IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 1:05CR225
v.	)	
	)	Hon. T.S. Ellis III
STEVEN J. ROSEN,	)	
	)	
KEITH WEISSMAN,	)	
	)	
Defendants.	)	

GOVERNMENT'S MOTION FOR CLARIFICATION

The government respectfully moves this Court to clarify two important issues with respect to its August 9, 2006 Memorandum Opinion. The issues upon which the government seeks clarification involve the elements of the offenses at issue, and as such, also have implications for the CIPA Section 6 matters that are still pending before the Court. Specifically, the government seeks clarification from the Court that Count One of the superseding indictment requires the government to prove elements contained in 18 U.S.C. § 793(g), and not the elements contained in 18 U.S.C. §§ 793(d) and (e). In addition, the government moves the Court to clarify that the "national defense information" and "willful" intent elements of 18 U.S.C. §§ 793(d) and (e) do not require the government to prove that a defendant actually knew the disclosure of the information was potentially harmful to the United States.

I. The Section 793(g) Violation Charged in Count One of the Superseding Indictment Does Not Require the Government to Prove the Elements of Sections 793(d) and (e)

As the Court recognized in the first sentence of its Memorandum Opinion, the defendants are charged in Count One of the superseding indictment with violating 18 U.S.C. § 793(g), which prohibits conspiracies to violate Sections 793(a) through (f). The Fourth Circuit has explained, "the elements of a conspiracy offense are: 'an agreement among the defendants to do something which the law prohibits; knowing and willing participation by the defendants in the agreement; and an overt act by the defendants in furtherance of the purpose of the agreement.'" *United States v. Hedgepeth*, 418 F.3d 411, 420 (4th Cir. 2005) (quoting *United States v. Meredith*, 824 F.2d 1418, 1428 (4th Cir.1987)).

It is also clear that to prove the elements of a conspiracy, the government need not prove the elements of the offenses which are the objects of the conspiracy.[1] *Pinkerton v. United States*, 328 U.S. 640, 643 (1946) ("[T]he commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses"); *United States v. Tucker*, 376 F.3d 236, 238 (4th Cir. 2004) ("Proof of a conspiracy does not require proof that the object of the conspiracy was achieved or could have been achieved, only that the parties agreed to achieve it."); *United States v. Molovinsky*, 688 F.2d 243, 246 -247 (4th Cir. 1982), *cert. denied*, 459 U.S. 1221 (1983); *see also United States v. Adair*, 436 F.3d 520 (5th Cir.), *cert. denied*, 126 S.Ct. 2306 (2006) ("It is settled law that conspiring to commit a crime is an offense wholly separate from the crime which is the object of the conspiracy. Thus, we have consistently held that a conspiracy charge need not

[1] Of course, the government intends to set forth in its proposed jury instructions the pertinent statutory provisions of Sections 793(d) and (e), which were the object of the defendants' conspiracy, and define key terms.

include the elements of the substantive offense the defendant may have conspired to commit.").

Moreover, when the government charges a multiple object conspiracy, as it has done in this case, the government need not prove all the objects of the conspiracy to secure a conviction. *United States v. Bolden*, 325 F.3d 471, 492 (4th Cir. 2003) ("Courts have uniformly upheld multiple-object conspiracies, and they have consistently concluded that a guilty verdict must be sustained if the evidence shows that the conspiracy furthered any one of the objects alleged."); *United States v. Kamerud*, 326 F.3d 1008, 1016 (8th Cir. 2003) (Although all elements of a conspiracy must be proven to find a defendant guilty, all objects of the conspiracy need not be proven. Here, the government proved the first element of a conspiracy by proving the existence of an agreement to accomplish one or more objects of the conspiracy. The jury unanimously agreed on three of the four objects of the conspiracy, even though proof of just one of the four would have been sufficient to support the conviction."); *United States v. O'Connor*, 158 F.Supp.2d 697, 723 n.50 (E.D.Va. 2001) (Ellis, J.) ("The government need only prove one object of the charged conspiracy to support a conviction . . . .").

Nor must the government prove all of the overt acts alleged in the indictment; proof beyond a reasonable doubt that one of the defendants committed one of the alleged overt acts is sufficient for conviction. *United States v. Fleschner*, 98 F.3d 155, 159 (4th Cir. 1996), *cert. denied*, 521 U.S. 1106 (1997) (approving jury instruction stating that government must prove "one of the conspirators during the existence of the conspiracy knowingly committed at least one of the means or methods or overt acts described in the indictment"); *O'Connor*, 158 F.Supp.2d at 723 n.49 ("the government is not required to prove beyond a reasonable doubt all of the overt acts alleged in the indictment; proof that at least one overt act was committed in furtherance of

the conspiracy is sufficient"). It is also clear that the overt act supporting the conviction need not involve the actual transmission of national defense information. Rather, "[a]n overt act is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy." *Fleschner*, 98 F.3d at 159.

When applied to the present case, these basic legal principles make clear that in order to convict the defendants of Section 793(g), the government must prove that they entered into an unlawful agreement to violate Section 793(d) or (e); that the defendants knowingly and willfully became members of the conspiracy; that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment; and that the overt act or acts were committed to further some objective of the conspiracy. The government does not need to prove the elements of Section 793(d) or (e), which are the objects of the defendants' conspiracy.

With these legal principles in mind, the government respectfully moves to clarify statements in this Court's August 9, 2006 Memorandum Opinion which could be read to suggest that the government must prove the elements of Sections 793(d) and (e). For example, the Court states:

> Thus, the government in this case must prove beyond a reasonable doubt that the defendants knew the information was NDI, i.e., that the information was closely held by the United States and that disclosure of this information might potentially harm the United States, and that persons to whom the defendants *communicated* the information were not entitled under the classification regulations to receive the information. Further the government must prove beyond a reasonable doubt that the defendants *communicated* the information they had received from their government sources with "a bad purpose either to disobey or to disregard the law." Mem. Op. at 32 (emphasis added).
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> Thus, the statute, as applied to these defendants also requires the government to prove that such information *was communicated* with "reason to believe it could be

> used to the injury of the United States or to the advantage of any foreign nation." Mem. Op. at 33 (emphasis added).
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> Whether the "leaks" or *transmission* of information in this case were authorized is likely to be a sharply controverted issue in this case and if the government does not carry its burden of showing that the *transfers* of information were unauthorized, the prosecution fails. Mem. Op. at 38 (emphasis added).

Accordingly, we ask that the Court clarify its Memorandum Opinion to reflect that in meeting its burden of proof with respect to Section 793(g), as charged in Count One, the government need only prove that the defendants *conspired* to violate Sections 793(d) and (e) -- not that they actually communicated national defense information or committed other substantive violations of the object statutes.

II. The Government Does Not Need to Prove that the Defendants Actually Knew the Disclosure of the Information Was Potentially Harmful to the United States

The government also seeks clarification on portions of the Memorandum Opinion in which the Court gives arguably conflicting definitions of the "national defense information" element contained in Sections 793(d) and (e). At one point in the Memorandum Opinion, the Court states that "information relating to the national defense, whether tangible or intangible, must necessarily be information which if disclosed, is potentially harmful to the United States, and *the defendant must know that disclosure of the information is potentially harmful to the United States*." Mem. Op. at 58-59. (emphasis added). The Court subsequently defined the term "national defense information" in a way which properly excluded any requirement that the government prove a defendant actually knew the information was potentially harmful to the United States.[2] The government is concerned that the Court's earlier statement could be read to

[2] "To prove that the information is related to the national defense, the government must prove (1) that the information relates to the nation's military activities, intelligence gathering or

mean that the "national defense information" element in Sections 793(d) and (e) requires the government to prove that a defendant actually knew the information he disclosed was potentially harmful to the United States.[3] As the government previously argued (*see* "Government's Sealed Supplement, attached), the term "national defense information" is used to describe the general nature and character of the information itself and does not reflect the specific characteristics or qualities of a defendant, his knowledge or intent. Requiring the term "national defense information" to include proof of a defendant's knowledge or intent is unsupported by case law. In *United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988), the Fourth Circuit approved a jury instruction on "national defense information" that required the government to prove only that disclosure of the information would be potentially damaging, not that the defendant *knew* that his disclosure would be potentially damaging:

> 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. The concurring judges also did not express the view that the government

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foreign policy, (2) that the information is closely held by the government, that it does not exist in the public domain; and (3) that the information is such that its disclosure could cause injury to the nation's security." Mem. Op. at 62-63.

[3] The government notes that the defendants have seized upon this language in their statements to the press regarding the Court's Memorandum Opinion. *See The Los Angeles Times*, "Lobbyists to Stand Trial in Spy Case," August 11, 2006 ("[The defendants' lawyers] added that they found parts of the ruling encouraging, and they said they doubted the government could prove that the men knowingly jeopardized national security. 'As a result, we are more confident than ever about our clients' innocence and wish we could start the trial next week,' they said.").

must prove that the defendant actually knew the information he passed was potentially harmful to the United States, or that the absence of such an instruction meant that the statute violated the First Amendment. In fact, Judge Wilkinson stated that the district court's limiting instruction on the meaning of "national defense information," as described above, "properly confines prosecution under the statute to disclosures of classified information potentially damaging to the military security of the United States. In this way the requirements of the vagueness and overbreadth doctrines restrain the possibility that the broad language of this statute would ever be used as a means of punishing mere criticism of incompetence and corruption in the government." *Id.* at 1084 (Wilkinson, J., concurring). Even Judge Phillips -- who, of the three judges on the panel, expressed the most concern about First Amendment issues -- wrote, "I agree that the limiting instruction which required proof that the information leaked was either 'potentially damaging to the United States or might be useful to an enemy' sufficiently remedied the facial vice." *Id.* at 1086 (Phillips, J., concurring). In short, nothing in *Morison* supports the view that the "national defense information" element of Sections 793(d) or (e) requires the government to prove that a defendant actually knew the information he disclosed was potentially harmful to the United States.

Nor does the "willful" intent element contained in Sections 793(d) and (e) require the government to prove that a defendant actually knew that the information was potentially harmful to the United States. In this regard, the government seeks the Court's clarification of its statement:

> Limiting the set of information relating to the national defense to that information which the defendant *knows*, if disclosed, is potentially harmful to the United States, by virtue of the statute's willfulness requirement, avoids this problem. Mem. Op. at 58. (emphasis in original).

Clearly, Sections 793(d) and (e) could not be used to convict a person "for the innocent, albeit negligent, disclosure of information relating to the national defense." *Id.* As a general matter, the statute's willful intent requirement means that only those defendants with the intent to violate the law will fall within the statute's confines. However, the case law does not support the notion that "willful" intent requires the government to prove that a defendant actually knew the information was potentially harmful to the United States.

The Supreme Court has explicitly held that "in order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Bryan v. United States*, 524 U.S. 184, 191-92 (1998) (citation and quotation marks omitted). In *Bryan*, the defendant was convicted of conspiracy and substantive violations of Title 18, United States Code, Section 924(a)(1)(D), the Firearms Owners' Protection Act, which prohibits anyone from "willfully" violating § 922(a)(1)(A), which forbids dealing in firearms without a federal license. *Id.* at 187. The defendant argued that the statute's willful intent element required the government to prove that he had knowledge of the statute, regulations or licensing requirement in order secure a conviction. The Supreme Court rejected this reasoning and held that the government need only establish that the defendant knew his conduct was generally illegal. In upholding the defendant's conviction, the Court stated: "knowledge that the conduct is unlawful is all that is required."[4] *Id.* at 196. Both the Fourth Circuit and this Court

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[4] The Supreme Court cited the following evidence as "unquestionably adequate" to establish that the defendant knew his conduct was unlawful: (1) the defendant used straw purchasers to acquire the firearms, (2) the defendant stated he would shave the serial numbers off the firearms, and (3) the defendant re-sold the firearms on street corners, which the Court characterized as "not consistent with a good-faith belief in the legality of the enterprise." 524 U.S. at 188. The Court explained: "Why else would he make use of straw purchasers and assure them that he would shave the serial numbers off the guns? Moreover, the street corner sales are

have recently adopted the *Bryan* standard of willfulness. *United States v. Bursey*, 416 F.3d 301, 309 (4th Cir. 2005), *cert. denied*, 126 S.Ct. 1154 (2006) (citing *Bryan* for the proposition "that knowledge of conduct's general unlawfulness . . . is only requirement for willful violation."); *United States v. Lindh*, 212 F.Supp.2d 541, 574 (E.D.Va. 2002) (Ellis, J.) (citing *Bryan* for the proposition that willful element required government to prove "that the defendant knew his conduct was unlawful, but not that he knew of federal statutory scheme").

Moreover, the willful intent jury instruction approved by the Fourth Circuit in *Morison* is in conformity with the Supreme Court's subsequent holding in *Bryan*. The jury instructions in *Morison* merely stated that "[a]n act is done wilfully if it is done voluntarily and intentionally and with the specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law." 844 F.2d at 1071. Thus, in order to prove willful intent in *Morison*, the government was not required to establish that the defendant actually knew the information he passed was potentially harmful to the United States; rather, the government was required to prove only that Morison knew his conduct was generally unlawful.

Indeed, what protects the defendants in the instant case from "prosecution for the innocent, albeit negligent, disclosure of information relating to the national defense," Mem. Op. at 58, is the statute's very requirement that the government prove Rosen and Weissman acted with knowledge that their conduct was unlawful. At trial, the government will present overwhelming evidence of the defendants' willful intent to violate Section 793. Often using the defendants' own words, the government will prove that Rosen and Weissman knew that they had

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not consistent with a good-faith belief in the legality of the enterprise." *Id.* at 188 n.8.

obtained, or were seeking to obtain, classified national defense information, knew that it was unlawful to disclose that information, and knew that the foreign officials and members of the media to whom they disclosed the information were not entitled to receive it. *See* "Statement of Facts in Support of Government's Supplemental Response to Defendants' Motion to Dismiss the Superseding Indictment," filed March 31, 2006, Under Seal (Docket 266). The evidence adduced at trial will clearly distinguish Rosen and Weissman from the host of lobbyists and others who operate within the confines of the First Amendment.

Although the "national defense information" and "willful" elements of Sections 793(d) and (e) do not require the government to prove that a defendant actually knew the information disclosed was potentially harmful to the United States, the "reason to believe" element of the statute does capture this type of evidence. As the Court pointed out in its Memorandum Opinion, the "reason to believe" element relates "to the subjective understanding of the defendant as to the possible effect of the disclosure." Mem. Op. at 59 n.56. As a result, the "reason to believe" element "is not superfluous" when compared against the "national defense information" and "willful" elements. *Id.* It is a separate and distinct element. If, however, the "national defense information" and "willful" elements of Sections 793(d) and (e) are construed to require proof that a defendant actually knew his disclosure would be harmful to the United States, then these elements would consume the "reason to believe" element and would indeed make it "superfluous"-- a result that would be inconsistent with the analysis in the Court's Memorandum Opinion.

Accordingly, we ask that the Court clarify its Memorandum Opinion to reflect that neither Section 793(d) or (e) require the government to prove that a defendant actually knew the

information he disclosed was potentially harmful to the United States. To pass constitutional muster, those sections require only that the government prove the information alleged to be national defense information is related to the nation's military activities, intelligence gathering or foreign policy, was closely held, and that disclosure of the information would be potentially damaging to the United States. Mem. Op. at 62-63. With respect to proving a defendant's knowledge and intent in a case brought under Sections 793(d) or (e), the government need only prove that a defendant acted willfully, meaning that he knew his conduct was unlawful, and, in cases involving intangible information, the government must prove that the defendant had *reason to believe* that the information he communicated *could be used to the injury of the United States or to the advantage of any foreign nation.*

CONCLUSION

For the reasons set forth above, the Court should clarify its August 9, 2006 Memorandum Opinion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing "Government's Motion for Clarification" was sent by facsimile transmission this 18th day of August 2006 to:

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