No. 10-50074

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DONGFAN GREG CHUNG,

Defendant-Appellant.

GOVERNMENT'S OPPOSITION TO DEFENDANT'S PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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

ANDRÉ BIROTTE JR.
United States Attorney

ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

GREGORY W. STAPLES
Assistant United States Attorney

Ronald Reagan Federal Bldg.
411 West Fourth Street
Suite 8000
Santa Ana, California 92701
Telephone: (714) 338-3500

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

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I

BACKGROUND

During a search of the home of defendant Dongfan "Greg" Chung, a former Boeing and Rockwell engineer, federal agents found over 300,000 pages of Boeing and Rockwell documents, including documents relating to the Space Shuttle, Delta IV Rocket, F-15 fighter, B-52 Bomber, and Chinook Helicopter. United States v. Chung, 659 F.3d 815, 819 (9th Cir. 2011). The evidence at trial -- much of it from the trove discovered at defendant's home -- included tasking lists and letters from Chinese officials requesting specific information; technical documents, briefings, and letters responsive to those requests; and journal entries and correspondence with Chinese officials

documenting defendant's activities during his visits to China, including presentations defendant gave about the Space Shuttle and defendant's trip to a Chinese Ministry of Aviation production factory. Id. at 820-22.

Immediately prior to defendant's visit to China in 2002, defendant downloaded over 500 export-controlled technical specifications from the Shuttle Drawing System ("SDS"), a restricted Boeing database. Id. at 822; GER 1005-06. Throughout 2003, defendant downloaded additional SDS specifications, and input and organized these materials on his home computer. Defendant completed this project on December 15, 2003 and traveled to China on December 27, 2003. Id. Agents searched defendant's home in September 2006. Id.

Defendant was convicted of violating the Economic Espionage Act of 1996 in connection with trade secrets related to the Space Shuttle and Delta IV Rocket, and was also convicted of acting as an unregistered foreign agent, conspiracy, and making a false statement to federal agents. Id. at 818.

The PSR grouped all counts together; thus, the offense level was determined by using the guideline resulting in the highest offense level. (ER 1113.) Because the Statutory Index to the Sentencing Guidelines does not list a guideline for acting as an unregistered foreign agent in violation of 18 U.S.C. § 951, the

district court utilized U.S.S.G. § 2M3.2 (Gathering National Defense Information), which it found to be the most analogous guideline. See U.S.S.G. § 2X5.1 (where no guideline exists for a particular crime, court should use most analogous guideline). This Guideline applies to "diverse forms of obtaining . . . national defense information with intent or reason to believe the information would injure the United States or be used to the advantage of a foreign government." U.S.S.G. § 2M3.2, comment. (backg'd). The district court found that the "information with respect to the Space Shuttle, certainly the Delta IV rocket, the F-15, B-52, B-1, and the Chinook helicopters" was national defense information.[1] (ER 1027.)[2]

Defendant argued that § 2M3.2 applies only to classified information held by the government, whereas the information at issue here was not classified and was not in the possession of

[1] Defendant argued that the most analogous guideline was § 2B1.1, which applies to convictions under the Economic Espionage Act, 18 U.S.C. § 1831. The court explained that it was too difficult to calculate loss under § 2B1.1; because the full extent of information defendant passed to China was unknown, the court could not put a "price tag" on the harm to national security or to Boeing. (ER 1025-26.) The district court also stated that it gave defendant "the benefit of the doubt" by applying § 2M3.2 because under § 2B1.1 the loss could exceed $50 million and result in a base offense level greater than 30. (ER 1036-37.)

[2] The abbreviations used herein are the same as those used in the Government's Answering Brief ("GAB").

the government. In its unanimous opinion, the panel rejected both arguments and upheld the district court's choice of § 2M3.2 as the most analogous guideline. Id. at 834-35. First, the panel ruled that § 2M3.2 is not limited to classified information. Id. at 835. Citing the background commentary, the panel reasoned that the offense level distinctions in § 2M3.2 as well in the guidelines for other espionage-related offenses (U.S.S.G. §§ 2M3.1 - 2M3.4) divide the information gathered or transmitted into only two categories -- "top secret" and "otherwise" -- and do not require that the information be classified. Id. at 835. Second, the panel ruled that "for application of section 2M3.2 by analogy," there was no requirement that the information be held by the government rather than by a government contractor. Id. The panel noted that § 2M3.2 applies to a conviction for espionage under 18 U.S.C. § 793, which does not require that nonpublic documents be classified, "so long as they relate to national defense and are 'transmitted with the intent to advantage a foreign nation or injure the United States.'" Id. (quoting United States v. Lee, 589 F.2d 980, 990 (9th Cir. 1979)). Here, the panel concluded, defendant gathered and gave nonpublic information to Chinese officials with the intention to advantage China, which was adequate to invoke § 2M3.2 by analogy regardless of whether "the

information was in the hands of a government contractor, rather than in the hands of the United States itself." Id.

In his petition for rehearing en banc, defendant does not identify any decision of this Court or another court of appeals with which the panel's opinion conflicts. Instead, he contends that the panel's decision "involves a question of exceptional importance," see Fed. R. App. P. 35(a), because of its alleged expansion of "national defense information" -- a term relevant to both § 2M3.2 and espionage offenses under § 793 -- to include unclassified information. (Petition at 1-2.) That is not an issue of such importance as to warrant en banc review, but even if it were, this case is not the vehicle for such review. Defendant was not convicted under § 793 and the panel had no cause to review that statute directly. The panel merely held that, in this case, § 2M3.2 was the sentencing guideline most analogous to defendant's conviction under 18 U.S.C. § 951 for being an unregistered foreign agent. That narrow issue does not involve any recurring "question of exceptional importance." Fed. R. App. P. 35(a)(2). Indeed, the instant case appears to be the only reported appellate case on that question.[3] Moreover,

[3] There appear to be two reported appellate cases involving application of § 2M3.2. Both of those cases addressed convictions for willfully retaining national defense information under 18 U.S.C. § 793(e), for which the Statutory Index in

although the panel was not called upon to interpret the term "relating to the national defense" in § 793, it recognized that the term has a well-understood meaning under Supreme Court and Ninth Circuit caselaw. That meaning requires that the information be nonpublic (closely held by the government), but does not require that it be classified. Rather, the focus of both sentencing guideline § 2M3.2 and the corresponding provisions in 18 U.S.C. § 793 is on obtaining nonpublic information with the intent to advantage a foreign government.

Defendant also seeks panel rehearing to correct supposed factual errors, but these purported errors merely repeat the same claims underlying defendant's en banc request. Defendant contends that the documents at issue were not "secret" because they were not classified or in the government's possession (Petition at 6), but neither is required by § 2M3.2. Defendant also contends that there was no evidence that he passed any of

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Appendix A of the Sentencing Guidelines references both § 2M3.2 and § 2M3.3. Both cases concluded that § 2M3.3 properly covered the specific conduct charged. United States v. Malki, 609 F.3d 503, 508-10 (2d Cir. 2010); United States v. Aquino, 555 F.3d 124, 127-31 (3d Cir. 2009). Defendant cites a district court case in which the court sentenced under 18 U.S.C. § 3553(a) after concluding there was no analogous guideline for a charge of conspiracy to act as a foreign agent. United States v. Alvarez, 506 F. Supp. 2d 1285 (S.D. Fla. 2007). The opinion contains no analysis, however, and merely cites the district court's ruling in the course of addressing a different issue.

the pertinent documents to China. (Petition at 9.) There was such evidence, but, in any event, neither the unregistered foreign agent charge nor § 2M3.2 required proof that information was passed to China. Sentencing Guideline 2M3.2 applies to "obtaining" national defense information and does not require that such information be transmitted.

In summary, § 2M3.2 applies to obtaining nonpublic information relating to national defense with the intent to advantage a foreign government. The documents found in defendant's home clearly involved national defense programs, and defendant's economic espionage convictions and other trial evidence establish that the material at issue was nonpublic and was taken with the intent to benefit China. Defendant merely reargues the issues raised and correctly decided in his appeal. United States v. Molina-Tarazon, 285 F.3d 807, 808 (9th Cir. 2002) ("[A] petition for rehearing is not a brief on the merits. It need not, and should not, repeat arguments previously made in the briefs nor rehearse facts discussed in the opinion"); see also Anderson v. Knox, 300 F.2d 296, 297 (9th Cir. 1962) (use of petition for rehearing to "study and reargue" case anew is "abuse of privilege of making such a petition"). The petition should be denied.

II

ARGUMENT

A. THE PANEL'S HOLDING THAT SECTION 2M3.2 WAS THE CORRECT ANALOGY FOR THE UNREGISTERED FOREIGN AGENT CHARGE DOES NOT WARRANT EN BANC REVIEW BECAUSE NEITHER CASELAW NOR THE GUIDELINES LIMIT "NATIONAL DEFENSE INFORMATION" TO CLASSIFIED INFORMATION IN THE POSSESSION OF THE GOVERNMENT

Sentencing Guideline § 2M3.2, entitled "Gathering National Defense Information," applies a base offense level of 35 "if top secret information was gathered" or "30, otherwise." Since the Guidelines do not define "national defense information," defendant argues that the term should be given the same meaning it has in 18 U.S.C. § 793, the primary statute to which § 2M3.2 applies. That meaning, defendant argues, requires that the information be classified. Defendant's argument is not supported by the statutory scheme, the case law, or the Guidelines.

First, § 793 does not use the word "classified" to describe national defense information.[4] In contrast, another section of the Espionage Act, 18 U.S.C. § 798, does limit its application to classified information.[5] Had Congress intended for § 793 to be

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[4] Section 793(a) prohibits certain acts "for the purpose of obtaining information respecting the national defense 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 nation."

[5] Section 798(a) applies to "[w]hoever knowingly and willfully communicates . . . any classified information." That section also defines "classified information." See 18 U.S.C.

limited to classified information, it would have written the statute in conformity with § 798.

Furthermore, although the phrase "national defense" is not defined in § 793 or in related espionage statutes, it has a "well understood" meaning in the caselaw. Gorin v. United States, 312 U.S. 19, 28 (1941). Interpreting the Espionage Act of 1917, the predecessor statute to 18 U.S.C. § 793, the Supreme Court held in Gorin that "national defense" "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." Id. In rejecting the defendants' argument that the statute was vague and could cover innocuous reports, the Court observed that the statute's reach was limited by the scienter requirement, namely, an intent to injure the United States or advantage a foreign nation, and that national defense information published by authority of Congress or the military departments likely would not satisfy the necessary scienter. Id. at 27-28.

In United States v. Lee, 589 F.2d 980 (9th Cir. 1979), this Court applied the meaning of "national defense" enunciated in Gorin to a prosecution for gathering national defense information, in violation of § 793, and attempting to transmit

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§ 798(b).

national defense information to aid a foreign government, in violation of 18 U.S.C. § 794. Id. at 981-82. The defendant in Lee sought to call an expert to challenge the classification of the charged documents as "Top Secret." Id. at 990. In concluding that the district court had properly excluded this proposed testimony as "totally irrelevant to the issues," this Court reasoned:

> Under the espionage statutes charged in the indictment [18 U.S.C. §§ 793, 794], Lee was found guilty of gathering and transmitting documents which relate to the "national defense." There is no requirement in these statutes that the documents be properly marked "Top Secret" or for that matter that they be marked secret at all. It is enough that they related to the national defense and that they are transmitted with the intent to advantage a foreign nation or injure the United States . . . . See Gorin v. United States, 312 U.S. 19 [1941].

Id.[6]

[6] Military courts have also found that "national defense information" as used in the espionage statutes is not limited to government-classified information. United States v. Safford, 40 C.M.R. 528, 531-32 (1969), rev'd on other grounds, 41 C.M.R. 33 (1969) (rejecting claim that "information and documents involved in prosecutions in military courts under the Espionage Act (18 U.S.C. § 793) must be of a type requiring classification under security criteria within the defense establishment," citing Gorin); see also United States v. Allen, 31 M.J. 572, 627-28 (1990) (information need not be classified to constitute a violation of § 793; if information is not classified, it must be information that is not generally accessible to the public).

While not defining "national defense information," the Guidelines have essentially adopted the meaning set forth in Gorin and Lee, focusing on the required scienter. According to the background commentary to § 2M3.2, "[t]he statutes covered in this section proscribe diverse forms of obtaining and transmitting national defense information with intent or reason to believe the information would injure the United States or be used to the advantage of a foreign government." U.S.S.G. § 2M3.2, comment. (backg'd). See United States v. Aquino, 555 F.3d 124, 128 (3d Cir. 2009) (noting that § 2M3.2 carries a mens rea requirement).[7]

The panel's conclusion that § 2M3.2 was the most appropriate guideline to apply by analogy is fully consistent with this caselaw and with the Guidelines. Citing Gorin, the panel acknowledged that the "information in question must be nonpublic to some degree; otherwise there could 'be no reasonable intent to give advantage to a foreign government.'" 659 F.3d at 835 (quoting Gorin, 312 U.S. at 28) (emphasis in panel opinion). The panel also cited Lee's holding that "[d]ocuments need not be

[7] In light of § 2M3.2's mens rea requirement, defendant's assertion that the panel's decision will chill disclosure of unclassified evidence of fraud, waste or abuse in the national defense establishment is baseless. The panel found that § 2M3.2 provided the correct analogy based on defendant's intent to advantage a foreign nation. 659 F.3d at 835.

marked secret, so long as they relate to the national defense and are 'transmitted with the intent to advantage a foreign nation or injure the United States.'" Id. (quoting Lee, 589 F.2d at 990). Finally, the panel cited the background commentary to § 2M3.2 in concluding that there is no requirement that the information gathered be classified. Id.

None of the cases cited by defendant hold that "national defense information" is limited to classified information. They are simply espionage cases that happen to deal with classified materials. To the extent these cases discuss the definition of "national defense information," they are consistent with the panel's holding and recognize that the central issue in defining information relating to the national defense is its nonpublic nature. For example, in United States v. Morison, 844 F.2d 1057 (4th Cir. 1988), the Fourth Circuit approved a jury instruction defining "national defense" in the context of § 793 as follows:

> And that term, the term national defense, includes all matters that directly or may reasonably be connected with the defense of the United States against any of its enemies. It refers to the military and naval establishments and the related activities of national preparedness. To prove that the documents or the photographs relate to national defense there are two things that the government must prove. First, it must prove that the disclosure of the photographs would be potentially damaging to the United States or might be useful to an enemy of the United States. Secondly, the government must prove that the documents or the photographs are closely held in that [they] . . . have

> not been made public and are not available to the general public.

844 F.2d at 1071-72; see also United States v. Abu-Jihaad, 630 F.3d 102, 135-36 & n.32 (2d Cir. 2010) (finding sufficient evidence that information related to national defense where only some of information was in public domain), cert. denied, 131 S. Ct. 3062 (2011); United States v. Squillacote, 221 F.3d 542, 576, 579 (4th Cir. 2000) (information made public by the government and publicly available information that the government has never protected is not national defense information). The cases cited by defendant also recognize that "national defense" is a broad concept. E.g., United States v. Truong Dinh Hung, 629 F.2d 908, 918 (4th Cir. 1980) ("national defense" information as used in espionage statutes is not restricted to strictly military matters); United States v. Boyce, 594 F.2d 1246, 1251 (9th Cir. 1979) ("national defense" is not limited to information concerning the military establishment and military preparedness for defending the territory of the United States).[8]

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[8] Section 2M3.2 also covers violations of 18 U.S.C. § 1030(a)(1), communicating classified information obtained through unauthorized computer access. Section 1030(a)(1) does not use the term "national defense information," and therefore does not help define the term. Section 1030(a)(1) does, however, have a scienter requirement that the material be obtained with reason to believe it could be used to injure the United States or advantage a foreign nation. The common feature placing both § 1030(a)(1) and various subsections of § 793 under guideline

Defendant had more than 300,000 pages of documents relating to aerospace technology from various defense contractors. Defendant does not, and cannot, explain how this is anything but gathering national defense information.[9] As both the nonpublic nature of the documents gathered by defendant and defendant's intent to benefit China were demonstrated by the convictions on the Economic Espionage Act charges[10], as well as by other evidence at trial, the requisites for application of § 2M3.2 by analogy were satisfied.[11] The district court viewed the

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§ 2M3.2 is the intent requirement, not the classification of the information at issue.

[9] In addition to the military aircraft involved, the government presented evidence at sentencing that the Space Shuttle and Delta IV Rocket technologies underlying the economic espionage charges were covered by the United States Munitions List as defense articles and significant military equipment. (CR 164.)

[10] To establish a violation under 18 U.S.C. § 1831, the government must prove that the information was neither known to, nor readily ascertainable by, the public, and that the defendant acted with the intent to benefit a foreign government or agent. Chung, 659 F.3d at 824-25, 828.

[11] Defendant does not cite any case exempting national defense information in the hands of a government contractor from the reach of § 793. Defendant's argument that § 2M3.2 should apply only to information actually in the physical possession of the government would lead to irrational results. The weapons systems, satellites, and rockets used by the military are built for the government by private companies, many of which have clearance to work on classified projects. Evidence was introduced at trial that Boeing had "black programs" that were classified, and could not be named publicly. (GER 627.) Under defendant's interpretation of the law, a person could take

documents and heard the testimony of the witnesses concerning those documents, and was in the best position to determine their relation to national defense and whether they were closely-held. See Gorin, 312 U.S. at 31-32 (whether defendant's acts were related to national defense is a jury question). There is no basis for rehearing.

B. THE PANEL OPINION CONTAINS NO FACTUAL ERRORS

Defendant claims that panel rehearing is necessary to correct two alleged factual errors: (1) that the documents defendant possessed were nonpublic, and (2) that defendant transmitted the documents to China. (Petition at 6, 9-10.) Defendant cites to the panel's finding that

> [d]efendant gathered and gave to Chinese officials nonpublic information related to the X-37 space vehicle, the Delta IV Rocket, the F-15 Fighter, and the Chinook helicopter. When transmitting that secret information, which related to the national defense, Defendant had the intention to advantage China.

(Petition at 6, citing 659 F.3d at 835.) Neither of defendant's contentions has merit.

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information from a black program, hand it to a foreign country, and face no consequences because the information was not physically possessed by the government. Furthermore, the panel held only that "application of section 2M3.2 by analogy" did not require that the information be held by the government; the panel did not address the requirements of § 793 in this regard. 659 F.3d at 835.

1. The Information in the Documents Was Not Publicly Known

Defendant concedes that the Delta IV documents contained "information that has value from not being publicly known." (Petition at 8.) Defendant's only contention is that the government did not classify them as "secret." (Id.) As set forth above, government classification is not required for national defense information.

Defendant misstates the record with respect to the X-37. He acknowledges that a Boeing witness testified that the "X-37 material was sensitive." (Petition at 7.) He then claims that "government expert William Novak" testified that the value of the material was minimal depending on when China received it (which, even if true, does not refute the point that the document was nonpublic), and that most of the information was later published in Aviation Week.[12] (Id.) In fact, Novak testified that the information pertaining to the X-37 in the document possessed by defendant was not what appeared in the Aviation Week article; what appeared in Aviation Week was the tank failure on the Lockheed X-33, a different program. (ER 775-76.) What was described as "very sensitive" information concerning the X-37

[12] In fact, Novak was not designated as an expert by the government; he was defendant's supervisor. (GER 90.) Novak, like defendant, did not work on the X-37 program. (ER 802.)

never appeared in Aviation Week and was not in the public domain. (GER 1020, 1027.) Not only was the X-37 information not publicly known, but aspects of it were in current use in a classified program at Boeing. (GER 1027-28 ("For the [X-37] there are two versions. The ALTV version is the responsibility of NASA. That, we can talk about, only.").)

Finally, defendant states that the F-15 and Chinook helicopter documents were from the 1960s and 1970s. (Id.) Once again, this does not refute the point that the documents were not public. Defendant ignores the testimony that both aircraft are still in use by the military, the manuals contain information that is used with operating aircraft, and that the information was not publicly known. (E.g., GER 596-99.)

2. Application of § 2M3.2 Does Not Require Transmitting Information to a Foreign Government

A recurring flaw in defendant's petition is his claim that there was no evidence defendant passed any of the pertinent documents to China. This assertion is both irrelevant and wrong.

Defendant was charged with possession of trade secrets with the intent to benefit China, and acting as an unregistered agent of China. While these charges did not require proof that information was passed to China, neither does § 2M3.2. The Guideline is entitled "Gathering National Defense Information"

and applies to "obtaining" as well as "transmitting" national defense information. U.S.S.G. § 2M3.2, comment. (backg'd).

Moreover, there was circumstantial evidence from which the district court and panel could conclude defendant did pass the documents. As set forth in the government's answering brief, defendant sent documents to China, including B-1 Bomber manuals through a Chinese consular official. (GAB 7.) Defendant also traveled to China to give unauthorized lectures on the Space Shuttle. (GAB 9.) In 2002, after defendant elected not to move to Houston with Boeing's space shuttle program, defendant downloaded more than 500 export-controlled SDS specifications before leaving Boeing and traveling to China. When he returned to Boeing temporarily in 2003, defendant downloaded more SDS specifications, and created indices for the downloaded specifications that he continually modified until his trip to China in December 2003. (GAB 9-10, 19, 22.) Finally, the tasking lists and letters from Chinese officials requested information about American air and spacecraft, and during the search of defendant's home, agents recovered documents responsive to those requests. (GAB 4-9.) Defendant was not allowed to keep the documents in his home, and had no plausible explanation for why he did so. Viewing the evidence in the light most favorable to

the government, it is reasonable to infer that he passed national defense documents in his possession to China.

C. ANY ERROR WAS HARMLESS

If there was not a sufficiently analogous guideline, then the district court was required to sentence solely under 18 U.S.C. § 3553. U.S.S.G. § 2X5.1. After a lengthy discussion of the aggravating and mitigating factors and the objectives of sentencing under § 3553(a), the court applied a 2-level upward variance. (ER 1027-35.) Accordingly, even if the court erred in applying § 2M3.2, any error was harmless.

III

CONCLUSION

For the foregoing reasons, defendant's petition for panel rehearing and for rehearing en banc should be denied.

Dated: November 22, 2011

Respectfully submitted,

ANDRÉ BIROTTE JR.
United States Attorney

ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

/s/ Gregory W. Staples
GREGORY W. STAPLES
Assistant United States Attorney
Santa Ana Branch Office

Attorneys for Plaintiff-Appellee
UNITED STATES OF AMERICA

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