) (the reading of *Miranda* warnings is an action normally attendant to arrest); *United States v. Morgan,* 2013 WL 3491418, 3 (9th Cir. 2013*)* (same).

From the perspective of law enforcement, "[a]n officer's obligation to administer *Miranda* warnings attaches ... only where there has been such a restriction on a person's freedom as to render him in custody." *United States v. Crawford*, 372 F.3d 1048, 1059 (9th Cir. 2004) (ellipses in original; internal quotation marks omitted), *citing Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (per curiam) (*quoting Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam)). Either way you see it – through the suspect's eyes or those of law enforcement – the *Miranda* warnings in the Advice of Rights form indicate that the agents detained Gowadia.

To corroborate the district court's finding that the agents told Gowadia he could leave, the government argues that "Gowadia was told he could leave and *did* leave". AB 32 (italics in original). Concerning October 13, 2005, however, the record clearly shows that Gowadia did not leave his home, and the agents' notice that he could leave is questionable. *See* OB 36, 40-41; ER5, 5-6; ER7, 118-119; ER8, 26-27, 37, 38. Concerning interrogation at the Maui Police Station and the FBI offices in Honolulu, while Gowadia left those venues after daylong interrogation sessions, under the unique circumstances of this case he no longer possessed his liberty because:

- everything related to his business had been confiscated and unless he

complied with the agents' instructions his livelihood and ability to support himself would be lost;

- his passport and foreign currency had been confiscated, preventing him from going on previously arranged business travel;
- the agents threatened to again interrogate his adult children in California, thus pressuring him to cooperate;
- he admitted committing serious crimes, supporting the inference that he knew he would be held accountable; and
- the agents demanded that he participate in further interrogation.

OB 43-46, *citing* ER6, 169-170; ER7, 7, 86, 128.

The government relies on *United States v. Sanchez* wherein the Eighth Circuit considered six nonexclusive factors to determine whether an interrogation was custodial in nature. AB 60 n.21, *citing United States v. Sanchez*, 676 F.3d 627, 630 (8th Cir. 2012). The first factor asks three questions similar to the language factor in *Wauneka* and *Kim*: Was the suspect informed at the time of questioning that the questioning was voluntary? Was he free to leave or request the officers do so? Was he told he was not considered under arrest? *Id.*

The first *Sanchez* factor weighs in Gowadia's favor.[6] While the Advice of Rights form could be read to indicate that the questioning was voluntary, the totality of the circumstances discussed herein and in the opening brief show that Gowadia had no choice but to submit to the interrogation. Likewise, whether or not the agents denied that he was under arrest, the totality of the circumstances set forth *supra,* and in the opening brief, clearly indicated to Gowadia that he was being detained.

B. Confrontation with Evidence of Guilt.

The government does not dispute that:

- during interrogation from October 14 to 24, 2005, FBI Agent Thatcher Mohajerin and Air Force Office of Special Investigations Agent Joseph Williams confronted Gowadia with evidence of guilt of serious crimes, to which he provided a detailed written and verbal confession (*see, e.g.*, OB 43, *citing* ER6, 175-176; ER7, 4, 6, 125-126, 141; ER8, 55; AB 72); and
- the FBI set up equipment in the interrogation room that enabled five

[6] With the exception of the sixth *Sanchez* factor – was the suspect placed under arrest at the termination of the questioning – the remaining five factors weigh in Gowadia's favor. *See id.* The agents did not formally arrest Gowadia until October 26, 2005.

Air Force experts to secretly monitor the sessions and help Mohajerin and Williams confront Gowadia with evidence of guilt and extract his detailed confession and intelligence. *See, e.g.*, OB 55, *citing* ER6, 184; ER7, 110-113; AB 40-42.

C. Physical Surroundings of Interrogation.

The government does not dispute that:

- the FBI controlled all aspects of Gowadia's environment, including arranging and paying for his transportation and accommodations in Honolulu with a credit card in a fake name (*see* OB 47, *citing* ER7, 9-10, 19, 94-95, 104, 129-130);
- on October 20, 2005, the FBI tripled the size of the four-member surveillance team, sending to Honolulu an additional seven agents to provide 24-hour surveillance (*see* OB 48, *citing* ER3, 130-31; ER6, 201); and
- Agent Williams wanted to know where Gowadia was at all times (*see* OB 52, *citing* ER6, 202), with the surveillance team ordered to notify both Williams and Mohajerin if Gowadia left his hotel room, met anyone or "did anything" (OB 48, *citing* ER7, 100).

Under the second *Sanchez* factor the question is whether the suspect

possessed unrestrained freedom of movement during questioning. *Sanchez*, 676 F.3d at 630. At all three interrogation venues the agents never permitted Gowadia freedom of movement. In his home on October 13, neither Gowadia nor his wife could move about freely while 15 armed agents dominated the premises in order to execute the warrant. OB 36, *citing* ER7, 119; ER8, 25-27. At the Maui Police Station, and the following week at the FBI offices in Honolulu, law enforcement officers accompanied Gowadia on bathroom breaks and in Honolulu to the cafeteria for lunch.[7] OB 44, *citing* ER7, 55, 127, 134. Further, in Honolulu 11 surveillance agents monitored Gowadia's every move, reported his activities, his communications and "anything" he did. OB 48; ER7, 100. While they did not have the direct authority to arrest Gowadia according to Mohajerin (ER8, 48), they certainly had the authority and duty to trigger the arrest process.

D. Duration of Interrogation.

The government does not dispute that:

- in Honolulu, the daily sessions lasted from six to seven hours; the session at Gowadia's home on October 13 lasted more than five hours; and the session the next day at the Maui Police Department

[7] Agent Williams testified that Gowadia ate lunch alone after being taken to the cafeteria. ER7, 134.

lasted more than six hours (*see* OB 62-63).[8]

E. Degree of Pressure Applied to Detain.

The government does not dispute that:

- in executing the search warrant on October 13th the agents seized and confiscated all business equipment and records essential for Gowadia to operate his international consulting business (*see* OB 44);
- as a result of that seizure, Gowadia could not operate his business, generate income, and support himself and his wife (*see* OB 44-45, 64);
- after this confiscation, which included his passport and foreign currency, Gowadia believed he was not free to go on a previously scheduled overseas business trip (*see* OB 45, 54);
- Gowadia believed he needed the agents' permission to send a facsimile concerning the already scheduled business trip (*see* OB 54);
- before meeting the agents on October 14, Gowadia spoke with his two adult children in California, Tanzi and Ashton, and learned they both had been subjected to unannounced interrogations at their homes

[8] The government disputes that the session on October 24 continued for a full day. *See* AB 43-44.

the night before by FBI agents concerning his associates and activities, and a joint checking account he held with Tanzi (*see* OB 45);

- Agents Mohajerin and Williams told Gowadia that the FBI would likely interrogate his children again (*see* OB 45); and
- in 2004 Gowadia had two encounters with federal officers at the Honolulu International Airport during which he was ***not*** free to leave while they questioned him and searched his luggage (*see* OB 53).

Three of the *Sanchez* factors relate to pressure applied to detain the suspect. The third factor asks whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions. *Sanchez*, 676 F.3d at 630. Here the FBI initiated contact with Gowadia on October 13, 2005, when they executed the search warrant. Subsequent encounters at the Maui shopping mall, the Maui Police Station and the Honolulu FBI offices, were not voluntary because Gowadia was caught between the proverbial "rock and a hard place".[9] Failure to submit to the agents' demands would: (1) terminate his ability to support himself and his wife given the confiscation of his business; (2) prevent

[9] For a recent instance of this Court's use of this colloquialism see *E.E.O.C. v. Peabody Western Coal Co.,* 610 F.3d 1070, 1082 (9th Cir. 2010).

previously arranged business travel; (3) subject his children to further interrogation; (4) continue the government's surveillance; and (5) continue the airport searches. Under these circumstances, Gowadia's acquiescence to the agents' requests that he respond to questioning on Maui and in Honolulu cannot be considered voluntary. The cases relied upon by the government are factually distinct from this case because they are grounded in the defendants' voluntary cooperation.[10]

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[10] *See* AB 69-73, *citing*: *Mathiason*, 429 U.S. at 492-94 (defendant was not in custody as he voluntarily went to the police station, was immediately informed he was not under arrest and gave a half-hour interview during which he confessed to burglary, after which he left the police station without hinderance); *United States v. Norris*, 428 F.3d 907, 912 (9th Cir. 2005) (defendant not in custody when he gave inculpatory statements to police, where he voluntarily accompanied officers to the police station, was told that his cooperation was voluntary, he could terminate the interview at any time and he was not under arrest, and where he was never restrained in any way and upon completion of the interview was taken home by the officers); *Crawford*, 372 F.3d at 1060 (no custodial interrogation where defendant agreed to go to the FBI office, was told that he was not under arrest and free to leave, and was returned home at the end of the interview); *Lucas v. United States*, 408 F.2d 835, 836 (9th Cir. 1969) (record did not indicate custody or loss of defendant's freedom, i.e., that he disbelieved officer's statement that he was not under arrest, and no expression by defendant to indicate that he considered himself detained or in custody); *Hudgens*, 798 F.2d 1234 (defendant was not in custody when he made incriminating statements about bank robbery to FBI agents, where he initiated interrogation by calling FBI to offer robbery information, he was not a suspect prior to time he initiated conversation, he was not physically restrained, he was not told that he was not free to leave his vehicle where statements were made and that he was not asked any questions until he identified himself as one of persons wearing a ski mask in bank surveillance photographs).

The fourth factor considers whether deceptive stratagems were employed during questioning. *Id.* The government's description of the interrogations as "buil[ding] a very good rapport", and that the agents were "cordial" and "friendly" grossly mischaracterizes the circumstances. AB 38-39. For the government Gowadia was a grave threat to national security, which threat included endangering the nation's premier military armament, the B-2 stealth bomber. AB 19, 26, 36, 40, 42, 63. Their interrogation included a secret team of Air Force experts who monitored the sessions in order to assist the agents. OB 55, *citing* ER6, 184; ER7, 110-111. Further, Agent Williams 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 record strongly supports the inference that whatever "rapport" and "cordial" banter there may have been, it represented a deceptive stratagem. *Sanchez*, 676 F.3d at 630. The government's somber purpose was to extract not only intelligence, but a detailed confession to potential charges that carried the death penalty. *See* 18 U.S.C. § 794(b).

The fifth factor focuses on whether the atmosphere of the questioning was police controlled. *Sanchez*, 676 F.3d at 630. Fifteen armed officers overwhelmed

Gowadia's home on October 13th, then dominated the premises for the next eight hours. OB 35-36, *citing* ER7, 119; ER8, 15-16, 25-27. The following day Mohajerin and Williams interrogated Gowadia at the Maui Police Station where a police officer was stationed outside the room and Gowadia was escorted each time he left the room. OB 44, *citing* ER7, 127. The same custodial procedure was employed at the FBI offices in Honolulu. The record shows that law enforcement dominated all three venues.

3. The Government Concedes That the Prolonged Nine-Day Interrogation Was for the Purpose of Extracting a Confession and Intelligence.

Delay in presentment 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). Any confession thereby obtained must be suppressed. *See Upshaw v. United States*, 335 U.S. 410, 414, 69 S.Ct. 170, 172, 93 L.Ed. 100 (1948).

The government concedes that the marathon interrogation was meant to secure a detailed confession and extract intelligence:

- "They [the agents]… needed to discover what classified information [Gowadia] had disclosed, with whom he had shared it, and what

damage the disclosures caused." (AB 63).

The government also concedes in the answering brief that the agents purposely delayed arresting and charging Gowadia in order to interrogate him:

- "the agents declined to formally arrest and charge him before obtaining all the information he might voluntarily give, both for counterintelligence reasons and to ensure conviction for his offenses" (AB 63);
- "They sensibly feared that 'he would [not] talk again' (Br. 74) if they arrested and charged him" (AB 64) (brackets in original, *citing* OB as "Br"); and
- "'there are intelligence opportunities beside the arrest that might be utilized with a person like Mr. Gowadia'" (AB 64, *quoting* Mohajerin).

Further, the government does not dispute that the agents:

- believed Gowadia would stop talking if they formally arrested him (s*ee* ER7, 89);
- employed a method of interrogation designed to solicit statements from individuals (*see* OB 66, *citing* ER6, 161-162);
- used the Advice of Rights form as a ploy to extract a confession (*see*

OB 66, *citing* ER6, 159-160); and

- believed that in questioning Gowadia they were reasonably likely to elicit incriminating responses. (*See* OB 72-74, *citing* ER6, 202, 204, 207-208, 230-231, 240; ER7, 64, 87, 89, 134, 136; ER8, 33-34).

To justify engaging in this prohibited practice the government refers to: (a) the multi-agency decision to arrest Gowadia that included the United States Attorney and the Department of Justice's National Security Division; (b) the need to protect "important internal deliberations"; and (c) executive prerogative concerning charging "a person like Mr. Gowadia". AB 64, *quoting* Mohajerin, *citing* GER 715.

The government further relies on non-binding dicta concerning the importance of confessions in the pursuit of truth in criminal justice. *See* AB 63-64, *citing Moran v. Burbine,* 475 U.S. 412, 426, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) (confessions are essential to society's compelling interest in finding, convicting, and punishing those who violate the law); *McNeil v. Wisconsin*, 501 U.S. 171, 181, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) (same). More dicta is provided concerning executive power and discretion under the Constitution to enforce federal criminal laws. AB 64-65, *citing United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (the Attorney General and

United States Attorneys have broad discretion to enforce the Nation's criminal laws). According to the government these cases support carving out an exception to the prohibition against delay in presentment for the purpose of interrogation: this Court should permit indefinite delay to interrogate in cases like this one involving arms-control violations and espionage, a multi-agency national investigation and "a person like Mr. Gowadia". *See* AB 63.

The Supreme Court has addressed such proposed limits to due process. In balancing the competing interests between the autonomy the government deems necessary, and the process a citizen is due before he is deprived of a constitutional right, the scales of justice tip in favor of individual rights. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529-33, 124 S.Ct. 2633, 2646, 159 L.Ed.2d 578 (2004). (citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker).

> "The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164–65, 83 S.Ct. 554, 9 L.Ed.2d

644 (1963). "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile". *United States v. Robel*, 389 U.S. 258, 264, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967). The government's proposal – enabling interrogation for an indefinite period and admission into evidence of the resulting confession – fails to strike the proper constitutional balance.

4. Section 3501(c) Governs the Appeal of the Order Denying the Motion to Suppress, Not Rule 5(a) of the *Federal Rules of Criminal Procedure.*

The motion to suppress was based upon § 3501(c), which governs the admissibility of confessions. ER8, 120-121; SER 189-204. The district court referred only ***once*** in the Order to Rule 5(a) of the *Federal Rules of Criminal Procedure* ("Rule 5"), but otherwise clearly framed its analysis under § 3501, quoting subsections (c) and (d), and Supreme Court case law applying that section's salient terms. *See* ER1, 82-85. The appropriateness of focusing on § 3501(c) in this appeal could not be more clearly established in the record. *And see* OB 5, 20, 27-31, 33, 34, 63, 64, 68, 69, 76.

The government argues, however, that "[s]ection 3501(c) do[es] not apply", and the detention issue is governed by Rule 5(a). AB 67. Further, it claims that, "[Gowadia] renews only his contention that the government did not promptly

present him to a magistrate judge after his arrest, as required by Rule 5(a)..." AB 47, *citing* OB 18- 21, 26-77.[11] This claim is mystifying inasmuch as Gowadia cites § 3501(c) 17 times in the main body of his argument, but cites Rule 5(a) only three times. *See* OB 26-77.

Rule 5(a) concerns curtailing abuse of police power at the time of "arrest" by requiring presentment of the "defendant" to a magistrate judge without unnecessary delay. Rule 5; *and see Mallory,* 354 U.S. at 452, 77 S.Ct. 1356; *McNabb v. United States*, 318 U.S. 332, 343-44, 63 S.Ct. 608, 87 L.Ed. 819 (1943). According to the government, since Gowadia was neither "a defendant" nor under "arrest", pursuant to Rule 5 there could be no delay in taking him before a magistrate judge. AB 51-52.

This focus is irrelevant in answering the questions of detention and delay under § 3501(c), which are:

- was Gowadia detained?
- was his confession made beyond the six-hour safe harbor?
- if yes, then was the delay in presenting him to a magistrate judge reasonable considering the means of transportation and the distance

[11] Further, the government mistakenly argues that Gowadia's reliance on § 3501 is "mostly implicit". AB 31.

to be traveled?

18 U.S.C. § 3501(c).

Further, the government's focus on Rule 5 leads to a misinterpretation of *Alvarez-Sanchez*. *See* AB 54. In that case the Supreme Court reviewed the application of § 3501(c) to a delay between defendant's arrest on state narcotics charges and presentment to a federal magistrate on subsequent federal charges. The issue was whether § 3501(c) required suppression of inculpatory statements to federal agents that were made while the defendant was in custody on only the state charges. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 358-59, 114 S.Ct. 1599, 1604, 128 L.Ed.2d 319 (1994).

The Supreme Court held that § 3501(c) does not apply if the suspect is arrested and in the custody of state or local authorities, on only state or local charges, at the time of the confession. *Id.*, at 352, 114 S.Ct. at 1601. Because Alvarez–Sanchez was in custody on only state charges when he made incriminatory remarks to federal Secret Service agents, § 3501(c) was inoperative and could not justify suppression of his statement. *Id.*

The government posits that: "the Supreme Court reversed [the Ninth Circuit], holding, that, 'plainly, a duty to present a person to a federal magistrate does not arise until the person has been ***arrested*** for a federal offense'." AB 54,

citing Alvarez-Sanchez, 511 U.S. at 358, 114 S.Ct. at 1604 (emphasis added). This attempt to repackage the *Alvarez-Sanchez* holding into an application of Rule 5's arrest provision is misguided. The Supreme Court's holding clearly focused upon the application of § 3501(c). *Id.*, at 352, 114 S.Ct. at 1601. Indeed, the Supreme Court acknowledged the duty to bring a suspect who has been "detained" for a federal crime before a judicial officer. "Until a person is arrested ***or detained*** for a federal crime, there is no duty, obligation, or reason to bring him before a judicial officer ... and therefore, no delay under § 3501(c) can occur." *Id.*, at 358, 114 S.Ct. at 1604 *(*emphasis added; internal quotation marks omitted).[12]

5. Assuming Success on Appeal, the Outcome Warned by the Government Will Not Occur.

The government warns against establishing precedent requiring that "a suspect must be promptly presented to a magistrate judge as soon as he is subject to custodial interrogation or some similarly informal detention from which he does

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[12] *Alvarez-Sanchez* also discussed improper collaboration between federal and state officers. *See Alvarez–Sanchez*, 511 U.S. at 359–60, 114 S.Ct. 1599, 128 L.Ed.2d 319 (improper collaboration between federal and state officers undertaken to delay federal presentment leads to suppression in federal court of any resultant confession). Here, there is no issue concerning arrest or detention of Gowadia by state or local authorities, or improper collaboration between state and federal officers. Thus the government's discussion in this regard is irrelevant. *See* AB 54-55, *citing: Anderson v. United States*, 318 U.S. 350, 356, 63 S.Ct. 599, 87 L.Ed. 829 (1943); *United States v. Rowe*, 92 F.3d 928, 932, 933, n.2 (9th Cir. 1996); *and United States v. Tramontana*, 460 F.2d 464, 466, n.1 (2nd Cir. 1972).

not feel 'free to leave'." AB 49; *and see* AB 51 ("Gowadia reads Sections 3501(c) and (d) to require presentment whenever a suspect is 'in * * * custody' or subject to any kind of 'detention,' even if it falls short of a formal arrest").

Section 3501(c) is written to prevent these scenarios from happening. The statute provides immunity, or safe harbor, against inadmissibility for confessions delivered within six hours of arrest or detention:

> "[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 ... ***shall not be inadmissible solely because of delay in bringing such person before a magistrate judge*** ... 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..."

18 U.S.C. § 3501(c) (emphasis added). Thus, all confessions are admissible notwithstanding arrest or "other detention in the custody of any law-enforcement officer" so long as:

- the confession is found to have been made voluntarily;
- the weight of the confession is left to the jury; and
- the confession was made within six hours following the arrest or other detention.

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 quotation marks omitted). Even if the confession is made after the six-hour window, it remains admissible if the delay in bringing the person before a magistrate is found to be reasonable considering means of transportation and distance to be traveled to the nearest available magistrate judge. *Id.; and see* § 3501(c).

As to whether delay is reasonable or not under § 3501(c), the government fails to take into account long-standing precedent that excludes confessions born of an unreasonable pre-arraignment delay. *See, e.g.*, *United States v. Fouche*, 776 F.2d 1398, 1406 (9th Cir. 1985) ("the district court has the authority to exclude the confession as involuntary, and may do so solely because of the pre-arraignment delay"); *United States v. Manuel*, 706 F.2d 908, 913 (9th Cir. 1983) ("Section 3501(c), by implication, provides that unreasonable pre-arraignment delay can provide the sole basis for a finding of involuntariness, if the delay exceeds six hours."). Thus the answering brief provides no reasonable, administrative basis that impeded prompt presentment of Gowadia to a federal magistrate. *See, e.g., United States v. Garcia-Hernandez*, 569 F.3d 1100, 1106 (9th Cir. 2009) (delay in presentment may not be based upon a desire to interrogate the defendant further, but could withstand judicial scrutiny if due to a shortage of personnel necessary to

process defendant and determine whether he should be criminally charged); *United States v. Gamez*, 301 F.3d 1138, 1143 (9th Cir. 2002) (day-and-a-half delay reasonable due to the unavailability of Spanish-speaking federal agents); *Van Poyck*, 77 F.3d at 289 (weekend delay reasonable and defendant's statements admissible though given outside of § 3501(c)'s safe harbor due to lack of available magistrate).

The government's discussion concerning presentment claims in the immigration context is also not relevant because those cases involve civil detentions for status offenses. *See* AB 57-59, *citing United States v. Cepeda-Luna*, 989 F.2d 353, 358 (9th Cir. 1993) (for civil deportation arrests and detentions under 8 U.S.C. § 1357(a)(2), Rule 5(a) is inapplicable); *United States v. Encarnacion*, 239 F.3d 395, 400 (1st Cir. 2001) (same); *cf. United States v. Sotoj-Lopez*, 603 F.2d 789, 791 (9th Cir. 1979) (federal officers must comply with Rule 5(a) if the alien is being charged with a non-status offense).[13]

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[13] The government relies on dicta in unrelated cases, none of which considered the issues under § 3501(c). In *United States v. Marion* (*see* AB 62) the Supreme Court considered a district court's dismissal of an indictment for lack of speedy prosecution, not presentment-to-magistrate delay. *United States v. Marion*, 404 U.S. 307, 326, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). In *United States v. Lovasco* the Supreme Court considered dismissal of an indictment for pre-indictment delay, not presentment-to-magistrate delay. *See* AB 63, *citing United States v. Lovasco,* 431 U.S. 783, 790-91, 97 S.Ct. 2044, 2049, 52 L.Ed.2d 752 (1977).

6. This Court must Dismiss as Irrelevant to this Appeal the Government's Issue That Waiver of Miranda Rights Equates to Waiver of Prompt Presentment, Which Argument Is – in Any Event – Without Legal Basis.

In signing the Advice of Rights form Gowadia agreed that he was "willing to answer questions without a lawyer present." OB 40, *citing* ER8, 94 (Advice of Rights form). The government argues that Gowadia's waiver of *Miranda* rights equates to waiver of the right to prompt presentment. AB 75-76. This issue is irrelevant to Gowadia's appellate challenge under § 3501(c) and must be summarily dismissed by this Court.

For the sake of argument, however, Gowadia notes the following. First, the case law relied upon by the government to support this premise is either non-binding or unpersuasive. For instance, *United States v. Indian Boy X* is inapplicable because it did not involve § 3501(c) analysis, and the defendant's custody was not an issue during interrogation where he waived his *Miranda* rights and allegedly confessed to murder. *See* AB 75, *citing United States v. Indian Boy X*, 565 F.2d 585, 587 (9th Cir. 1977).

Second, recent Supreme Court and Ninth Circuit precedent questions the soundness of similar cases cited in the answering brief for the proposition that a valid *Miranda* waiver also waives the right to prompt judicial warning of one's

constitution rights. AB 75-76.[14] In *United States v. D.L.* the government argued that the defendant's Miranda waiver permitted a delay for interrogation. *United States v. D.L.*, 453 F.3d 1115, 1124 (9th Cir. 2006). This Court found, however, that even if it permitted "a reasonable period of delay for purposes of interrogation, it would not excuse the additional twenty-one hour delay after interrogation was completed before [the defendant] was presented to a magistrate." *Id.* In *Alvarez–Sanchez* the defendant was arrested on a Friday, on Monday afternoon he waived his *Miranda* rights, but he was not arraigned until Tuesday morning. *United States v. Alvarez-Sanchez*, 975 F.2d 1396, 1398, 1405 (9th Cir. 1992), *rev'd on other grounds*, 511 U.S. 350, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994). The *Miranda* waiver did not impede the Ninth Circuit from addressing the reasonableness of the delay. *See id.*, at 1405.

In *Corley* law enforcement officers arrested the defendant and held him more than nine hours before he executed a *Miranda* waiver, finally taking him to a magistrate almost 30 hours after his arrest. *Corley*, 556 U.S. at 311, 129 S.Ct. at

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[14] *See* AB 75-76: *United States v. Mandley*, 502 F.2d 1103, 1105 (9th Cir. 1974); *United States v. Woods*, 468 F.2d 1024, 1026 (9th Cir. 1972); *United States v. Cluchette*, 465 F.2d 749, 754 (9th Cir. 1972); *United States v. Lopez*, 450 F.2d 169, 170 (9th Cir. 1971) (per curiam); *United States v. Barlow,* 693 F.2d 954, 959 (6th Cir. 1982); *O'Neal v. United States*, 411 F.2d 131, 136 -37 (5th Cir. 1969); and *United States v. Poole*, 495 F.2d 115, 120 (D.C. Cir. 1974).

1565. Again, the *Miranda* waiver did not impede the Supreme Court from engaging in a § 3501(c) analysis. *Id.*, at 313-23, 129 S.Ct. at 1566-58.

The government argues that Gowadia's waiver of *Miranda* rights, "was functionally the same as waiving his right to prompt presentment". *See* AB 76. Under the § 3501 rubric the Third Circuit articulated a similar rationale in *Corley*: if a district court found a confession voluntary after considering the points listed in § 3501(b),[15] it would be admissible, regardless of whether delay in presentment was unnecessary or unreasonable. *See Corley*, 556 U.S. at 312-13, 129 S.Ct. at 1565. The Supreme Court was not persuaded with this logic and vacated the Third

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[15] "The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

18 U.S.C. § 3501(b).

Circuit's decision. *Id.,* at 323, 129 S.Ct. at 1571.

The fundamental problem with the government's reasoning – *Miranda* waiver equals presentment waiver – was addressed by the Supreme Court in *Corley*:

> "If [§ 3501] (a) really meant that any voluntary confession was admissible, as the Government contends, then [§ 3501] (c) would add nothing; if a confession was made voluntarily it would be admissible, period, and never inadmissible solely because of delay, no matter whether the delay went beyond six hours."

Corley, 556 U.S. at 314, 129 S.Ct. at 1566 (internal quotation marks omitted). As the Supreme Court pointed out, such a reading would be at odds with the basic interpretive canon that "a statute should be construed to give effect to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Id.* (internal quotation marks and brackets omitted).

Finally, Gowadia notes that the government provides no constitutionally persuasive rationale for equating the voluntary waiver of expressly identified individual rights under *Miranda*, to the simultaneous waiver of other unannounced, unarticulated rights, like the right to prompt presentment. This Court should reject the government's faulty argument that waiver of *Miranda* rights simultaneously acts to waive the right to prompt presentment.

7. In the Event the Court Vacates Conviction under Count 2, Then Conviction under Count 19 for Money Laundering must Be Vacated as Well Because it Is Based upon the Unlawful Activity in Count 2.

Gowadia acknowledges the government's argument that he failed to include Count 19, money laundering, in the list of counts to be vacated. *See* AB 78, *citing* OB 128-29. He rejects the conclusion, however, that failure to list Count 19 amounts to waiving his challenge to the conviction under that count.

The Second Superseding Indictment for Count 19 tied the money laundering allegation specifically and exclusively to the criminal activity in Count 2.[16] Under the language of the indictment, the government had to prove that the funds

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[16] "On or about August 16, 2004, in the District of Hawaii, and elsewhere, NOSHIR S. GOWADIA, the defendant, did knowingly engage in a monetary transaction by, through or to a financial institution, affecting interstate and foreign commerce, in criminally derived property of a value greater than $10,000, that is, the deposit of funds in the amount of $29,980, into the City Bank business savings account of N.S. Gowadia, Inc., in Kihei, Hawaii, such property having been derived from a specified unlawful activity, to wit: the knowing and willful export of a defense service to the People's Republic of China without first obtaining a validated license or written approval from the Department of State, Directorate of Defense Trade Controls in violation of Title 22, United States Code, Section 2778; and Title 22, Code of Federal Regulations, Sections 125.1, 125.2, 125.3, 126.1, 127.1 and 127.3, ***as charged in Count 2 of this Second Superseding Indictment***."

ER8, 167 (emphasis added).

laundered were derived from the underlying offense in Count 2. The jury instructions for Count 19, money laundering, followed the indictment: the fourth element required proof beyond a reasonable doubt that the monetary transaction "was, in fact, derived from the specified unlawful activity charged in count 2 of the indictment, that is, the willful export of a defense service to the People's Republic of China without first obtaining a license from the Department of State, Directorate of Defense Trade Controls". ER1, 46. Clearly, Count 19's money laundering offense was never considered a stand-alone crime, distinct and separable from the underlying crime set forth in Count 2.

Post-conviction, the inseparability of Count 19 with the underlying crime in Count 2 was expressly reflected in the Presentence Investigation Report (PSR)[17] and the application of the U.S. Sentencing Guidelines' grouping provisions. Probation grouped the conviction under Count 19 with Counts 1, 2, 6 and 8, "since the defendant was convicted of the underlying offense from which the laundered funds were derived." *See* PSR ¶ 102; *citing* U.S.S.G. § 3D1.2(c)[18]; § 3D1.3(a)[19]; §

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[17] Excerpts from the PSR are filed with this Court under seal pursuant to Circuit Rule 30-1.10.

[18] "All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule: * * * When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline

2S1.1, Application Notes 2(c)[20] and 6[21]. Under these Guideline provisions, sentencing for money laundering was collapsed into sentencing for the underlying offense that generated the laundered money.

Under the indictment Count 19 was never considered a stand-alone offense,

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applicable to another of the counts." U.S.S.G. § 3D1.2(c).

[19] "In the case of counts grouped together pursuant to §3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group." U.S.S.G. § 3D1.3(a).

[20] "(C) Application of Chapter Three Adjustments.—Notwithstanding §1B1.5(c), in cases in which subsection (a)(1) applies, application of any Chapter Three adjustment shall be determined based on the offense covered by this guideline (i.e., the laundering of criminally derived funds) and not on the underlying offense from which the laundered funds were derived." U.S.S.G. § 2S1.1, Application Note 2(C).

Section 2S1.1(a)(1) states that: "Base Offense Level: (1)The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined".

Here, Probation did not apply Chapter Three adjustments based on money laundering, but rather based the Chapter Three adjustments on the grouping of Counts 1, 2, 6 and 8, within which Count 19 was grouped. *See* PSR ¶¶ 101, 102, and 106-111.

[21] "Grouping of Multiple Counts.—In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts)." U.S.S.G. § 2S1.1, Application Note 6.

with conviction expressly tied to Count 2. Post-conviction the Guidelines required the punishment for Count 19 be grouped with Counts 1, 2, 6 and 8. Should the Court vacate the conviction for Count 2, then logically, necessarily, conviction and punishment for Count 19 must be vacated as well.

8. Given the Government's Concession That Any Error in Failing to Suppress Gowadia's Confession Cannot Be Considered Harmless, Should the Court Find Detention then the Convictions under Counts 1, 2, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 19 Must Be Vacated.

"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." *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (internal quotation marks and citation omitted). Admission of a full confession, in which a defendant discloses the motive for and the means of the crime, "will seldom be harmless." *United States v. Williams*, 435 F.3d 1148, 1162 (9th Cir. 2006). Acknowledging this authority and the weight Gowadia's confession carried, the government concedes that "any error in failing to suppress the statements cannot be considered harmless as to the China counts (Count 1, 2, 6, and 8), the B-2 Counts (Counts 9, 10, 11, 12, 13, and 14), and the retention count (Count 15)". AB 77.

Should this Court adopt Gowadia's detention argument, then the confession

loses its immunity because it was given outside the six-hour safe harbor period provided in § 3501(c). *See, e.g.,* OB 64-67. Gowadia was detained beginning October 13, 2005, and held until his arrest on October 26, 2005. The issue then becomes whether the delay was reasonable. The district court did not reach the reasonableness issue under § 3501(c). More importantly, the government concedes that the reason for the delay was to extract a confession and intelligence. AB 63-64. This rationale is the "epitome" of unreasonable delay. *Corley*, 556 U.S. at 308, 129 S.Ct. at 1563.

Given the record on appeal and the government's concession concerning the purpose of the delay, it is appropriate for this Court to find that the delay was unreasonable and the confession should have been suppressed. Inasmuch as the confession cannot be deemed harmless this Court must vacate conviction on Counts 1, 2, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 19, and remand the matter to the district court for proceedings consistent with that decision.

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

1. Gowadia Did Not Waive or Forfeit His Right To Challenge The Minute Order Because the Underlying Issues Were Raised Before the District Court Thus Permitting *De Novo* Review on Appeal.

The government argues that Gowadia waived his right to challenge the classification decisions he now raises on appeal. AB 88. This argument is in error. Although Gowadia advised the district court that "[t]hroughout the CIPA process, the defense has accepted the government's representation that certain information is classified" (ER6, 119), he also clarified that statement by explaining that:

> "If the government introduces evidence that "Fact A" is classified, the implication is that the fact is "closely held." However, if it is demonstrated that the fact is readily available to the public, it cannot be "information related to the national defense" pursuant to 18 U.S.C. § 793(e). Thus, **this is one way that the classification determination can be *challenged* by the defense.**
>
> . . .
>
> [Furthermore, s]ince the **defense expects to argue at trial that certain information may be publicly available and/or if disclosed causes no harm, the defendant at trial is entitled to argue that the "fact" was wrongfully classified.**"

Id. at 122 (emphasis added).

Based upon the above clarification, it is clear Gowadia did not waive his right to challenge the classification decisions. *See generally United States v. Perez,* 116 F.3d 840, 845 (9th Cir. 1977) (*en banc*) (in order to waive a known right, such action must be intentional). Gowadia merely articulated that he would

not contest the classification decisions; however, he would **challenge** whether any of the charged information was not in the public domain, would not harm the interests of the United States, and/or was not closely held[22]. ER6, 119-24. "Such a challenge is not to seek a court order that overturns the executive branch's classification determination." *Id.* at 123. It is to protect Gowadia's constitutional right to require the government to prove beyond a reasonable doubt every element of the charges. Second, for the above same reason Gowadia did not forfeit his right to raise this issue on direct appeal. *See Perez,* 116 F.3d at 845 (a defendant who fails to make a timely assertion of a right forfeits the same on appeal).

Additionally, Gowadia referenced the document containing the alleged derivative classification information set forth in Count 11 of the Indictment.

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[22] The jury instructions provided some guidance concerning the definition of "closely held". Under 18 U.S.C. § 793(e), Counts 3, 4, 9, 10 and 11, and regarding the phrase "national defense", the district court instructed:

> "[The government] must prove that the material is closely held by the United States government. The fact that information is classified by the government is not, standing alone, enough to make the information closely held. However, in determining whether the information or material is closely held, you may consider whether it has been classified by appropriate authorities and whether it remained classified on the date or dates pertinent to the indictment. One example of information that is not closely held is information that has been made public by the United States government and is found in sources lawfully available to the general public. When informational material is lawfully available to the public and not classified by the United States government, it is not closely held."

ER1, 43.

Compare ER6, 120 *with* ER8, 156. By example, he explained a challenge would be mounted at trial disputing that the information contained therein related to the "national defense" because the same was in the public domain, not closely held, and its disclosure would not harm the United States. ER6, 120-22. Therefore, Gowadia also did not forfeit his right to challenge the disclosure of the alleged derivative classified information because it was timely raised in the district court. As a result, this Court reviews *de novo* the district court's Minute Order, rather than for plain error as mistakenly claimed by the government. *Gonzaga-Ortega v. Holder,* 694 F.3d 1069, 1073 (9th Cir. 2012).

Finally, the plain error standard of appellate review is also inapplicable because the government's reliance on *United States v. Lee* is misplaced since Gowadia is not challenging whether the charged documents were "properly marked 'TOP SECRET' or for that matter that they be marked secret at all." AB 90, *citing United States v. Lee*, 589 F.2d 980, 990 (9th Cir. 1979).

2. Although the District Court Permitted Defense Testimony That the Charged Information Was in the Public Domain and Not Classified or Closely Held, the Minute Order Resulted in Redactions to Numerous Trial Exhibits Impermissibly Impinging upon Gowadia's Due Process Rights to Mount an Effective Defense.

The government argues that Gowadia was permitted "to introduce evidence and argue that the charged information was in the public domain, was not closely held, and was not in fact classified." AB 79. In support the government refers to the testimonies of defense experts Glenn Varney and Robert Skulsky, and Gowadia himself. AB 83. However, such testimonial evidence does not cure the impact of the erroneous Minute Order issued March 20, 2009 (Minute Order).

First, the Minute Order concluded as a matter of law that Gowadia was not permitted to challenge the classification decisions of the executive branch. ER1, 97-98. Therefore, the defense experts were unjustifiably hampered when testifying that key exhibits alleged to contain derivative classified information were either in the public domain, not classified or not closely held. Specifically, when examining these exhibits referred to by those defense experts, the jurors were confronted with numerous, and some of them very large, blocks of yellow redactions unmistakably indicating that the deleted material was either closely held or classified and necessarily outside the public domain. *See e.g.,* SER, 1-3 and 107-15. Moreover, numerous other exhibits admitted into evidence contained similar yellow redactions which directly contradicted these experts' testimonies that the information generated by Gowadia was either in the public domain, not closely held and/or would not damage the United States or be useful to a foreign

nation. *See e.g.,* SER, 4-106, 116-88. Under these circumstances there was no possibility for the jury to impartially assess the credibility and veracity of the defense experts and/or Gowadia because the testimonies they gave were nullified by these redactions. *See, e.g.,* SER, 1-188.

In addition to the redactions, substitutions were placed in a number of the redacted areas which highlighted the allegedly closely held or classified nature of the redacted information. *E.g.,* SER, 1-2, 6, 22-23, 27-28, 32, 34, 37-38, 40-42, 53-54, 75, 82, 86, 91-92, 98, 102, 104, 119-21, 123-24, 136-39, 144, 148, 159, 160-61 and 165-68. In other instances it was incongruous for some redactions to be substituted with the notation "Non Pertinent" in the same document, and often the same page, while other redactions contained substitutions with letters, numbers, and/or symbols. *E.g.,* SER, 2, 6, 27-28, 32, 38, 40-41, 82, 119-21, 144, 161 and 165-68. This impermissibly persuaded the jury that the irrelevant redacted material "not in the public domain" or "closely held" could be employed to convict Gowadia. *See United States v. Rosen*, 557 F.3d 192, 195 (4th Cir. 2009) (substitutions of classified material with unclassified information must provide the defendant with the same ability to make his defense as would disclosure of the classified material); *and see United States v. Clegg,* 846 F.2d 1221, 1224 (9th Cir. 1988).

Notwithstanding the district court's allowance of defense testimony that the charged information was either not closely held, or not classified, or in the public domain, the damage from the Minute Order had already been done. Key exhibits against Gowadia had already been prejudicially marred with numerous, and often large blocks, of redactions and/or substitutions. Therefore, a juror could not reasonably review those documents and continue to conclude that the redacted or substituted information was not closely held, unclassified, within the public domain as advanced by the defense, or completely irrelevant to the charges against Gowadia.

C. Concerning the AECA Offenses, the Jury Instructions Relieved the Government of its Burden to Prove That the Services and Data Were Not in the Public Domain and Were Not Marketing Information.

1. The Record Does Not Demonstrate Relinquishment of a Known Right Required to Apply the Invited Error Doctrine.

"[I]n order for the invited error doctrine to apply, a defendant must both invite the error and relinquish a known right." *United States v. Lindsey*, 634 F.3d 541, 555 (9th Cir. 2011); *Perez*, 116 F.3d at 845. In *Lindsey* while the defendant stipulated to the erroneous jury instruction, the record did not show that there was ever a discussion about the instruction in any court proceeding or filing. *Id.* This

Court found that defendant did not "affirmatively act[ ] to relinquish a known right" and declined to review the challenge under the invited error doctrine. *Id.*

Here, the government argues that the invited error doctrine precludes review of Gowadia's jury instruction issues. AB 102-104. Like *Lindsey*, however, the record does not show that Gowadia intentionally abandoned or relinquished the jury instruction issues argued in the opening brief:

- the definition of "classified information" caused members of the jury to reasonably find that classified technical data, especially data classified as secret or top secret, could not – by definition – be available in the public domain (OB 114-17); and
- the technical data falling within Categories VIII and XIII of the United States Munitions List ("USML") could not be in the public domain because the president had already decided that such data could not be exported (OB 117-19).

Like *Lindsey*, this Court should find that Gowadia did not "affirmatively act[ ] to relinquish a known right" and, therefore, should decline to apply the invited error doctrine. *Lindsey*, 634 F.3d at 555. To be sure, preservation of appellate issues in the lower court's record is preferred. However in a situation like this where the issue was neither preserved nor relinquished, review remains

available albeit under the deferential standard of plain error. *See Perez*, 116 F.3d at 846.

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

A. Categories VIII and XIII of the USML.

The issue is whether the instructions sufficiently conveyed the public-domain element for AECA Counts 2, 12, 13 and 14 concerning the USML. The relevant jury instruction directed that designation by the president of a defense item under USML Categories VIII or XIII necessarily prohibited the export of that item. OB 110-11. Gowadia argues that if the jury found he exported a Category VIII or XIII item under Counts 2, 12, 13 and 14, then it was required to find that he violated the AECA because the president had already prohibited export of that item – thus nullifying the government's burden of proving the public domain exception. OB 117-19.

The government counters that "nothing in the instructions suggested that an item's designation on the USML satisfied the separately listed public domain element." AB 110. To the contrary, and as fully analyzed in the opening brief, a

juror could reasonably surmise that the public domain element[23] was no longer part of the government's burden since the instructions told them that the export of a Category VIII or XIII item is per se prohibited.

B. Classified Information.

The government's answering brief reminds us that one of the most contested issues at trial was whether the information charged in the indictment was closely held or in the public domain. AB 111. At trial the government provided evidence to show that the information was either classified or closely held; while in contrast the defense provided evidence, including the testimony of experts and Gowadia, to show that the information was in the public domain.

After the government rested its case defense counsel moved for a judgment of acquittal arguing that the government had failed to prove all elements of the charges beyond a reasonable doubt. Concerning the ACEA charges, the prosecutor agreed: "[w]e strongly, of course, agree that we have not met the public

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[23] The government argues that the public domain exception is not an element but rather an affirmative defense. AB 101 n.36, *citing United States v. Guess*, 629 F.2d 573, 576 (9th Cir. 1980). In the next breath, however, it acknowledges that the public domain exception is, indeed, an element of a AECA offense, *citing United States v. Posey* for the proposition that "the substantial defense of violating the AECA requires that a defendant actually export Munitions List items not in the public domain". *See id., citing United States v. Posey*, 864 F.2d 1487, 1492 (9th Cir. 1989). The government cannot have it both ways.

domain burden." OB 116, *citing* ER3, 41. In the answering brief the government argues that this admission was a stray "misstatement". AB 110. The record shows otherwise.

Immediately following the above admission the prosecutor argued the following, which we quote at length to provide a full and clear representation of its understanding:

> "***We strongly, of course, agree that we haven't met the public domain burden.*** First off, with respect to the Chinese count, there's been testimony that a substantial number of the documents in the case are classified. For instance, Study 1. There's testimony in the record that Study 1 is a classified document provided to the People's Republic of China as a part of the defense service in designing and testing, analyzing the Chinese cruise missile nozzle and also the modified nozzle.
>
> Additionally, 'Analysis of the Shape of the Flow Field – 'on the Flow Field' is also a classified document, and also his answer is, March 20. All of those are classified documents provided in the context of a defense service that Mr. Gowadia was providing to the People's Republic of China. ***Hence, because classified information is by its very definition closely held*** and the testimony from Col. Roger Vincent was indeed this particular information is closely held, ***we believe we've met our public domain – our burden just by virtue of that***.
>
> Obviously, the standard here [on the motion to acquit] is the evidence viewed in the light most favorable to the government at this point. We think the evidence is quite clear on that point that this is a public domain – that ***the public domain is not implicated because we have classified information***.

> The same applies to counts 12, 13, and 14. A lock-on range of the B-2 bomber, ***there's clear testimony that that lock-on range is classified and, therefore, clearly not public domain.***"

ER3, 41-42 (emphasis added).

"We strongly... agree" is relevant and not merely a stray "misstatement" because it demonstrates the government's misunderstanding concerning the elements of these charges, namely the public domain burden. For the government, evidence showing Gowadia provided closely held or classified information amounted to eliminating its burden to prove the public domain exception: "because classified information is by its very nature closely held ... we believe we've met our public domain – our burden ***just by virtue of that***".[24] ER3, 41 (emphasis added).

While "we strongly ... agree" was made outside the jury's presence (AB 110-11), the statement and its context support Gowadia's argument that the instructions failed to adequately describe the government's burden of proof under the AECA counts. As the government itself misunderstood its burden of proof, likewise a juror could reasonably reach the same conclusion under the instructions

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[24] These extended remarks also tend to demonstrate that "we strongly… agree" is not a transcription error, as argued by the government. AB 110.

set forth in the opening brief: assuming it was closely held or classified, the technical data Gowadia allegedly provided could not be in the public domain.

3. Under Counts 12, 13 and 14, the Jury Instructions Omitted the Government's Burden to Prove That the Technical Data at Issue Was Not Basic Marketing Information.

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). Gowadia argues under Argument D that he defended the AECA charges under the marketing exemption, with testimony and evidence showing that he sought to market his AIRSS system to individuals in three different foreign countries. OB 124, *citing* ER2, 36, 42, 44-45, 49, 59, 62-63, 91-92, 133-34, 147-48, 152, 155, 221-25. He did this by discussing in correspondence the "function or purpose" of his AIRSS system, which was to reduce the lock-on range of heat-seeking missiles. *See* OB 122-24, *citing* ER4, 18-19; ER6, 76, 81, 82. As such, requiring proof of lack of a marketing purpose should have been identified as an element of the AECA charges under Counts 12, 13 and 14 in the jury instructions – which element the government should have been required to prove beyond a reasonable doubt. *See* OB 126.

In response the government argues that the district court in fact instructed the jury that technical data does not include "basic marketing information on

function or purpose or general system descriptions of defense articles". AB 112, *citing* ER1, 27. However, the instruction on the marketing exemption appears six pages earlier in the jury instruction transcript, and too far removed from the instructions concerning the elements of Counts 12, 13 and 14. *Compare* ER1, 27 *with* 33-34. While the fourth element to the instructions for Counts 12, 13 and 14 identifies "technical data" as data "not in the public domain", the fourth element is silent with respect to the marketing exemption. See ER1, 34

There is no logical reason to exclude the marketing exemption from the elements of the offense for Counts 12, 13 and 14, while including the public domain exemption. *See* OB 127. The government responds that including the marketing exemption would have been needless repetition. AB 112. If that were the case, however, then the same logic should apply to the public domain exemption. But it didn't. The instructions advised the jury that technical data did not include data in the public domain, but those instructions remained silent concerning the marketing exemption for which the law gives no lesser weight.

The government also argues that the record does not support the marketing exception because the letters underlying Counts 12, 13 and 14 describe Gowadia's "technical expertise", but do not describe basic function, purpose or a general system under § 120.10(a)(5)'s marketing exemption. *See* AB 112-13. This Court

should reject that argument, which the government itself contradicts in its counter statement of the facts. Regarding Gowadia's letter to Toni Busch of the Swiss Ministry of Defense, the government acknowledges that Gowadia, "offered in the letter and in a follow-up proposal ***to use his AIRSS system to help the Swiss reduce the IR signature of their military helicopters***". AB 17 (emphasis added). The government acknowledges the same offer regarding Gowadia's letters to Sabine Hipp in Germany and Patrick Bar Avi in Israel. AB 17, 18.

Clearly these letter-proposals to Busch, Bar Avi and Hipp described the "function or purpose" of the AIRSS system as a method to reduce the IR signature of aircraft, which would, in turn, protect against enemy threats. *See* OB 123, *citing* ER4, 18-19 (to Busch); ER6, 76 (to Busch); ER6, 81 (to Bar Avi); and ER6, 82 (to Hipp).

D. The Court must Disregard the Government's Summary of Facts that Are Irrelevant to Resolution of the Issues on Appeal.

Appellate courts consider only those facts relevant to the issues on appeal. *See, e.g., United States v. Vazquez-Botet*, 532 F.3d 37, 43 (1st Cir. 2008). Parts of a record that do not bear on the merits of the appeal may be stricken. *See, e.g., Michenfelder v. Sumner*, 860 F.2d 328, 338 (9th Cir. 1988).

With respect to Argument A the government concedes that "because Gowadia's statements to the agents were indeed 'damaging evidence' in a number of respects, the government agrees that any error in failing to suppress the statements cannot be considered harmless as to the China counts (Counts 1, 2, 6, and 8), the B-2 counts (Counts 9, 10, 11, 12, 13, and 14), or the retention count (Count 15) that Gowadia challenges". AB 77.

Given this concession, discussion of testimony and evidence from the record demonstrating harmless error is inappropriate. Yet the answering brief provides a summary of irrelevant and prejudicial testimony and evidence including: Gowadia's work history from the late 1960s through the early 1990s (AB 9-12); detail concerning the B-2's design and operation (AB 9-10); a summary of events from 1993 to 2002 related to Gowadia's criminal motive (AB 13); a summary of Colonel Roger Vincent's trial testimony (AB 19-20, 26); Gowadia's activities and communications with China (AB 20-25); details concerning Gowadia's statement on October 13, 2005, wherein he made no admissions of wrongdoing. AB 29.

Further, Gowadia does not challenge on appeal the tax convictions under Counts 20 and 21 or discuss the money laundering conviction under Count 19, which is based upon the Count 2 conviction. Yet the government provides

extensive testimony and evidence concerning Gowadia's taxes, Swiss bank accounts, and his finances and payments from the Chinese. AB 14-16, 24. The government also discusses Gowadia's work in Singapore, which matters are outside the purview of the Second Superseding Indictment. AB 15-16; *and see* ER8, 122-73.

Had the government argued harmless error, then they would have carried the burden of demonstrating that the weight of the record supported the convictions notwithstanding error in admitting Gowadia's confession.[25] But given the not-harmless error concession (AB 77), there is no justification for including such prejudicial summaries in the answering brief. They are irrelevant to the decision in this case and the Court should disregard them. *See, e.g., United States v. Solorio*, 669 F.3d 943, n.2 (9th Cir. 2012).

CONCLUSION

For the arguments set forth in this reply brief and in the opening brief, this Court should vacate the convictions under Counts 1, 2, 6, 8, 9, 10, 11, 12, 13, 14,

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[25] *See United States v. Seschillie*, 310 F.3d 1208, 1215 (9th Cir. 2002), *cert. denied*, 538 U.S. 953, 123 S.Ct. 1644, 155 L.Ed.2d 500 (2003), *quoting United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc).

15 and 19, and remand the matter to the district court for further proceedings consistent with that decision.

DATED: Wailuku Maui, Hawai`i, August 26, 2013.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN

/s/ Harlan Y. Kimura
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Signature of Attorney or Unrepresented Litigant: /s/ Georgia K. McMillen
Date: August 26, 2013

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