UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 3:08-cr-69
v.	)	
	)	(Varlan/Guyton)
J. REECE ROTH,	)	
	)	
Defendant.	)	

GOVERNMENT'S TRIAL BRIEF

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I. FACTUAL SUMMARY

During the time period of May 2004 through June 2007, Atmospheric Glow Technologies, Inc. (AGT) had two Small Business Innovative Research (SBIR) contracts with the Air Force Research Lab-Munitions Directorate. The objective of both contracts was to design plasma actuators as mechanisms or flight controls for a small unmanned air vehicle (UAV).

Between about May and October 2004, Professor J. Reece Roth at the University of Tennessee (UT) Plasma Science Lab, along with Daniel Sherman and others at AGT, discussed developing a work arrangement where Xin Dai, a Chinese foreign national and graduate research assistant (GRA) working for Roth at UT, would work in some capacity on a Phase II contract. On October 29, 2004, Roth e-mailed Sherman and AGT President Kim Kelly-Wintenberg and proposed a Project Plan where he outlined a work plan between two GRAs that he supervised at the UT Plasma Lab to work on the Phase II contract. Roth noted in this Project Plan that the project was subject to export controls. Consulting with Roth, Sherman later drafted and submitted on behalf of AGT a Project Proposal for the Phase II contract to the Air Force Research Laboratory-Munitions Directorate. This Proposal incorporated much of the Project Plan that Roth sent to Sherman. Sherman also sent a Data Sheet form to the Air Force representing that AGT was not proposing to use any non-United States citizen as part of any research and development work for the contract.

In January 2005, AGT received a tentative award letter for the Phase II contract. This contract was titled “Augmented UAV Flight Performance Using Non-Thermal Plasma Activators.” A plasma actuator is a device used to produce atmospheric plasma for

aerodynamic applications. Sherman and Roth exchanged proposed drafts of a subcontract, Task Order 102, between AGT and UT. Task Order 102 specifically names Dai and Truman Bonds, another GRA, to the contract, but does not identify their nationalities. On the final signature page Task Order 102 cites the AFMC-FAR clause which explicitly stated "Export-Controlled Data Restrictions." Right below that clause, the contract is signed by AGT President Kelly-Wintenberg, Roth as project manager, and a UT representative.

On May 13, 2005, Roth sent a letter to Dai assigning him to work on the Phase II contract and explaining to Dai that the purpose of the project was to research and implement this technology into a UAV for the Air Force. Later that month, Dai and Bonds began working on the contract, with Dai working at the UT Plasma Lab and Bonds working at AGT. AGT required Dai and Bonds to produce weekly r+eports on their research progress. Data from tests of specific actuator designs was quantified and the weekly reports were used to document the progress of the plasma actuator development. The data from these weekly reports was directly incorporated into quarterly reports.

In approximately July 2005, AGT, with the consent of Roth, directed Bonds to start sharing his weekly reports with Dai. Thereafter, Bonds e-mailed every weekly report that he produced to Dai, Roth, Sherman, and project manager Robert Briggs. Roth responded to some of those weekly reports and further tasked Dai with additional research to verify the results in Bond's weekly reports. Dai received and retained many of Bonds' weekly reports containing technical data on his computer. Six of those weekly reports have been certified by the State Department Directorate of Defense Trade Controls (DDTC) as

defense articles, i.e., technical data, described on the U.S. Munitions List. The export of those weekly reports is the basis for Counts 3-8 of the indictment.

In October 2005, Project Manager Briggs e-mailed Dai, Roth, Bonds and others quarterly reports I and II. These documents are specific deliverables under the Controlled Data Requirements List (CDRL) of the Phase II contract and have been certified by the DDTC as defense articles, i.e., technical data as defined in the U.S. Munitions List. The export of those quarterly reports is the basis for Counts 9 and 10 of the indictment.

In the fall of 2005, AGT installed at the UT Plasma Science Lab a piece of specialized equipment called a "Force Stand," also known as a Displacement Sensing Unstable Equilibrium Thrust (DUET) Stand.

The Force Stand was specifically designed, funded and produced under the Phase II contract and has been certified by the DDTC as a defense article on the munitions list. The device was created for the singular purpose of taking sensitive measurements of the forces produced by plasma actuators.

During the fall of 2005, Dai began using the Force Stand installed at the UT plasma lab. Under the supervision of Roth at the lab, Dai routinely used the device to test and improve the plasma actuators, thereafter forwarding the test data to AGT via weekly reports. This is the basis for Count 15 of the indictment which charges the export of a defense service to a foreign national.

On or about October 21, 2005, during Roth's Plasma Science Seminar, Sirous Nourgostar, a citizen of Iran, was given a tour of the lab and shown the details of the DUET Stand. This included a detailed explanation of the capabilities and operation of the Force Stand. This is the basis for Count 16 of the indictment.

During January through March 2006, Roth began to encourage Dai to use Nourgostar to help him with Phase II research, specifically by utilizing Nourgostar's photography skills to photograph functioning actuators in February 2006. Dai produced a weekly report which included a photograph of an actuator in operation taken by Nourgostar in about April 2006.

In the spring of 2006, Roth asked Nourgostar if he was interested in working on the Phase II contract after Dai graduated that summer. On May 3, 2006, AGT, through Project Manager Briggs, advised Roth that, "for obvious security reasons, your Iranian student is not going to be acceptable" as a replacement for Dai. Roth responded that he did not feel it was AGT's position to tell him who he could use on the project.

On May 5, 2006, Roth met with Robin Witherspoon, the Contract Administrator and Export Control Officer at UT, and attempted to add Nourgostar to the Phase II contract and requested UT to seek an export license to accomplish this. Witherspoon then learned from Roth that Chinese national Dai had been working on the Phase II project since May 2005 without a license from the State Department. Three days later, on May 8, 2006, Witherspoon e-mailed Roth advising him that the Phase II contract was export controlled and providing him with the text of the clause so stating. She warned Roth to be cautious about what he took with him on his forthcoming trip to China and not to disclose anything about the Phase II project. Witherspoon called Roth on May 11, 2006, and advised him that she spoke to the State Department and found out that both Iran and China are prohibited countries for export control purposes.

Witherspoon also contacted AGT regarding her discussions with Roth and her recent discovery about foreign national Dai working on the Phase II contract. On May 12, 2006,

AGT managers, including Kelly-Wintenberg, Sherman and Briggs, met with Roth and advised him that they would no longer have involvement with foreign nationals on the Phase II contract. They also warned Roth not to disclose Phase II research on his upcoming trip to China. The following day, Roth departed for China where he lectured at Fudan University in Shanghai and Tsinghua University at the Shenzhen campus. On about May 15, 2006, while in China, Roth used the internet account of Fudan University Professor S. D. Zhang and e-mailed Dai in Knoxville. Roth directed Dai to send him a copy of their jointly-authored draft AIAA paper. Dai complied and attached a nearly final version of the AIAA paper. The paper included technical data and diagrams taken directly from Dai's weekly reports on the Phase II contract. This AIAA paper and Dai's research from his weekly reports 31 and 32 contained therein have been certified by the DDTC as defense articles, i.e., technical data as defined in the U.S. Munitions List. This export is the basis for Counts 14 and 17 of the indictment.

On May 20, 2006, Roth presented a lecture at Fudan University titled "Subsonic Plasma Aerodynamics for Flight Control of Aircraft."

Upon reentry into the United States from China on May 26, 2006, Roth was inspected at the Detroit International Airport by Customs and Border Protection. Roth had the following items in hard copy in his possession:

> 1. Dai's Phase II weekly report for the week ending May 9, 2006, marked "Property of AGT." This has been certified by the DDTC as being a defense article, i.e., technical data as defined in the U.S. Munitions List. This export is the basis for Count 14 of the indictment.
>
> 2. A copy of Robin Witherspoon's aforementioned May 8, 2006, e-mail where she included the "Export-Controlled Data Restrictions."

That same night, Roth's laptop computer was seized when he arrived in Knoxville, Tennessee. Found on his thumb drive storage device was Dai's Weekly Report from the week ending November 28, 2005. Found on his laptop was the entire AGT Proposal to the Defense Advanced Research Projects Agency (DARPA). The DARPA proposal and the reports found on Roth's lap top computer have been certified as a defense articles, i.e., technical data as defined in the U.S. Munitions List. These exports are the basis for Counts 11 and12 of the indictment.

In November 2006, Dr. Way Kuo, Dean of the UT School of Engineering, became aware that Roth was considering submitting the aforementioned AIAA paper for publication. Dr. Kuo advised Roth that he needed to conform to the requirements of the Phase II contract, including the export controls. Specifically, he informed Roth that if he wished to present Dai's research results he needed to get approval from UT. Roth never received approval from UT to disclose or publish Dai's research. In August 2007, Iranian graduate student Sirous Nourgostar informed Roth that he could no longer find his copy of the AIAA paper that he previously possessed. Nourgostar requested another copy of the paper from Roth. Despite the prior admonitions by the Dean Kuo, department head Wayne Davis, Robin Witherspoon and the management at AGT, Roth e-mailed Nourgostar a copy of the AIAA paper that same day without authorization. This is the basis for Count 17 of the indictment

STATUTES

A. Conspiracy

Count One of the proposed indictment charges Roth and AGT with engaging in a criminal conspiracy to export a defense article without a license in violation of 18 U.S.C. § 371. Section 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years or both.

To prove a violation of 18 U.S.C. § 371, the United States must prove: (1) the conspiracy described in the indictment was willfully formed and was existing at or about the time alleged; (2) that the accused willfully became a member of the conspiracy; (3) that one of the conspirators thereafter knowingly committed at least one overt act charged in the indictment at or about the time and place alleged; and (4) that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy. *United States v. Brown,* 147 F.3d 477, 489 (6th Cir. 1998).

The proof need not show a formal agreement; "a tacit or material understanding among the parties" is sufficient. *United States v. Martinez,* 430 F.3d 317, 330.(6th Cir. 2005). Once a conspiracy is demonstrated, a defendant's connection to the conspiracy "need only be slight" and may be inferred from circumstantial evidence and his actions. *Id.* A conspiracy may be inferred from acts done with a common purpose; tacit approval or mutual understanding between the parties is sufficient to show a conspiratorial agreement. *United States v. Hughes*, 891 F.2d 597, 601 (6th Cir. 1989).

B. The Arms Export Control Act

Counts 3 through 17 of the indictment charge unlawful exports of defense articles and services. The Arms Export Control Act (AECA), 22 U.S.C. § 2778, regulates the export from and import into the United States of "defense articles"[1] and "defense services."[2]

The State Department, Directorate of Trade Controls (DDTC), promulgates regulations under the AECA, which are known as the International Traffic In Arms Regulations (ITAR). 22 C.F.R. §§ 120-130. The ITAR contains the Munitions List, which sets forth twenty-one categories of defense articles and services that are subject to export licensing controls. *Id.* at § 121.1. Unless an exemption applies, the ITAR requires a validated export license from the DDTC for the export of Munitions List articles and related technical data[3] to all destinations. *See* 22 C.F.R. §§ 123-125.

1. Illegal Exports

There are three essential elements of an illegal export under the AECA: (1) the defendant exported, or caused to be exported, from the United States an article listed on the Munitions List or a technology relating to an article on the Munitions List; (2) the defendant did not obtain a license or written approval for the export from the State

[1]"Defense article" means, *inter alia*, any item or technical data designated on the United States Munitions List.

[2] "Defense services" means, *inter alia*, "the furnishing of assistance (including training) to foreign persons whether in the United States or abroad, in the design, development . . . testing, or use of defense articles . . . ."

[3]"Technical data" means, *inter alia*, information which is required for the design, development, production, testing or modification of defense articles.

Department; and (3) the defendant acted willfully. *See United States v. Reyes*, 270 F.3d 1158, 1169 (7th Cir. 2001).

The ITAR contains a specific definition of what constitutes the export of an item. The following, *inter alia*, constitute an exportation: (1) sending or taking a defense article out of the United States in any manner; or (2) disclosing (including oral or visual disclosure) or transferring "technical data" to a foreign person, whether in the United States or abroad (sometimes referred to as a "deemed export"). 22 C.F.R. § 120.17.

2. Scienter

Criminal violations of the AECA require that the government prove that the defendant acted with "willful" intent. There is a split between several circuits regarding the definition of willful intent in export cases. A few other circuits have internally inconsistent definitions of the phrase, and still other circuits, such as the Sixth Circuit, have not yet made any pronouncements on the subject.

In *Bryan v. United States*, 524 U.S. 184, 196 (1998), the Supreme Court held that in order to establish "willful" intent with regard to a Title 18 firearms violation, the government must prove that the defendant acted with knowledge that his conduct was unlawful. The Supreme Court held that the willfulness requirement in the statute did not carve out an exception to the traditional rule that ignorance of the law is no excuse, and that knowledge that the conduct is unlawful is all that is required. *Id.* The Court also distinguished two of its previous cases, *Ratzlaf v. United States*, 510 U.S. 135 (1994), and *Cheek v. United States*, 498 U.S. 192 (1991), in which the Court interpreted "willfully" to require a showing that the defendant was aware of the particular statute that he was charged with violating. The Court held that *Ratzlaf* and *Cheek* involved "highly technical

statues" that dealt with currency restructuring and tax. 524 U.S. at 194. The complexity of these statutes presented the danger of ensnarling individuals engaged in innocent conduct; a danger that the Court held was not a concern in *Bryan*. *Id.*

The Department of Justice takes the position that the Supreme Court's decision in *Bryan* concerning the "willfulness" requirement applies in all export control cases. However, the Sixth Circuit has not specifically addressed the issue.

(a) Circuits in Conformity with *Bryan* in Export Control Cases

Of the nine circuits which have ruled concerning the government's burden to establish willful intent in export control cases, five have ruled in accordance with the holdings in *Bryan* that the government need only show that the defendant knew his acts were illegal.

The First Circuit, in *United States v. Murphy*, 852 F.2d 1 (1st Cir. 1998), found that the defendant's "year-long clandestine efforts, covert acts, and subterfuges to purchase weapons for shipment to Ireland for the IRA's uses" was enough to establish willful intent under the AECA. *See id*. at 7. The Court held that the government needs only prove that the defendant knew he had a legal duty not to export the items; the government was not required to prove that the defendant knew the arms were on the United States Munitions List. *Id.*

The Second Circuit, citing *Bryan*, approved a district court's jury instruction on willfulness under the IEEPA which required only a showing that the defendant knew his actions, which involved transferring funds to Iran, were illegal. *United States v. Home Int'l Trading Corp.*, 387 F.3d 144, 147 (2d Cir. 2004). In addition, the Court ruled that the evidence of the defendant's willful intent was sufficient, and highlighted the fact that banks

refused to complete his transactions on two occasions, the defendant was alerted in writing to the embargo's regulations, and the defendant conducted his transactions using stealth. *Id*. According to the Court, "this activity clearly confirms that [the defendant] knew his activities ran afoul of the law."[4] *Id.*

The Third Circuit similarly has held that the government must show only that the defendant knew the export was unlawful. *United States v. Brodie*, 403 F.3d 123, 147 (3d Cir. 2005) (involving TWEA); *United States v. Tsai*, 954 F.2d 155, 162 (3d Cir. 1992) (involving AECA).

The Fourth Circuit has rejected the argument that a jury could not find a defendant acted willfully under the AECA because the government presented no evidence that the defendant knew certain encryption devices were covered by the Munitions List or designed for military use. *United States v. Hsu*, 364 F.3d 192, 198 n.2 (4th Cir. 2004). Citing the

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[4]Another recent case suggests that the Second Circuit may require a reduced showing by the government regarding intent for certain charges that frequently accompany export cases such as making false statements on export declarations in violation of 18 U.S.C. § 1001. *See infra* page 67. In *United States v. George*, 386 F.3d 383 (2d Cir. 2004), the defendant was convicted of willfully making false statements in a passport application in violation of 18 U.S.C. § 1542. 383 F.3d at 387. A Second Circuit panel stated that "the Second Circuit has held that the term 'willfully' in criminal statutes typically does not require the government to prove the defendant's specific intent to violate the particular criminal statute in question." *Id*. at 393. However, the court went even further and held that:

> [B]ecause no conceivable meritorious reason exists for knowingly submitting false information on a passport application, conviction under § 1542 does not require a finding that the defendant acted with an awareness of the generally unlawful nature of his or her conduct, an improper purpose, or an "evil-meaning mind" as required in *Bryan*. Moreover, the defendant need not be cognizant of the particular illegality of his or her conduct under the statute. . . .

Id. at 395.

First Circuit's decision in *Murphy*, the court stated that "[w]hatever specificity on 'willfulness' is required, it is clear that this extremely particularized definition finds no support in the case law." *Id.*; *see also United States v. Bursey*, 416 F.3d 301, 309 (4th Cir. 2005) (holding that in prosecution under statute which prohibited willfully and knowingly entering or remaining in an area protected by Secret Service, defendant "need not have known of the Statute itself (nor, for that matter, the Regulations) in order to possess the requisite intent to violate it"); *but see United States v. Mitchell*, 993 F.2d 229 (4th Cir. 1993) (unpublished) ("we assume without deciding that the more stringent . . . standard for willfulness applies to § 2778").

The Seventh Circuit, in *United States v. Beck*, 615 F.2d 441 (7th Cir. 1980), held that the government was required to show only that the defendant knew his conduct was illegal, not that the defendant knew he needed an export license pursuant to the AECA. *See* 615 F.2d at 450-51. The Court found that the defendant's experience in the arms business, evidence that he was aware of the arms embargo at issue, his acts of subterfuge, and other evidence, constituted enough evidence of intent to support the jury's guilty verdict. *See id.* at 451-52. In another AECA case, the Seventh Circuit held that the government must prove that the defendant knew that making a false statement or misrepresentation or omission of a material fact on a waybill was illegal. *United States v. Muthana*, 60 F.3d 1217 (7th Cir. 1995). More recently, the Seventh Circuit held that evidence pertaining to a defendant's general knowledge that his shipment of aircraft parts to Iran was prohibited by federal law, along with more specific evidence that the defendant was aware of the

Munitions List and licensing requirement was "**more** than sufficient grounds for the jury's finding of a willful violation of the AECA."[5] *Reyes*, 270 F.3d at 1169 (emphasis added).

(b) Circuits Moving Toward *Bryan*

Four other circuits have addressed the issue of intent in export cases. Although their holdings are not entirely clear, the general trend appears to be toward the adoption of the *Bryan* standard.

Prior to *Bryan*, two Eleventh Circuit export control cases required that the government establish more than simply the defendant's knowledge that his acts were illegal. *See United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir. 1989) (involving AECA); *United States v. Frade*, 709 F.2d 1387, 1392 (11th Cir. 1983) (involving TWEA); *see also United States v. Fuentes-Coba*, 738 F.2d 1191, 1196 (11th Cir. 1984) (stating that "government must prove that the regulatory provisions were both 'actually known' and 'deliberately violated' by the defendant," but approving district court's jury instruction on intent similar to *Bryan* standard). A post-*Bryan* case, however, suggests that these holdings may no longer be valid. In *United States v. Starks*, 157 F.3d 833 (11th Cir. 1998), the Court considered the meaning of the term "willfully" in the context of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). 157 F.3d at 837. At issue was the trial court's jury instructions, which defined "willfully" to mean "the act was committed voluntarily and

[5]Similarly, in *United States v. Malsom*, 779 F.2d 1228 (7th Cir. 1985), the Court upheld the conviction of the defendants for shipments to Libya in violation of the EAA and AECA. The Court held that because the defendants had been warned "on numerous occasions" that they needed export licenses prior to overseas shipment, the government had established the requisite intent. *Id.* at 1234. The court also noted that the circuitous shipping route (to Libya via West Germany and to Italy via West Germany) suggested that the "defendants were doing all in their power to avoid detection." *Id.*

purposely, with the specific intent to do something the law forbids, that is with a bad purpose, either to disobey or disregard the law." *Id.* at 838. In support of their arguments, the defendants relied "heavily" on a prior Eleventh Circuit opinion, *United States v. Sanchez-Corcino*, 85 F.3d 549 (11th Cir. 1996), which addressed the meaning of "willfully" in the context of firearm licensing statutes. *Id.* *Sanchez-Corcino*, in turn, relied partly on the two export control cases mentioned above in reaching the conclusion that "for the Government to prove the offense of willfully dealing in firearms without a license . . . it must prove that the defendant acted with knowledge of the licensing requirement." 85 F.3d at 553 n.2. "The *Starks* court, however, explicitly rejected our decision in *Sanchez-Corcino*." 157 F.3d at 838. The Eleventh Circuit's recognition that *Bryan* "clearly refutes" *Sanchez-Corcino* calls into question the validity of the export control cases upon which it rested. *See id.* A recent district court decision in Florida further supports the view that courts in the Eleventh Circuit are no longer relying on circuit precedent that was rejected by *Bryan*. In *United States v. Al-Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004), the court, without citing any of the prior Eleventh Circuit export control opinions, applied *Bryan* in an IEEPA case and stated that "[w]hile knowledge of IEEPA, the Executive Order, or the regulations thereunder is not necessary to support a conviction, some 'bad purpose' must be demonstrated by the government." *Id.* at 1340.

The Ninth Circuit, in *United States v. Lizarraga-Lizarraga*, 541 F.2d 826 (9th Cir. 1976) (an AECA case), reversed the decisions of a district judge, which had ruled that the government need not prove that the defendant knew his actions were illegal. *See id.* at 827. In holding that specific intent was required, the Ninth Circuit held that "the government must prove that the defendant voluntarily and intentionally violated a known legal duty not

to export the proscribed articles." *Id.* at 829. The Court did not mention whether the government needed to prove that the defendant knew that the articles were listed in the regulations, but both the Seventh Circuit in *Beck* and the First Circuit in *Murphy* read the Ninth Circuit's opinion as supportive of their position that such a showing was not required. *See Murphy*, 852 F.2d at 7; *Beck*, 615 F.2d at 450.[6] Similarly, a more recent Ninth Circuit opinion characterized *Lizarraga-Lizarraga* as holding that the government need only present "proof that a defendant was aware of the unlawfulness of the conduct." *United States v. Henderson*, 243 F.3d 1168, 1172 (9th Cir. 2001). In a recent opinion from a district court in the Ninth Circuit the Court, citing the Fourth Circuit case *Hsu*, 364 F.3d 192, 197, stated, "[i]n the AECA context, a willful violation occurs where a defendant knows his or her conduct violates the law." *United States v. Qing Li*, – F. Supp. –, 2008 WL 789899 (S.D. Cal. 2008).

The Fifth Circuit, in *United States v. Davis*, 583 F.2d 190 (5th Cir. 1978), claimed to adopt the Ninth Circuit's holdings in *Lizarraga-Lizarraga*, but nevertheless reversed the defendant's convictions in part because the district court failed to instruct the jury that ignorance of the law was a defense to crimes charged under the AECA's predecessor statute. *Id.* at 194. Subsequent Fifth Circuit cases interpreted this to mean that the government is required to prove that the defendant "knew that either a license or other form of authorization was required in order to export prohibited items." *Covarrubias*, 94 F.3d at

[6]The *Beck* Court mischaracterized *Lizarraga-Lizarraga* by stating that the case "held that the defendant need not know that he is specifically required to have an export license." *See Beck*, 615 F.2d at 450. As noted above, the Ninth Circuit was not presented with, and never addressed, that issue.

175 (involving AECA); *see also United States v. Hernandez*, 662 F.2d 289, 292 (5th Cir. 1981) (requiring instruction on defendant's ignorance of the AECA).

However, the Fifth Circuit has articulated a different definition of willfulness in two cases involving the TWEA. In these cases, the Court stated that the government "need not show that appellants had knowledge of the specific regulations governing [the] transactions," but must prove "only that the defendants knew that their planned conduct was legally prohibited and that they therefore acted with an 'evil-meaning mind.'" *Dian Duc Huynh*, 246 F.3d at 742 (quoting *Tooker*, 957 F.2d at 1214). According to the Court, defendants "cannot avoid prosecution by claiming that they had not brushed up on the law." *Tooker*, 957 F.2d at 1214.

Like the Ninth and Fifth Circuits, the intent requirement in the Eighth Circuit is open to interpretation. In *United States v. Gregg*, 829 F.2d 1430 (8th Cir. 1987), the Eighth Circuit upheld the defendants' conviction under the EAA, AECA, and several other statutes. One of the defendants argued that it was error not to admit as exhibits to the jury the AECA, the EAA and the implementing regulations because they were relevant to the specific intent issue. *Id.* at 1436. In rejecting this argument, the Court stated that "the crucial issue is not whether the jury would be confused by these massive legislative and bureaucratic artifacts but <u>whether [the defendant] was</u> confused by them." *See id.* (emphasis in original). The Court noted that the defendant gave lectures and published newsletters on the subject of export law. *See id*. In its discussion of another argument raised by the defendant (a vagueness challenge), the court stated that the government must prove "the necessary intent and knowledge." *See id.* at 1437. In an explanatory footnote, the Court seemed to endorse the more strenuous specific intent requirement,

stating that "[t]he trial court's charge . . . plainly directed acquittal if the jury was not satisfied beyond a reasonable doubt that the defendant knew that the items exported were on the Munitions List and required a license." *See id*. at 1437 n.14.[7]

The *Gregg* court's emphasis on whether the defendant was confused by the statutes and regulations, along with its footnote on the trial court's specific intent instruction, suggests that the Eighth Circuit may be in accord with the Fifth Circuit's position. Nevertheless, the First Circuit in *Murphy* concluded that the *Gregg* court had not endorsed the most stringent standard. The *Murphy* court said that it "d[id] not read [the *Gregg*] footnote as requiring proof that the defendant knew that the arms are on the United States Munitions List," and claimed that *Gregg* simply required the "same level of proof as the 7th and 9th Circuits." *Murphy*, 852 F.2d at 7. That level of proof, according to the court, requires "the 'government [to] prove that the defendant voluntarily and intentionally violated a known legal duty not to export the proscribed articles.'" *Id.* (citing *Lizarraga-Lizarraga*, 541 F.2d at 828-29, and *Beck*, 615 F.2d at 450). The Court offered as support for its reading of *Gregg* only the sentence in the text from which the footnote sprung, which states in relevant part that the government must prove "the necessary intent and knowledge."

C. Wire Fraud

Count 17 charges wire fraud under the theory that Roth's scheme deprived the State of Tennessee of its intangible right to honest services by its employee.

The statute in question, 18 U.S.C. § 1343, in pertinent part, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

[7]The trial court used similar language in its EAA jury charge. *Id.*

> pretenses . . . for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. . . .

To obtain a conviction for wire fraud, the government must prove: (1) a scheme or artifice to defraud; (2) use of interstate wire communications in furtherance of the scheme; and (3) intent to deprive a victim of money or property. *United States v. Daniel*, 329 F.3d 480, 485 (6th Cir. 2003).

The term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services. 18 U.S.C. § 1346. This includes honest and impartial government. *United States v. Frost,* 125 F.3d 346, 364 (6th Cir. 1997). In *Frost*, 125 F.3d 346, the Sixth Circuit found that the defendant professor breached a fiduciary duty to the university employer which had the right to his honest services. The Court found that this was a valid basis for a wire fraud conviction under 18 U.S.C. §§ 1343 and 1346. *Id.* at 367-68.

Unlike the mail fraud statute, the fraud by wire statute makes no reference to the venue of the offense. Accordingly, the provisions of § 3237(a) apply, and prosecutions may be instituted in any district in which an interstate or foreign transmission was issued or terminated. *See United States v. Goldberg*, 830 F.2d 459, 465 (3d Cir. 1987).

State Department Certifications

The determination by the Department of State that a particular item is a defense article, pursuant to the AECA and ITAR, and thus is on the Munitions List and subject to export controls, is not subject to judicial review. *United States v. Martinez*, 904 F.2d 601, 602-03 (11th Cir. 1990); *Karn v. United States Dep't of State*, 925 F. Supp. 1, 8 (D.D.C. 1996); 22 U.S.C. § 2778(h).

The government will establish that an item is covered by the Munitions List by testimony from two witnesses: an official from the DDTC and a technical expert. The technical expert is called upon to establish what the item is, and the DDTC witness will testify as to whether the item is on the list.

The government will also introduce documents from the United States Department of State, Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, containing the seal of the Department of State stating that the items and documents at issue in this case are technical data and defense articles listed in the United States Munitions List.

These documents are self-authenticating pursuant to Federal Rule of Evidence 902(1) as domestic public documents under seal. Further, they are exceptions to the hearsay rule under Federal Rule of Evidence 803(7).

Respectfully submitted this the 22nd day of August 2008.

James R. Dedrick
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By: s/Jeffrey E. Theodore
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Assistant U.S. Attorney

s/A. William Mackie
A. William Mackie
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2008, a copy of the foregoing motion was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Opposing counsel may access this filing through the Court's electronic filing system. Any counsel not named as being served electronically will be served by regular U.S. mail or facsimile.

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