No. __-_____

IN THE

Supreme Court of the United States

MARK HENRY, AKA Weida Zheng, AKA Scott Russel,
AKA Bob Wilson, AKA Joanna Zhong,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a "willful" violation of the Arms Export Control Act ("AECA"), 22 U.S.C. § 2778, requires proof that the defendant was aware of the export licensing requirements provided under the statute and its related regulations, as the Courts of Appeals for the Fifth, Seventh, Ninth, and Eleventh Circuits have held, or whether it is sufficient to establish that the defendant was generally aware that his or her conduct was in violation of *some* law, as the Courts of Appeals for the First, Second, Third, Fourth, and Sixth Circuits have held.

2. Whether the AECA's assignment of legislative powers to the executive branch violates the constitutional nondelegation doctrine, and whether Congress is required to provide something more than an "intelligible principle" when it delegates criminal lawmaking functions to the prosecuting branch of government.

3. Whether the personal right to defend in criminal cases encompasses an absolute right to waive the statutory procedural protections provided under the Court Interpreters Act, 28 U.S.C. § 1827.

PARTIES TO THE PROCEEDING

All parties to the proceedings before the Court of Appeals for the Second Circuit are named in the case caption before this Court.

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PETITION FOR WRIT OF CERTIORARI

Mark Henry respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's opinion affirming Henry's conviction and sentence, *United States v. Henry*, 888 F.3d 589 (2d Cir. 2018), is included in the Appendix at Pet. App. A1. The Second Circuit's order denying Henry's motion for a panel rehearing, or, in the alternative, for rehearing *en banc*, pursuant to Rules 35(a) and 40 of the Federal Rules of Appellate Procedure, is included in the Appendix at Pet. App. A36.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Second Circuit affirmed the judgment of the district court on April 26, 2018 and denied Henry's timely petition for rehearing on October 17, 2018. This petition was filed within 90 days of the latter event.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Arms Export Control Act, 22 U.S.C. § 2778, the International Traffic in Arms Regulations, 22 C.F.R. § 120-30, and the Court Interpreters Act, 28 U.S.C. § 1827 are reproduced in the Appendix at Pet. App. A98-101.

STATEMENT OF THE CASE

This case presents an opportunity for the Court to resolve a conflict among the federal courts of appeals as to the question of whether a "willful" violation of the Arms Export Control Act ("AECA"), 22 U.S.C. § 2778, requires proof that a defendant was aware of the export licensing requirements provided under the statute and its related regulations. This case also presents an opportunity for the Court to determine whether the AECA's delegation of authority to the President violates the constitutional nondelegation doctrine and to clarify whether something more than an "intelligible principle" is required when Congress assigns criminal lawmaking functions to the executive branch of government. Finally, this case presents an opportunity for the Court to determine whether criminal defendants who proceed to trial may be forced to listen to the proceedings through a court-appointed interpreter.

I. Proceedings before the District Court

Through an indictment filed in the United States District Court for the Eastern District of New York on February 13, 2013, the government charged petitioner Mark Henry with one count of conspiracy to violate the AECA, in violation of 18 U.S.C. § 371, and one count of violating the AECA, in violation of 22 U.S.C. § 2778(b)(2) and (c). Pet. App. A.53-63. The indictment specifically alleged that, from April 2009 to September 2012, Henry purchased ablative materials,[1]

[1] In a post-trial Memorandum and Order denying Henry's motion for a new trial, the district court noted that "[a]blative material is a protective substance that absorbs heat in high-velocity and high-intensity heat environments. The ablative material that Henry exported could be used as a heat shield to prevent rockets or missiles from melting upon

which the U.S. Department of State has designated as a "defense article" subject to export licensing requirements, and "caused those materials to be shipped from the United States to a Taiwanese company" without first obtaining an export license, in violation of the AECA and 22 C.F.R. §§ 121.1, 123.1, and 127.1. Pet. App. A58-61. Henry was also charged with one count of attempting to violate the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1705. Pet. App. A61-62.

Henry proceeded to trial, and on July 2, 2014 he was acquitted of the charged IEEPA violation and convicted on both of the charged AECA counts. On November 19, 2015, the district court sentenced Henry to a period of 78 months' imprisonment and three years of supervised release. Pet. App. A37-39. On April 26, 2018, the Court of Appeals for the Second Circuit affirmed Henry's conviction, and on October 17, 2018 the Second Circuit denied Henry's petition for a panel rehearing, or, in the alternative, for rehearing *en banc*, pursuant to Rules 35(a) and 40, Fed. R. App. P.

A. The District Court's Order denying Henry's application to waive his right to the assistance of an interpreter.

On the morning of the first day of trial, Henry's defense counsel informed the district court that Henry, who had been provided Mandarin language interpreters during previous court proceedings, did not wish to use interpreters at trial "in light of the fact that he doesn't want his credibility questioned on the fact that he is using an interpreter[.]" Pet. App. A67. The district court inquired as to Henry's "facility with the English language" and asked Henry several questions (in English) about his personal history and his ability to understand technical terms and documents.

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their launch[.]" *United States v. Henry*, 2015 WL 861743, at * 1, n.1 (E.D.N.Y. Feb. 27, 2015).

Pet. App. A68; 71-74. After this colloquy, the district court noted that Henry "obviously can speak and understand English," but advised that "I am concerned about the technical aspects of the case, the regulations." Pet. App. A74. In response, Henry's defense counsel proposed an alternative procedure through which a "standby" interpreter would be available to provide translation services "in case [Henry] is having some difficulties with certain concepts[.]" Pet. App. A75-76.

The district court ultimately denied Henry's request to proceed without an interpreter, or with a "standby" interpreter, but permitted Henry to present his own testimony in English. Pet. App. A78. The court specifically instructed Henry that he was required to "use the interpreters throughout the trial, unless and until someone tells you—unless I tell you that it is fine for you to listen to the testimony in English." Pet. App. A80.

B. The District Court's jury instructions regarding the AECA's *mens rea* element

With respect to the charged AECA counts, the key issue at trial was whether Henry had known that he was required to register and obtain an export license from the U.S. State Department before exporting ablative materials to Taiwan. On June 2, 2014, the parties filed "joint proposed jury instructions," through which the government requested an instruction stating that a "willful" violation of the AECA could be established absent proof "that the defendant knew the existence or details" of the licensing requirements provided under the statute and its related regulations. Pet. App. A.44. The defense objected to this proposed instruction and requested that the district court instruct the jury that "good faith" and "mistake of law" are valid

defenses under the AECA. Pet. App. A44-51. During a charge conference held on June 26, 2014, the district court granted the government's request for an instruction that broadly defined the term "willfullness" and denied the defense's request for "good faith" and "mistake of law" instructions. Pet. App. A89-91. At the conclusion of trial, the district court specifically instructed the jury that:

> Willfully means to act with knowledge that one's conduct is unlawful and with the intent to do something that the law forbids. . . . [T]he government is not required to prove that the defendant knew the existence or details of the Arms Export Control Act or the related regulations. All that is required is that the government prove that the defendant acted with the intent to disobey or disregard the law.[2]

Pet. App. A96.

II. Proceedings before the Court of Appeals

Henry appealed his conviction to the Court of Appeals for the Second Circuit. Among other issues, Henry argued that the district court erred when it instructed the jury, over his objection, that the AECA's "willful[ness]" element could be established without proof that he was aware of his obligation to register and obtain a license from the State Department before exporting ablative materials to Taiwan. Henry also argued that the AECA's delegation of legislative authority to the executive branch with respect to the designation of defense articles and services violates the constitutional nondelegation doctrine. Finally, Henry argued that the district court improperly denied his request to waive the assistance of an interpreter at trial.

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[2] The district court also instructed the jury, over the defense's objection, that "[i]n determining whether the defendant acted willfully, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him." Pet. App. A96-97.

In a published opinion issued on April 26, 2018, the Second Circuit determined that the district court's jury instructions regarding the AECA *mens rea* standard were correct, and that "willfulness requires only that the defendant know that what he was doing was illegal, and not that he know that his conduct was prohibited under a specific AECA provision or related regulation." Pet. App. A19-20. With respect to Henry's constitutional challenge to the AECA, the Second Circuit held that the statute's first sentence, which provides that "in furtherance of world peace and the security and foreign policy of the United States" the President is authorized to designate defense articles and services, satisfies the "intelligible principle" standard under this Court's precedents. Pet. App. A13-14. Finally, the Second Circuit held that the right to waive the assistance of court-appointed interpreters "is not absolute," and that the district court's order requiring Henry to use interpreters throughout his trial (except during his own testimony) was not an abuse of discretion. Pet. App. A26.

On October 17, 2018, the Second Circuit denied Henry's petition for a panel rehearing, or, in the alternative, for rehearing *en banc*, pursuant to Rules 35(a) and 40 of the Federal Rules of Appellate Procedure. Pet. App. A36.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I. This Court should resolve the existing conflict among the federal courts of appeals regarding the AECA's *mens rea* element.

This Court's intervention is warranted to resolve an existing and intractable conflict among the federal courts of appeals as to the question of whether a "willful"

violation of the AECA may be established absent proof that a defendant was aware of his or her legal obligation to register and obtain a license from the State Department before importing or exporting certain articles or services. Until this conflict is resolved, importers and exporters who are unaware of the AECA's registration and licensing requirements, and those who are unfamiliar with the statute's application to particular items that have been administratively designated as "defense articles or services," will be exposed to criminal liability, or not, depending on the federal circuit in which they are charged.

This case is an appropriate vehicle for the Court's consideration of the issue. During the trial proceedings below, Henry did not dispute that he was required by law to register with the State Department and obtain a license before exporting ablative materials outside of the United States. Nor did Henry dispute the fact that he had exported ablative materials to Taiwan without registering and obtaining an export license. Rather, the *only* disputed issue with respect to the charged AECA counts was whether, at the time he sought to export ablative materials, Henry was specifically aware of, and therefore "willfully" violated, the licensing requirements provided under the statute and its related regulations. Nearly all of the evidence presented at trial related to this key issue, and it is therefore likely that the district court's jury instructions regarding the statute's *mens rea* element affected the jury's verdict.

A. The Fifth, Seventh, Ninth, and Eleventh Circuits have determined that a conviction for "willfully" violating AECA requires proof of a defendant's awareness of the relevant licensing obligations.

If Henry's trial had been held within the Fifth, Seventh, Ninth, or Eleventh Circuits, the established law in those circuits would have precluded the district court from instructing the jury that it could convict Henry of a "willful" AECA violation even if he had not been aware of the licensing provisions provided under the statute and its related regulations.[3] Pet. App. A96.

In *United States v. Hernandez*, 662 F.2d 289 (5th Cir. 1981), the defendant was convicted of violating the AECA after a trial in which the jury heard evidence that he had purchased firearms and ammunition at various retailers in Texas and transported them by car into Mexico. The Court of Appeals for the Fifth Circuit overturned the AECA conviction on the grounds that there was insufficient evidence to establish that the defendant had "willfully" violated the statute. *Id.*, at 292. Although the evidence *did* support a finding that the defendant knew his conduct was *generally unlawful*, the Fifth Circuit determined that there was not sufficient proof that he had specifically known that he was violating his obligations under the AECA. *Id. See also United States v. Davis*, 583 F.2d 190, 193-94 (5th Cir. 1978).

[3] The Court of Appeals for the Eighth Circuit, for its part, has not expressly held that § 2778(c) requires a finding that the defendant was aware of the statute's export licensing obligations. However, in *United States v. Gregg*, 829 F.2d 1430, 1437 & n.14 (8th Cir. 1987), the court confirmed that an AECA conviction requires proof of a "willful" export of a designated defense article "with the necessary intent and knowledge, and without an appropriate license," and noted 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 license*.") (emphasis added).

In *United States v. Pulungan*, 569 F.3d 326, 329 (7th Cir. 2009), the Court of Appeals for the Seventh Circuit likewise held that a "willful" AECA violation requires proof of the defendant's awareness that a particular item is considered a "defense article" that cannot be exported without a license. The *Pulungan* opinion distinguished *malum prohibitum* regulatory offenses from *malum in se* crimes—those that are "evil in themselves under widely held moral codes"—and held that "the 'willfulness' element in a regulatory offense such as § 2778(c) is designed to require knowledge of *this* rule, rather than of some other actual or potential regulation." *Id.*, at 331 (emphasis in the original). Subsequently, in *United States v. Dobek*, Judge Posner of the Seventh Circuit expounded on the definition of "willfulness" as it applies to the AECA:

> Ordinarily a person is conclusively presumed to know the law, which is to say that ignorance of the law that one has violated is not a defense to conviction for the violation. But this principle, sensible when a person is bound to know that what he is doing is wrong, breaks down when a person who does not know of the law prohibiting what he does has no reason to think that he's acting wrongfully. Especially when the law is a regulation rather than a statute. . . . So we interpret 'willfully' in 22 U.S.C. § 2778 to require knowledge by the defendant in this case that he needed a license to export the munitions that he exported.

789 F.3d 698, 700 (7th Cir. 2015).

In *United States v. Lizarraga-Lizarraga*, the Court of Appeals for the Ninth Circuit determined that 22 U.S.C. § 1934, the predecessor statute to § 2778(c), required proof of a defendant's intentional violation of a known legal duty. 541 F.2d 826, 829 (9th Cir. 1976). The Ninth Circuit specifically noted that the statute "prohibits exportation of items listed by administrative regulation, not by the

statute itself," and recalled that the regulations contain "an exhaustive list of items including amphibious vehicles, pressure-breathing suits, aerial cameras, 'privacy devices,' and concealment equipment (including paints)." *Id.*, at 828. In contrast to items that are "known generally to be controlled by government regulation, such as heroin or like drugs," the Ninth Circuit found that designated defense articles "might be exported or imported innocently." *Id.* Therefore, the Court concluded, "it appears likely that Congress would have wanted to require a voluntary, intentional violation of a known legal duty not to export such items before predicating criminal liability." *Id. See also United States v. Lee*, 183 F.3d 1029, 1032-33 (9th Cir. 1999) (noting that a "specific intent" *mens rea* standard "protects the innocent exporter who might accidentally and unknowingly export a proscribed component or part whose military use might not be apparent through physical appearance").

Finally, the Court of Appeals for the Eleventh Circuit has determined that a defendant's "suspicious conduct," from which it "reasonably could be inferred . . . that she was aware of the generally unlawful nature of her actions," was "insufficient to sustain a finding of guilt" under the AECA. *United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir. 1989). Citing to the Fifth Circuit's decision in *Davis*, 583 F.2d 190, the Eleventh Circuit reasoned that the use of the word "willfully" under § 2778(c) "connotes a voluntary, intentional violation of a known legal duty," and noted that the government had conceded that it was required to prove the defendant's specific intent to violate the statute's licensing provisions. *Id. See also United States v. Wenxia Man*, 891 F.3d 1253, 1268-69 (11th Cir. 2018).

B. The Second Circuit's interpretation of the AECA *mens mea* element comports with prior decisions from the First, Third, Fourth, and Sixth Circuits.

In contrast to the Fifth, Seventh, Ninth, and Eleventh Circuits, the Courts of Appeals for the First, Second, Third, Fourth, and Sixth Circuits have determined that a defendant may be convicted of "willfully" violating the AECA even if he or she was unaware of the export licensing obligations provided under the statute and its related regulations, so long as the defendant was aware that his or her conduct was *generally* unlawful.

For example, in *United States v. Murphy*, 852 F.2d 1, 7 (1st Cir. 1988), the First Circuit upheld a jury instruction which stated that the government did not need to prove that the defendant was aware of the AECA's export licensing requirements in order to establish a willful violation of the statute. In *United States v. Tsai*, 954 F.2d 155, 162 (3d Cir. 1992), the Third Circuit likewise held that willfulness is established "if the defendant knew that [an] export was in violation of the law," but the government does not need to establish the basis of that knowledge or prove that the defendant specifically knew about the relevant licensing obligations. *See also United States v. Electro-Glass Prods.*, 298 Fed. App'x 157, 160 (3d Cir. 2008). More recently, the Fourth Circuit determined that "it would be unwarranted for courts to draw from the word 'willful' a desire on the part of Congress to require not simply general knowledge of an export's illegality, but specific knowledge of the particulars of a certain list." *United States v. Bishop*, 740 F.3d 927, 933-34 (4th Cir. 2014). Finally, in *United States v. Roth*, the Sixth Circuit

held that "[s]ection 2778(c) does not require a defendant to know that the items being exported are [designated defense articles]. Rather, it only requires knowledge that the underlying action is unlawful." 628 F.3d 827, 835 (6th Cir. 2011).

In this case, the Second Circuit held that the district court's jury instructions regarding the AECA *mens rea* element were correct and that the government was not required to prove that Henry had been aware of the export licensing obligations he was charged with violating.[4] This holding echoes the First, Third, Fourth, and Sixth Circuit decisions cited above, and is in direct contrast to the established law in the Fifth, Seventh, Ninth, and Eleventh Circuits.

C. This Court's precedents indicate that an AECA conviction requires proof that the defendant was aware of, but "willfully" violated, the applicable export licensing requirements.

As indicated by the existing conflict of law described above, this Court has not previously determined whether a conviction under the AECA requires proof that a defendant was aware of the export licensing requirements provided under the statute and its related regulations. However, the Court's prior decisions in *Cheek v. United States*, 498 U.S. 192 (1991), *Ratzlaf v. United States*, 510 U.S. 135 (1994),

[4] This holding contradicts the Second Circuit's prior opinion in *United States v. Golitscheck*, 808 F.2d 195, 202-03 (2d Cir. 1986), wherein the court previously held that the AECA requires proof of a defendant's knowledge of a specific legal requirement and stated that "when the law makes knowledge of some requirement an element of the offense, it is totally incorrect to say that ignorance of such law is no excuse or that everyone is presumed to know such law." 808 F.2d at 203. *See also United States v. Durrani*, 835 F.2d 410, 423 (2d Cir. 1987) (upholding a jury instruction stating that the government was required to prove that the defendant "knew he was required to obtain an export license before causing defense articles to be exported."); *United States v. Smith*, 918 F.2d 1032, 1037-38 (2d Cir. 1990) (finding that a jury instruction which indicated that "willfulness" depended on whether the defendant knew that a particular helicopter was subject to AECA licensing requirements was "appropriate.").

and *Bryan v. United States*, 524 U.S. 184 (1998) support the conclusion that Congress did *not* intend to subject unwitting defendants who are unaware of the applicable export licensing requirements to criminal liability. At the very least, this Court's precedents indicate that the term "willfully," as provided under § 2778(c), is ambiguous on its face, and that this ambiguity should have been resolved in Henry's favor. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992).

In *Cheek*, the Court held that a conviction under 26 U.S.C. §§ 7201 and 7203, which criminalize the willful failure to file tax returns, requires proof that a defendant was specifically aware of the duty to file such returns. 498 U.S. at 201-02. Although "the common law presumed that every person knew the law," the Court noted that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Id.*, at 199-200. Therefore, the majority in *Cheek* held that a "willful" failure to file tax returns requires proof that a defendant was specifically aware of a particular legal duty under the Internal Revenue Code and "voluntarily and intentionally violated that duty." *Id.*, at 201.

Several years later, in *Ratzlaf*, this Court held that the "willfulness" standard applicable to the "antistructuring" provisions of the Bank Secrecy Act, 31 U.S.C. § 5322(a), requires proof that a defendant specifically "knew [that] the structuring in which he engaged was unlawful." 510 U.S. at 149. Moreover, "[b]ecause currency structuring is not inevitably nefarious," the Court explained that an intentional

structuring of financial transactions with the purpose of avoiding transaction reporting requirements does not qualify as a "willful" violation of the statute *unless* the defendant was aware "not only of the bank's duty to report cash transactions in excess of $10,000, but *also* of his duty not to avoid triggering such a report." *Id.*, at 144, 146-47 (emphasis added). Furthermore, the majority in *Ratzlaf* held that any ambiguity as to the definition of a "willful" antistructuring offense would be resolved in favor of the defendant. *Id.*, at 148 (citing *Hughey v. United States*, 495 U.S. 411, 422 (1990)).

In *Bryan*, the Court confirmed that "[t]he word 'willfully' is sometimes said to be 'a word of many meanings,'" and that its definition "is often dependent on the context in which it appears." 524 U.S. at 191 (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). The petitioner in *Bryan* was convicted of "willfully" dealing in firearms without a federal license, in violation of 18 U.S.C. § 922(a)(1)(A), and on appeal he argued that the government had failed to prove that he known about the statute's licensing requirement. *Id.*, at 189-90. The Court held that the firearms dealing statute that was in effect at the time did not present a danger of punishing "apparently innocent activity," and that when it comes to selling firearms without a license, "knowledge that the conduct is unlawful is all that is required." *Id.*, at 195-96.

In a dissenting opinion written on behalf of himself, Chief Justice Rhenquist, and Justice Ginsbug, Justice Scalia noted that there was no dispute that the term "willfulness" required proof that the defendant possessed "*some* awareness of the

law." *Id.*, at 204 (dissenting opinion) (emphasis added). However, the *Bryan* dissenters found that the firearms dealing statute was "simply ambiguous, or silent, as to the precise contours of that *mens rea* requirement," and argued that this ambiguity should have been "resolved in favor of lenity." *Id.*, at 205 quoting *United States v. Bass*, 404 U.S. 336, 347 (1971)).

The *Bryan* dissent also noted that, by separating the § 922(a)(1) *mens rea* standard from the *actus reus* of dealing in firearms without a license, the majority opinion would allow defendants to be convicted of "willfully" violating the statute even if they were entirely unaware of its licensing requirements but *did* have reason to suspect that they were in violation of some *other* law. *Id.*, at 202-03. "Once we stop focusing on the conduct that the defendant is actually charged with (*i.e.*, selling guns without a license)," the *Bryan* dissenters argued, there is "no principled way to determine *what* law the defendant must be conscious of violating."[5] *Id.*, at 202-03 (emphasis in the original).

With respect to the crimes charged in this case, the export licensing requirements provided under the AECA and its related regulations are akin to the complex statutes and *malum prohibitum* offenses discussed in *Cheek* and *Ratzlaf*, and are distinguishable from the firearms dealing statute examined in *Bryan*. As with the financial structuring conduct that was discussed in *Ratzlaf*, there is

[5] For example, the *Bryan* dissenters noted that the petitioner could have been convicted under the majority's expansive definition of willfulness "if he knew that his street-corner transactions violated New York City's business licensing or tax ordinances. (For that matter, it ought to suffice if Bryan knew that the car out of which he sold the guns was illegally double-parked, or if, in order to meet the appointed time for the sale, he intentionally violated Pennsylvania's speed limit on the drive back from the gun purchase in Ohio.)" 524 U.S. at 202.

nothing "inevitably nefarious" about shipping ablative materials overseas, 510 U.S. at 144, because ablative materials are not self-evidently contraband items that are "known generally to be controlled by government regulation." *Lizarraga-Lizarraga*, 541 F.2d at 828. Thus, it is far more obvious that an unlicensed sale of firearms—the conduct at issue in *Bryan*—will violate federal law as compared to an unlicensed import or export of "ablative materials."

Moreover, the rule adopted by the Second Circuit in this case will enable the government to establish "willful" AECA violations even when it is clear that a particular defendant had no idea that an item or service required a license for import or export, so long as that defendant had reason to believe that his or her conduct was in violation of *some* law. This rule turns the AECA into a "strange and unlikely creature" that punishes an *actus reus* (the unlicensed import or export of items designated by regulation as "defense articles") when it is accompanied by an entirely unrelated *mens rea* (say, a culpable violation of post office regulations). *Bryan*, 524 U.S. at 202 (dissenting opinion).

Finally, there is nothing in the plain language of the AECA to indicate that the statute is aimed at punishing people who are unaware of their obligation to register and obtain a license before importing or exporting particular articles or services. Thus, the precise meaning of "willfully" under § 2778(c) is ambiguous at best, and this Court should grant the petition and resolve that ambiguity in Henry's favor.

II. Henry's nondelegation doctrine challenge to the AECA presents an opportunity for this Court to address unresolved questions affecting fundamental separation of powers principles.

This case also presents a unique opportunity for the Court to define the outer boundaries of the "exception" to the constitutional nondelegation doctrine that allows Congress to provide an "intelligible principle" and assign legislative policymaking functions to a coordinate branch of government. The statute at issue in this case, the AECA, provides the President (or the President's designee) the unrestricted and unreviewable power to designate "defense articles or services," a designation that has the effect of criminalizing the import or export of such articles or services without a federal license. § 2778(a) and (c). Congress has provided no substantive guidance with respect to this assignment of criminal lawmaking authority, other than a vague declaration that the statute was itself enacted "[i]n furtherance of world peace and the security and foreign policy of the United States." § 2778(a)(1). Therefore, because of the statute's unique structure, Henry's nondelegation challenge requires a resolution of the following critical questions: *First,* does the AECA provide an "intelligible principle" to guide the executive branch's authority under the statute, as required under this Court's precedents. *Second*, is something more than an intelligible principle required when Congress delegates criminal lawmaking powers to the prosecuting branch of government?

A. The AECA provides the executive branch with sweeping and unreviewable powers to designate "defense articles and services."

The AECA specifically authorizes the President to "control the import and the export of defense articles and defense services" by "designat[ing] those items which shall be considered as defense articles and defense services" and by "promulgat[ing] regulations for the import and export of such articles and services." § 2778(a)(1).[6] Any person who exports or imports designated articles or services is required to register with "the United States Government agency charged with the administration of this section," and "no defense articles or defense services designated by the President . . . may be exported or imported without a license for such export or import[.]" § 2778(b)(1)(A)(i) and (b)(2). The President's designation of defense articles and defense services "shall not be subject to judicial review," § 2778(h),[7] and any person who "willfully violates" the statute's licensing requirements is subject to a maximum term of 20 years' imprisonment and a maximum fine of $1,000,000. § 2778(c). In sum, the AECA empowers the President (or the President's designee) to act as the legislator, executor, and sole judge of regulations that have the effect of exposing people to substantial criminal penalties.

[6] "In exercising the authorities conferred by" the AECA, the President is also authorized to "require that persons engaged in the negotiation for the export of defense articles and services keep the President fully and currently informed of the progress and future prospects of such negotiation." § 2778(a)(3).

[7] *See generally United States v. Bozarov*, 974 F.2d 1037, 1042 (9th Cir. 1992) (noting that "the availability of judicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge.").

The President's authority to designate defense articles and services under the AECA has been assigned to the U.S. Department of State. Exec. Order No. 11,958 42 Fed. Reg. 4311 (Jan. 24, 1977). In accordance with this assigned authority, the State Department has implemented the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. § 120-30, and has placed all formally designated "defense articles and defense services" on the United States Munitions List ("USML"), 22 C.F.R. § 121.1.[8]

The President is required to "periodically review" the USML "to determine what items, if any, no longer warrant export controls," and to submit the findings of such reviews to Congress. § 2778(f). While no item may be *removed* from the USML until 30 days after a notice of a proposed removal has been submitted to the House of Representatives Committee on International Relations and the Senate Committee on Foreign Relations, *id*., the AECA does not provide any similar Congressional review requirement with respect to the *addition* of new designated articles or services.

In fact, the AECA does not provide *any* limitations with respect to the President's authority to designate USML items (and thereby criminalize their unlicensed import or export). While the first sentence of the statute declares that

[8] The USML currently identifies 21 categories of designated articles and services and is "organized by paragraphs and subparagraphs" that "usually start by enumerating or otherwise describing end-items, followed by major systems and equipment; parts, components, accessories, and attachments; and technical data and defense services directly related to the defense article of that USML category." 22 C.F.R. § 121.1(a). "Ablative materials"—the type of articles that Henry was charged with conspiring to export and exporting without a license—are currently listed under Category XIII, subsection (d)(1), of the USML.

Congress has delegated its lawmaking authority to the President "[i]n furtherance of world peace and the security and foreign policy of the United States," § 2778(a)(1), there is nothing to indicate that this vague policy statement applies to, or somehow restricts, the executive branch's performance of those delegated powers. Moreover, while § 2778(a)(2) provides that "[d]ecisions on issuing export licenses shall take into account" such factors as "whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, [or] support international terrorism, . . . " this provision only applies with respect to the issuance of export licenses; by its plain terms it does not restrict or otherwise affect the President's authority to designate defense articles and services.

B. The AECA does not provide an "intelligible principle" to guide the executive branch's performance of inherently legislative functions.

In *Mistretta v. United States*, this Court confirmed that "'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch" of government.[9] 488 U.S. 361, 371-72 (1989) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)). *See also Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) ("Congress manifestly is not permitted to abdicate or transfer to others the legislative functions" assigned to it under the Constitution). However, this Court has allowed for an exception to the nondelegation principle that enables Congress to "give to

[9] Article I, § 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States[.]" Article I, § 8, cl. 18 further provides that Congress is empowered "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its legislative powers.

those who [are] to act under [its] general provisions [the] 'power to fill up the details' by the establishment of administrative rules and regulations[.]" *United States v. Grimaud*, 220 U.S. 506, 519 (1911). In *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), the Court clarified that "[i]f Congress shall lay down by legislative act an intelligible principle" to direct the actions of a delegated authority, then "such legislative action is not a forbidden delegation of legislative power." *See also American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (finding it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.").

Since 1935, when two statutes were overturned for want of an intelligible principle in *Panama Refining* and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), this Court has continually upheld "without exception, delegations under standards phrased in sweeping terms." *Loving v. United States*, 517 U.S. 748, 771 (1996). *See also Dept. of Transp. v. Ass'n of American Railroads*, --- U.S. ----, 135 S.Ct. 1225, 1246 (2015) (Thomas, J., concurring) ("Although the Court may never have intended the boundless standard the 'intelligible principle' test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power."). However, even under the permissive standards that have been applied to Congress's prior delegations of lawmaking authority, the AECA fails to provide an "intelligible principle" or to otherwise restrict the executive branch's performance of inherently legislative policymaking functions.

The statute's vague "world peace and . . . security and foreign policy of the United States" preamble does nothing to guide the President's discretion in designating defense articles and services. Even if the statute's grammatical structure indicated this clause was *intended* to serve as an "intelligible principle," Congress would have been hard put to think of a more vague, malleable, and substantively meaningless standard. *See Panama Refining*, 293 U.S. at 420 ("The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good."). *See also A.L.A. Schechter*, 295 U.S. at 530 (noting that "the necessity and validity" of flexible administrative rulemaking standards "cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.").

The AECA therefore represents a rare example of a federal statute that fails to satisfy the intelligible principle standard that has guided this Court's nondelegation jurisprudence for over a century. As such, this case presents a unique opportunity for the Court to designate the outer boundaries of that standard and to enforce the fundamental separation of powers principles that underlie the nondelegation doctrine.

C. This case also presents an opportunity for the Court to determine whether something more than an "intelligible principle" is required when Congress delegates criminal lawmaking authority to the prosecuting branch of government.

In *Touby v. United States*, 500 U.S. 160, 165-66 (1991), this Court determined the Controlled Substances Act ("CSA"), 21 U.S.C. § 811(h), which authorizes the Attorney General to temporarily designate "Schedule I" controlled substances, does not violate the nondelegation doctrine. The petitioners in *Touby* conceded that the statute provided an intelligible principle to guide the Attorney General's discretion in making such temporary designations,[10] but argued that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." 500 U.S. at 165-66. However, the Court determined that it was not necessary to resolve that question because even if "greater congressional specificity is required in the criminal context" the CSA would "pass[] muster" in light of the "multiple specific restrictions" the statute places on the Attorney General's delegated authority. *Id.*, at 166-67.

In *United States v. Baldwin*, 745 F.3d 1027, 1030 (10th Cir. 2014) (Gorsuch, J.), the Court of Appeals for the Tenth Circuit described the "arrangement" by which Congress has provided the General Services Administration and the Department of Homeland Security authority to establish regulations that impose criminal penalties under 40 U.S.C. § 1315(c) as one that "bears its curiosities," and

[10] In stark contrast to the unlimited and unreviewable powers assigned to the President under the AECA, the CSA provides a series of "specified procedures" that the Attorney General must follow, and a series of eight factors that the Attorney General must consider, before temporarily adding a substance to the list of "Schedule I" controlled substances. 500 U.S. at 162-63.

specifically questioned whether "this arrangement . . . blur[s] the line between the Legislative and Executive functions assigned to separate departments by our Constitution?" (citing *Touby*, at 500 U.S. 165-66). *See also United States v. Nichols*, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of reh'g en banc) (noting that this Court "has repeatedly and long suggested that in the criminal context Congress must provide more meaningful guidance," and arguing that "[i]t's easy enough to see why a stricter rule would apply in the criminal arena.") (internal quotation omitted). However, because the defendant in *Baldwin* had not raised a nondelegation challenge to § 1315(c), the Tenth Circuit did not conclusively decide the issue. 745 F.3d at 1031.

It thus remains an unsettled question whether Congress is required to provide "greater congressional specify" in the criminal context.[11] Therefore, the petition should be granted and the Court should provide much-needed direction—to litigants, to the judiciary, and to Congress—as to what does and does not qualify as an "intelligible principle," and whether something more than an intelligible principle is required when Congress delegates criminal lawmaking authority to the executive, prosecuting branch of government.

[11] The case of *Gundy v. United States*, 17-6086 (argued Oct. 2, 2018), which is pending before this Court, involves a similar issue of law regarding the Attorney General's authority to determine how the Sex Offender Registration and Notification Act applies to people who sustained sex offense convictions prior to the Act's effective date.

III. This Court's intervention is warranted to clarify whether criminal defendants have an absolute right to knowingly and voluntarily waive the assistance of an interpreter at trial.

Finally, this Court should grant the petition and resolve the important question of whether the individual right to defend encompasses a right to waive the assistance of an interpreter at trial.

The Court Interpreters Act ("CIA") requires "presiding judicial officer[s]" in federal criminal proceedings to "utilize the services of the most available certified interpreter" if the defendant's limited English proficiency would "inhibit [the defendant's] comprehension of the proceedings or communication with counsel or the presiding judicial officer[.]" 28 U.S.C. § 1827(d)(1). Under the statute, a defendant is entitled to "waive such interpretation in whole or in part," so long as the waiver is "approved by the presiding judicial officer and made expressly by [the defendant] on the record after opportunity to consult with counsel and after the presiding judicial officer has explained . . . the nature and effect of the waiver." § 1827(f)(1).

In this case, because of purported concerns that it would be difficult for Henry to understand "technical" aspects of the trial evidence, the district court denied Henry's explicit, voluntary, and informed request to waive his right to a court-appointed interpreter (or, in the alternative, for a "standby" interpreter), and ordered him to listen to the entire trial, except for his own testimony, through a translation headset. Pet. App. A82. In its opinion below, the Second Circuit upheld

the district court's order as a valid exercise of discretion under § 1827(f)(1). The court's opinion states that:

> A defendant's ability to waive the right to an interpreter at trial . . . is not absolute, and a district judge faced with a request for a waiver must weigh a defendant's wishes against the need for an interpreter in order to safeguard the defendant's right to a fair and speedy trial and the public's right to a comprehensible trial.

Pet. App. A.32.

Regardless of whether the district court's order in this case was proper under the plain terms of the statute,[12] the Second Circuit's determination that criminal defendants may be forced to avail themselves of their statutory right to an interpreter imposes a strange new rule of law. Therefore, this case presents a unique opportunity for the Court to clarify whether criminal defendants' personal right to make decisions regarding their defense encompasses the right to waive statutory procedural protections like those provided under the CIA.

"Freedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding," *Faretta v. California*, 422 U.S. 806, 834 n.45 (1975), and it is forbidden to "imprison a man in his privileges[.]"

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[12] It should be noted that the district court did not "explain . . . the nature and effect of the [requested] waiver," as required under § 1827(f)(1). Moreover, after Henry personally addressed the district court and answered multiple questions (in English) in support of his requested waiver, the district court noted that "[h]e obviously can speak and understand English." Pet. App. A74. Even if Henry did not have an absolute personal right to waive the CIA's procedural protections, the district court's finding that Henry would potentially have difficulty understanding trial evidence involving "technical" language was not likely a sufficient basis to deny his request under the statute. *See generally United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980) (noting that "a waiver of an interpreter is not a decision for [a defendant's] counsel or the Court to make. It is the defendant's decision, after the Court explains to him the nature and effect of a waiver.").

Adams v. United States ex rel. McCann, 317 U.S. 269, 280 (1942). *See also Michigan v. Mosley*, 423 U.S. 96, 108-09 (1975) (White, J., concurring) (noting that "[u]nless an individual is incompetent, we have in the past rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case."). Under this Court's precedents, Henry had the absolute right as a criminal defendant to decide "whether to plead guilty, waive the right to a jury trial, testify [on his] own behalf, [or] forego an appeal." *McCoy v. Louisiana*, --- U.S. ----, 138 S.Ct. 1500, 1508 (2018). Henry also was also entitled, if he wished, to waive his constitutional right to an attorney and defend himself at trial. In *Faretta*, this Court confirmed that a defendant who elects to proceed *pro se* "may conduct his own defense ultimately to his own detriment," but nevertheless "his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.*, at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)). *See also McKastle v. Wiggins*, 465 U.S. 168, 176-77 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused."); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (noting that the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided[.]").

Having elected to proceed with the assistance of counsel, Henry was also entitled to waive his right be present for the trial proceedings. *See Cuoco v. United States*, 208 F.3d 27, 30 (2d Cir. 2000) (citing *Smith v. Mann*, 173 F.3d 73, 76 (2d Cir. 1999)). However, in this case the Second Circuit has determined that the "ability to

waive the right to an interpreter at trial . . . is not absolute." Pet. App. A.32. Thus, under the current state of the law in the Second Circuit, a defendant may refuse to attend his trial but if he does attend then he may be forced to listen to all of the testimony through a translation headset.

A criminal defendant's knowing and voluntary waiver of the statutory right to an interpreter should be afforded no less "respect" than a waiver of critical constitutional rights such as the right to counsel or the right to attend trial. *Allen*, 397 U.S. at 350-51 (Brennan, J., concurring). Therefore, because "[t]he right to defend is personal," *Faretta*, 422 U.S. at 834, and because this case provides a unique factual record that directly implicates the CIA's waiver provision, this Court should grant the petition and remedy the Second Circuit's erroneous restriction of that fundamental personal right.

CONCLUSION

Therefore, the instant petition for a writ of *certiorari* should be granted.

Dated: January 14, 2019
New York, New York

Respectfully submitted,

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APPENDIX

15-3814-cr
United States of America v. Mark Henry

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2017
No. 15-3814-cr

UNITED STATES OF AMERICA,
Appellee,

v.

MARK HENRY, AKA WEIDA ZHENG, AKA SCOTT RUSSEL, AKA BOB WILSON, AKA JOANNA ZHONG
Defendant-Appellant.*

Appeal from the United States District Court
for the Eastern District of New York.

ARGUED: SEPTEMBER 13, 2017
DECIDED: APRIL 26, 2018

Before: JACOBS, CABRANES, and WESLEY, *Circuit Judges*.

* The Clerk of Court is directed to amend the official caption as set forth above.

Defendant-Appellant Mark Henry ("defendant" or "Henry") appeals the November 25, 2015 judgment of the United States District Court for the Eastern District of New York (Roslynn R. Mauskopf, *Judge*) convicting him after jury trial of one count of conspiracy to violate and one count of violating, attempting to violate, and aiding and abetting the violation of the Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2778(b)(2), (c).

Five questions are presented on appeal: (1) whether the AECA unconstitutionally delegates legislative authority to the executive; (2) whether the District Court erred in instructing the jury on the conduct required to find "willfulness"; (3) whether the District Court erred in instructing the jury on "conscious avoidance"; (4) whether the District Court violated Henry's rights under the Sixth Amendment and the Court Interpreters Act ("CIA"), 28 U.S.C. §§ 1827–28, to waive the assistance of an interpreter; and (5) whether the District Court abused its discretion in requiring that Henry be provided the assistance of a court-appointed Mandarin interpreter throughout trial.

We answer all five questions in the negative and therefore **AFFIRM** the District Court's judgment of conviction.

AIMEE HECTOR, Special Assistant United States Attorney, (Michael Lockard, Special Assistant United States Attorney, *on the brief*), *for* Richard P.

Donoghue, United States Attorney for the Eastern District of New York, New York, NY, *for Appellee*.

MARC FERNICH, Law Office of Marc Fernich, New York, NY, *for Defendant-Appellant*.

JOSÉ A. CABRANES, *Circuit Judge*:

Defendant-Appellant Mark Henry ("defendant" or "Henry") appeals the November 25, 2015 judgment of the United States District Court for the Eastern District of New York (Roslynn R. Mauskopf, *Judge*) convicting him after jury trial of one count of conspiracy to violate and one count of violating, attempting to violate, and aiding and abetting the violation of the Arms Export Control Act ("AECA"), 22 U.S.C. §§ 2778(b)(2), (c).

Five questions are presented on appeal: (1) whether the AECA unconstitutionally delegates legislative authority to the executive; (2) whether the District Court erred in instructing the jury on the conduct required to find "willfulness"; (3) whether the District Court erred in instructing the jury on "conscious avoidance"; (4) whether the District Court violated Henry's rights under the Sixth Amendment and the Court Interpreters Act ("CIA"), 28 U.S.C. §§ 1827–28, to waive the assistance of an interpreter; and (5) whether the District Court abused its discretion in requiring that Henry be provided the assistance of a court-appointed Mandarin interpreter throughout trial.

We answer all five questions in the negative and therefore **AFFIRM** the District Court's judgment of conviction.

I. BACKGROUND

Because Henry is appealing a judgment of conviction entered after trial, we view the facts from the trial record in the light most favorable to the government.[1]

A. Henry's Arms Export Business

Henry ran an arms export business—Fortune Tell, Ltd. ("Fortune Tell")—out of his home in Flushing, Queens. At least four times between 2009 and 2012, Henry bought "ablative materials"—a military technology used in rockets and missiles—from an American distributor, Krayden, Inc. ("Krayden"), and exported them to a customer in Taiwan. The customer was buying the materials on behalf of the Taiwanese military.

The export of ablative materials requires a license issued by the Directorate of Defense Trade Controls ("DDTC") of the United States Department of State. This requirement is part of a comprehensive regulatory framework established by the AECA, which in turn authorizes the President of the United States to implement rules

[1] *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

regarding the export and control of "defense articles."[2] The ablative materials Henry exported are considered "defense articles" under the AECA.[3] It is a crime to violate the AECA or any of the rules and regulations promulgated thereunder.[4]

The jury found that Henry exported or attempted to export ablative materials despite not having the required DDTC export license. According to the evidence presented at trial, Krayden prominently displayed information regarding the need for an export license in its communications with Henry. Henry and his customer in Taiwan also repeatedly discussed the export license requirement through email correspondence. Instead of acquiring the license,

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[2] *See generally* 22 U.S.C. § 2278.

[3] *See* 22 C.F.R. § 121.1 Category XIII(d)(1) (2017); *see also id.* Category IV(f) (2009); Supplemental App. 245.

[4] 22 U.S.C. § 2278(c) ("Any person who willfully violates any provision of this section, section 2779 of this title, a treaty referred to in subsection (j)(1)(C)(i), or any rule or regulation issued under this section or section 2779 of this title, including any rule or regulation issued to implement or enforce a treaty referred to in subsection (j)(1)(C)(i) or an implementing arrangement pursuant to such treaty, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than 20 years, or both.").

Henry sought to conceal from Krayden the fact that he intended to export the ablative materials.

Henry tried to conceal his conduct in different ways. In one instance, when purchasing the ablative materials, he provided Krayden the address of a freight forwarder by the name of AE Eagle, which would in turn ship the materials to Fortune Tell. Instead of identifying the address as belonging to AE Eagle, however, Henry claimed that the address belonged to a fictitious company— "UDMC Corporation"—in an attempt to disguise that the actual recipient was, in fact, a freight forwarder that would export the materials outside of the United States.

He also created false documentation in an effort to conceal from United States customs authorities the identity of the materials he was exporting, repeatedly referring to the contents of the shipments by names that obscured the fact that the packages contained ablative materials.

Henry sometimes used his true name when placing these orders. At other times, he placed orders under "Scott Russel," "Weida Zheng," or "DaHua Electronics Corp." Each of these orders was intended for Fortune Tell.

In addition to his dealings with Krayden, Henry ordered two microwave amplifiers from Amplifier Research Corp. ("Amplifier"), a United States manufacturer, in 2012. Because such devices serve both military and commercial purposes, exporting them overseas requires an additional license from the U.S. Department of

Commerce. Henry did not obtain the required licenses before attempting to ship the two amplifiers to mainland China. He also repeatedly provided the wrong end user address to Amplifier to obtain a lower price available only for end users who reside in the United States. In its correspondence with Henry, Amplifier made clear that the materials sold were subject to the AECA.

Although it did send the requested products to Henry, Amplifier alerted law enforcement when it learned of Henry's efforts to disguise the end user. Henry was arrested after he had received the materials but before he had shipped them to China.

He was indicted on one count of conspiracy to violate the AECA, 22 U.S.C. §§ 2778(b)(2) & (c), Title 18, United States Code, Section 371; one count of violating, attempting to violate, and aiding and abetting the violation of the AECA, Title 22, United States Code, §§ 2278(b)(2) and (c) and Title 18, United States Code, Section 2; and a third count of attempting to violate the International Emergency Economic Powers Act ("IEEPA"), Title 50, United States Code, Section 1705.

B. Trial Testimony

At trial, Henry testified he did not know that he was required to obtain a license for any of the materials he exported or sought to export. Some of his testimony was contradictory. While he admitted to being aware generally of export restrictions on certain materials, he denied ever having seen the export license warnings displayed repeatedly in correspondence with Krayden and Amplifier. He also asserted that his father had placed some of the orders with Krayden

and had otherwise handled all the email correspondence with the company's representatives, so that Henry himself would not have been aware of any notice of export restrictions contained in that correspondence.

Henry nevertheless admitted to reading correspondence in which the manufacturer or distributor highlighted the need for an export license, and admitted that he at times submitted incorrect end user information to obtain a lower price for certain materials. He testified that his misrepresentations to Krayden, Amplifier and United States customs authorities were for purposes other than to conceal his effort to export defense articles in violation of the AECA.

Henry's father, Xinhao Zheng, also testified. He confirmed his son's representations and stated that he would often place orders and correspond with manufacturers and distributors using his son's name and email address.

C. Use of an Interpreter

On the morning of the first day of trial, Henry, who is originally from China, requested to proceed without the use of a Mandarin interpreter. Henry testified that although he spoke English, he principally wrote and spoke in Mandarin. He admitted that he always used Google Translate when writing emails to manufacturers or distributors, and that he also used Google Translate while placing orders. Henry had used an interpreter in all pretrial proceedings but now wished to proceed without one because he believed the use of an

interpreter would diminish his credibility and prejudice the jury against him.

To assess the need for an interpreter, the District Court inquired about Henry's facility with the English language. After extensive discussion with Henry's lawyer and Henry himself about his ability to speak and understand English, the District Court concluded that, because of the technical nature of some of the evidence likely to be presented, Henry would be provided the assistance of a court-appointed Mandarin interpreter throughout the trial. As a compromise with Henry, the District Court made one exception to this rule. It permitted Henry to testify in English with the assistance, as necessary, of a standby interpreter, an option of which he took advantage during his testimony.

D. Conviction and Sentence

The jury returned a verdict of guilty as to the two AECA counts on July 2, 2014, and it acquitted Henry on the IEEPA count.[5] Henry filed a motion for a new trial on August 1, 2014.[6] It was denied on February 27, 2015.[7] Judge Mauskopf sentenced Henry principally to a term of imprisonment of 78 months on November 24, 2015.[8]

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[5] *See* 13 Cr. 91, Dkt. No. 59.

[6] Dkt. No. 70.

[7] Dkt. No. 77.

[8] *Id.*, Dkt. No. 94.

II. DISCUSSION

A. Constitutionality of the Arms Export Control Act

Henry first challenges the sufficiency of the evidence presented at trial, but this argument is more accurately understood as a challenge to the constitutionality of the AECA.[9] In his view, the provisions of the AECA authorizing the President to designate certain goods as "defense articles" are an unconstitutional delegation both because of their vagueness and because the AECA's statutory and regulatory scheme imposes criminal penalties on violators.

We hold, in agreement with the other circuits that have considered the issue,[10] that the AECA does not unconstitutionally delegate legislative authority to the executive.

1.

Congress is constitutionally prohibited from delegating its legislative authority to another branch of Government.[11] However, courts have recognized certain exceptions to this rule, with the

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[9] *See* Def. Br. at 12 ("[T]he State Department has no fixed or prescribed method . . . for classifying given articles as defense objects subject to the Munitions List.").

[10] *See United States v. Chi Tong Kuok*, 671 F.3d 931, 938–39 (9th Cir. 2012); *United States v. Hsu*, 364 F.3d 192, 204–05 (4th Cir. 2004).

[11] *Touby v. United States*, 500 U.S. 160, 165 (1991).

understanding that "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[12] The Supreme Court has sanctioned Congress's authority, in enacting legislation, to "give to those who [are] to act under such [legislation] 'power to fill up the details' by the establishment of administrative rules and regulations."[13] The Court has allowed for such delegation even where violations of such regulations result in serious criminal penalties.[14]

When Congress delegates authority to the Executive, it must "lay down by legislative act an intelligible principle to which the person or body authorized [to exercise the delegated authority] is directed to conform."[15] An "intelligible principle" is a principle that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[16]

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[12] *Mistretta v. United States,* 488 U.S. 361, 372 (1989).

[13] *United States v. Grimaud*, 220 U.S. 506, 517 (1911); *Mistretta*, 488 U.S. at 372 ("We also have recognized, however, that the separate-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches.").

[14] *Grimaud*, 220 U.S. 506.

[15] *Mistretta,* 488 U.S. at 372 (1989) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

[16] *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *see also Mistretta*, 488 U.S. at 372–73.

Courts have only twice found a delegation of legislative power to violate the "intelligible principle" standard.[17] Moreover, a delegation of legislative authority to the executive is accorded special deference if it concerns foreign affairs. This deference is justified by the "degree of discretion and freedom" that the executive requires to conduct foreign relations effectively.[18] The Supreme Court has suggested that a delegation of legislative authority to the executive that would otherwise be unconstitutional could be held valid if "its exclusive aim [were] to afford a remedy for a hurtful condition within foreign territory."[19]

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[17] *See A.L.A Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (C.E. Hughes, C.J., in a unanimous opinion, striking down delegation to industry associations comprised of private individuals to create legally binding codes of "fair competition"); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down blanket delegation to President to criminalize the interstate transport of petroleum); *see also United States v. Dhafir*, 461 F.3d 211, 215 (2d Cir. 2006) (observing that "the Supreme Court has struck down only two statutes as impermissible delegations").

[18] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *see also Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.").

[19] *Curtiss-Wright*, 299 U.S. at 315.

We review the constitutionality of the AECA *de novo*, as we would any other federal statute.[20]

2.

The AECA, in relevant part, authorizes the President—"[i]n furtherance of world peace and the security and foreign policy of the United States"—to compile the United States Munitions List ("USML"), which is to be comprised of goods and services that he designates as "defense articles and defense services."[21] The AECA also authorizes the President "to promulgate regulations for the import and export of such articles and services."[22] Any good or service placed on the USML cannot be imported or exported except by license,[23] and the statute imposes criminal penalties on violators.[24] The President has in turn delegated the authority to compile the USML and to grant or deny applications for export licenses to the Secretary of State.[25]

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[20] *United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002).

[21] 22 U.S.C. § 2278(a)(1).

[22] *Id.*

[23] *Id.* § 2278(b)(2).

[24] *Id.* § 2278(c).

[25] *See* 22 C.F.R. § 120.2.

As promulgated pursuant to this authority, the USML sets forth twenty categories of "defense articles." For each category, it enumerates a list of specific defense-related materials subject to regulation under the AECA.[26] The ablative materials and microwave amplifiers that Henry exported or attempted to export are among the "defense articles" enumerated in the USML.[27]

These provisions of the AECA satisfy the intelligible principle standard. The statute first delineates a general policy to guide the actions of the executive: "furtherance of world peace and the security and foreign policy of the United States."[28] It charges the President with applying that policy by compiling the USML and promulgating the associated regulations. It also establishes clear boundaries for this authority. The statute limits the President's discretion to defining a list of defense-related goods and services that are subject to export control and to promulgating license regulations. It further constrains this discretion by requiring the President to conduct periodic reviews of the USML to determine which goods and services no longer require export control.[29] The President must report on those reviews to

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[26] *See id.* § 121.1.

[27] *See id.* §§ 121.1 Category XIII(d)(1), Category XV(e)(14) (2017); §§ 121.1 Category IV(f), Category XV(e)(1) (2009).

[28] 22 U.S.C. § 2778(a)(1).

[29] *Id.* § 2778(f)(1).

Congress, and if he wishes to amend the USML, he may do so only after a thirty-day waiting period.[30]

Henry's challenge to the AECA is analogous to that raised by the defendant in *United States v. Dhafir*.[31] The defendant in *Dhafir*, after being convicted of violating the IEEPA by transferring funds to one or more persons in Iraq, argued that the law violated the non-delegation doctrine. We held the IEEPA to be constitutional, for reasons that guide our analysis here.

The IEEPA grants the President the power to "investigate, regulate, or prohibit" various commercial activities including: [i] "any transactions in foreign exchange," [ii] "transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof," and [iii] "the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States. . . ."[32] Violations of the IEEPA result in criminal penalties similar to those imposed under the AECA. We found that the IEEPA conformed to the intelligible principle standard because the statute "meaningfully constrains the

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[30] *Id.* §§ 2778(f)(1), (2).

[31] 461 F.3d 211 (2d Cir. 2006).

[32] 50 U.S.C. § 1702(a)(1)(A).

President's discretion," requires periodic review by Congress, and relates to foreign affairs.[33]

Importantly, the section of the IEEPA at issue in *Dhafir* involved an arguably broader delegation of Congressional power than the provisions of the AECA at issue here. In *Dhafir*, we upheld the IEEPA's "criminal provisions"—the statute's grant of authority to the President to specifically "define conduct as criminal for an unlimited time once a national emergency is declared,"[34] a more sweeping delegation than the authority to subject certain materials to export licensure. Moreover, whereas the AECA touches only the defense sector, the IEEPA authorizes the President to prohibit virtually any commercial transaction that, in his judgment, threatens national security.[35]

Henry nonetheless argues that the length and complexity of the USML render it, and consequently the AECA, unconstitutionally vague. This argument is without merit. The ablative materials Henry exported or attempted to export were unambiguously included in the USML during the time of his offense conduct.[36] Henry was also made

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[33] *Dhafir*, 461 F.3d at 216-17.

[34] *Id*. at 217 (internal quotation marks omitted).

[35] *Id.* at 216-217.

[36] *See* 22 C.F.R. § 121.1 Category IV(f) (2009) (including "[a]blative materials fabricated or semi-fabricated from advanced composites (e.g., silica, graphite, carbon, carbon/carbon, and boron filaments) for the articles in this category that

aware by several emails, both from the distributor in the United States and his customer in Taiwan, that ablative materials were included in the USML. Henry's conduct was clearly proscribed by the applicable statute and regulations, and he knew it.

We thus conclude that the AECA does not unconstitutionally delegate legislative authority to the executive. The statute is neither violative of the "intelligible principle" standard nor unconstitutionally vague.

B. Jury Instructions

Henry argues that the District Court erred in instructing the jury on both willfulness and conscious avoidance. On willfulness, Henry contends that the District Court erred by failing to instruct the jury that the government had to prove not only that he knew that his conduct was illegal, but also that he knew *why* it was illegal: that is, because the items he attempted to export were listed on the USML. On conscious avoidance, Henry argues that instruction to the jury on the concept of conscious avoidance permitted the jury to find him guilty on a standard of gross negligence or recklessness instead of the required higher standard of willfulness.

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are derived directly from or specifically developed or modified for defense articles").

We review challenges to jury instructions *de novo*, but we will not find reversible error unless the charge either "failed to inform the jury adequately of the law or misled the jury as to the correct legal rule."[37]

1. "Willfulness"

a.

We consider the question of willfulness in light of *United States v. Bryan*.[38] In *Bryan*, the Supreme Court approved the following definition of willfulness: "[a] person acts willfully if he acts intentionally and purposely with the intent to do something the law forbids, that is, with the bad purpose to disobey or disregard the law."[39] The Court further held that a person who acts willfully need not be aware of the specific law that his conduct may be violating. Rather, "knowledge that the conduct is unlawful is all that is required."[40] Knowledge of the specific law that one is violating has been required only where a "highly technical statute[ ]"—such as a

[37] *United States v. Alfisi*, 308 F.3d 144, 148 (2d Cir. 2002).

[38] 524 U.S. 184 (1998).

[39] *Id.* at 190 (internal quotation marks omitted).

[40] *Id.* at 196.

provision of the Internal Revenue Code—prohibits "apparently innocent conduct."[41]

b.

Here, the District Court instructed the jury as follows:

> The fourth and final element that the government must prove, is that the defendant acted knowingly and willfully. A person acts knowingly if he acts intentionally and voluntarily and not because of ignorance, mistake, accident, or carelessness. Willfully means to act with knowledge that one's conduct is unlawful and with the intent to do something that the law forbids. That is to say, with a bad purpose, either to disobey or disregard the law. The defendant's conduct was not willful if it was due to negligence, inadvertence, or mistake. However, it is not necessary for the government to prove that the defendant knew the precise terms of the statute or regulatory provision he is charged with violating—that is, the government is not required to prove that the defendant knew the existence or details of the Arms Export Control Act or the related regulations. All that is required is that the government prove that the defendant acted with the intent to disobey or disregard the law.[42]

The District Court's instruction correctly and clearly stated the definition of willfulness in the circumstances presented. It noted, pursuant to *Bryan*, that willfulness requires only that the defendant

[41] *Id.* at 194.

[42] J.A. 174.

know that what he was doing was illegal, and not that he know that his conduct was prohibited under a specific AECA provision or related regulation.[43]

Moreover, the heightened definition of willfulness applicable to "highly technical statutes" does not apply here. The cases on which defendant relies—*Ratzlaf v. United States* and *Cheek v. United States*—concern tax and financial regulation statutes so complicated and non-intuitive that one might violate them without actually understanding that his conduct was illegal.[44]

These cases are exceptions to the hoary principle that ignorance of the law is not a valid defense, and the AECA is not such an exception. Regardless of whether Henry was aware of the items contained in the United States Munitions List, or of the specific provisions of the AECA that he was alleged to have violated, neither the list nor the statute is unclear. Where it is proven beyond a reasonable doubt that

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[43] We have already rejected a similar argument raised by the defendant in *United States v. Homa Int'l. Trading Corp.*, 387 F.3d 144 (2d Cir. 2004). In *Homa*, the defendant argued that the district court erred in instructing the jury that it need only find an intention to violate the Iran embargo, rather than the specific provisions of the IEEPA which, at the time, forbade U.S. citizens from trading with Iran. Relying principally on *Bryan*, we held that the government need only prove that the defendant knew that his conduct violated the Iran embargo generally, and not because he also knew that his conduct ran afoul of Sections 1702 and 1705(b) of the IEEPA.

[44] 510 U.S. 135 (1994); 498 U.S. 192 (1991).

a defendant is generally aware of export license requirements for military-grade materials, there is no risk of criminalizing otherwise innocent conduct on a mere technicality. Unsurprisingly, no other court to have considered the AECA's willfulness requirement has applied the rule of those exceptional cases to this statute.[45]

We also reject Henry's suggestion that the District Court's instruction ran afoul of the letter and purpose of the AECA. "The AECA's language and structure make clear that Congress struck a balance between punishing those who intentionally violate the law and ensnaring individuals who make honest mistakes."[46] The statute's willfulness requirement eliminates "any genuine risk of holding a person criminally responsible for conduct which he could not reasonably understand to be proscribed."[47]

We conclude that the AECA's willfulness provision requires only that a jury find that the defendant violated a known legal duty and not that he knew specifically of the USML or of any other provision

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[45] *See United States v. Bishop*, 740 F.3d 927, 933–34 (4th Cir. 2014); *United States v. Chi Mak*, 683 F.3d 1126, 1138 (9th Cir. 2012); *United States v. Roth*, 628 F.3d 827, 834–35 (6th Cir. 2011); *United States v. Tsai*, 954 F.2d 155, 162 (3d Cir. 1992); *United States v. Murphy*, 852 F.2d 1, 7 (1st Cir. 1988).

[46] *Bishop*, 740 F.3d at 933.

[47] *Id.* (internal quotation marks omitted).

of the AECA that imposed that duty. The District Court's willfulness instruction was therefore not erroneous.

2. "Conscious Avoidance"

a.

A conscious avoidance charge may only be given "(i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction, and (ii) the appropriate factual predicate for the charge exists, *i.e.*, the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact."[48] The conscious avoidance charge "must communicate two points: (1) that a jury may infer knowledge of the existence of a particular fact if the defendant is aware of a high probability of its existence, (2) unless the defendant actually believes that it does not exist."[49]

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[48] *United States v. Quattrone*, 441 F.3d 153, 181 (2d Cir. 2006) (internal citation and quotation marks omitted); *see also United States v. Lanza*, 790 F.2d 1015, 1022 (2d Cir. 1986) (explaining that a conscious avoidance instruction is appropriate when a defendant claims to lack "some specific aspect of knowledge necessary to conviction but where the evidence may be construed as deliberate ignorance").

[49] *United States v. Kaiser*, 609 F.3d 556, 566 (2d Cir. 2010) (internal quotation marks omitted).

b.

Henry's principal defense at trial was that he was not aware of the AECA's export license requirements. He repeatedly testified that he had not seen or read notices of the export license restrictions that were contained in his correspondence with Krayden and Amplifier. His father testified in support of this argument, noting that he often corresponded with Krayden using his son's name and email address so that, in effect, he was the only one who was made aware of the licensing requirements. The testimony of Henry and his father attempted to build a factual predicate in support of an ignorance defense. Accordingly, a conscious avoidance charge was entirely appropriate.

Moreover, the conscious avoidance charge given by the District Court was proper. The District Court gave the following instruction:

> In determining whether the defendant acted knowingly and willfully, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid learning the truth that exporting the ablative material without a license was unlawful, then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish, or mistaken.
>
> If you find that the defendant was aware of a high probability that exporting the ablative materials without

> a license was unlawful and that the defendant acted with deliberate disregard of that fact, you may find that the defendant acted knowingly and willfully. However, if you find that the defendant actually believed that exporting the ablative material without a license was lawful, he may not be convicted. It is entirely up to you whether you find that the defendant deliberately closed his eyes and any inferences to be drawn from the evidence on this issue.[50]

In defining the concept of conscious avoidance, the District Court made it clear that the jury could find that Henry acted knowingly if it found that he consciously avoided "learning that the export of ablative materials without a license was unlawful."[51] The District Court also properly explained to the jury that although a finding of conscious avoidance may be a substitute for actual knowledge, it cannot substitute for the finding of the element of "willfulness" necessary to prove the crimes charged.[52] It did so by emphasizing that mere negligence or recklessness, coupled with conscious avoidance, was not enough to convict.[53] It also did so by properly instructing the

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[50] J.A. 174–75.

[51] *Id.*

[52] *Cf. United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1195–96 (2d Cir. 1989) (rejecting claims that conscious avoidance charge was improperly applied to a finding of criminal intent).

[53] *Cf. id.*; *see also United States v. Friedman*, 300 F.3d 111, 125 (2d Cir. 2002).

jury on the separate concept of "willfulness" and by properly explaining that in order to find that defendant acted willfully, the jury had to find both that defendant acted with knowledge that his conduct was unlawful *and* with the intent to do something that the law forbids.

* * *

We thus hold, in agreement with four of our sister circuits,[54] that the District Court's willfulness instruction was not erroneous, because the AECA does not require that a defendant have known specifically of the USML or of any other provision of the Act. We also hold that a conscious avoidance instruction was appropriate in Henry's case and that the instruction given by the District Court was correct because that charge made clear to the jury that it was still required to find that the defendant acted willfully.

C. Waiver of the Use of a Court-Appointed Interpreter

Finally, Henry argues that the District Court's requirement that he use a Mandarin interpreter violated his rights under the Sixth Amendment and the Court Interpreters Act, or CIA, of 1978.[55] First, he contends that the Sixth Amendment and the CIA afford him an

[54] *See Bishop*, 740 F.3d at 933–34; *Chi Mak*, 683 F.3d at 1138; *Roth*, 628 F.3d at 827; *Tsai*, 954 F.2d at 155; *Murphy*, 852 F.2d at 7.

[55] *See* U.S. Const., amend. VI; 28 U.S.C. § 1827(d)(1).

absolute right to waive the use of an interpreter. Next, he argues that even if the right to waive the use of an interpreter is not absolute, the District Court abused its discretion under the CIA by requiring that Henry use an interpreter while testifying.

We review *de novo* district court interpretations of the Constitution and of federal statutes.[56]

1. The right to waive use of a court-appointed interpreter is not absolute

a.

Both the Sixth Amendment and the CIA guarantee a criminal defendant the right to use of an interpreter. Nearly half a century ago, in *United States ex rel. Negron v. New York*, we held that the Sixth Amendment affords a criminal defendant the "right to have a competent translator assist him, at state expense if need be, throughout his trial."[57] We have not had occasion to define the scope of this right since *Negron*.

Relatedly, the CIA provides, in relevant part, for court appointment of an interpreter:

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[56] *See United States v. Quinones*, 313 F.3d 49, 60 (2d Cir. 2002) (constitutional interpretation); *Pettus*, 303 F.3d at 483 (constitutionality of federal statute).

[57] *United States ex rel. Negron v. New York*, 434 F.2d 386, 91 (2d Cir. 1970).

> The presiding judicial officer (1) . . . shall utilize the services of the most available certified interpreter . . . in judicial proceedings instituted by the United States, if the presiding judicial officer determines . . . that [a] party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings—
>
> (A) speaks only or primarily a language other than the English language; or
>
> (B) suffers from a hearing impairment (whether or not suffering also from a speech impairment)
>
> so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.[58]

The CIA also affords a defendant the right to waive the use of a court-appointed interpreter.[59] The statute provides that a defendant may waive his statutory right to an interpreter if (1) the waiver is made "expressly by such individual on the record" by the party, (2) "after opportunity to consult with counsel," (3) the presiding judge

[58] 28 U.S.C. § 1827(d)(1).

[59] *Id.* § 1827(f)(1).

has explained to the defendant "the nature and effect of the waiver," and (4) the waiver is "approved by the presiding judicial officer."[60]

We have yet to squarely address the effect of the requirement of district court approval on the scope of the waiver. Our cases indicate, however, that a defendant's right to waive the use of an interpreter is not absolute, and that a defendant's waiver request need not be honored when the court finds a compelling reason to deny it.

In *United States v. Moon*,[61] the defendant argued that the district court violated the CIA and his Sixth Amendment right to present a full defense when it forced him to use a court-appointed and court-certified interpreter instead of an interpreter of his own choosing.[62] Moon moved pursuant to § 1827(f) of the CIA to waive the use of a court-certified interpreter. The district court ruled that Moon was free to use the interpreter of his own choice for purposes of translating for him the proceedings of the trial, but that if Moon elected to testify, his testimony would have to be translated by a court-certified

[60] *Id.*

[61] 718 F.2d 1210 (2d Cir. 1983).

[62] The CIA specifies that when an interpreter is necessary, the district court is to appoint an interpreter who has been previously "certified" as a competent and qualified interpreter by the Administrative Office of the United States Courts. 18 U.S.C. § 1827(b)(1). The program through which interpreters become "court-certified" is devised and maintained by the Director of the Administrative Office of the United States Courts. *Id.* A district court is permitted to appoint a non-court-certified, but otherwise qualified interpreter, "[o]nly in a case in which no certified interpreter is reasonably available." 28 U.S.C. § 1827(b)(2).

interpreter.[63] Purportedly because of this restriction, Moon elected not to testify at his own trial.[64] He argued, as Henry does here, that the district court's action violated his absolute right under the CIA and the Sixth Amendment to waive the use of a court-appointed interpreter.

We rejected Moon's argument. We held that the court's requirement that Moon use a court-appointed and court-certified interpreter while testifying, despite Moon's expressed desire to proceed without one, violated neither the CIA nor the defendant's Sixth Amendment fair trial right. We reasoned that, "even [if] requiring Moon to use a court-appointed interpreter [can] be viewed as some restriction on his ability to present a full defense, . . . not all restrictions on a defendant's right to testify are *per se* impermissible"[65] and that certain restrictions on a defendant's right to testify in the language he wishes are "sanctioned where reasonably necessary to the achievement of a fair trial."[66]

Similarly, in *United States v. Huang*,[67] the district court declared a mistrial, over the defendant's objection, because it found that the

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[63] 718 F.2d at 1231.

[64] *Id.* at 1232.

[65] *Id.* at 1231.

[66] *Id.*

[67] 960 F.2d 1128 (2d Cir. 1992).

interpreter being used was not court-certified. Because the defendant expressed a desire to waive his right to a court-certified interpreter and proceed with trial, he appealed the mistrial order.[68]

We held in *Huang* that it was improper for the district court to declare a mistrial without first analyzing the appropriateness of the defendant's waiver. We noted that the district court should have analyzed whether there was a "sound ground on which it could properly reject" the defendant's request for waiver before declaring a mistrial well into the trial.[69] We went on to observe that we "[did] not mean to suggest that a defendant who waived his own objection to a translation that was materially deficient could thereby force the continuation of the trial to the prejudice of the government and the public," and that when a trial was arguably compromised by defendant's invocation of waiver, rejection of the waiver might be "required in the interests of justice."[70]

b.

We conclude from these cases that although the Sixth Amendment and the CIA afford a defendant a qualified right to waive the use of an interpreter, the district court has discretion to determine whether

[68] *See id.* at 1135–36.

[69] *Id.* at 1136.

[70] *Id.*

waiver is reasonable under the circumstances presented; neither the Sixth Amendment nor the CIA grants an absolute right to waive use of an interpreter at trial proceedings. Moreover, we conclude that the applicable standard of review of a judge's decision on waiver is "abuse of discretion."[71]

Requiring a defendant to use an interpreter when the district court properly finds that one is necessary does not inhibit the defendant's ability to mount a successful defense. Rather, it ensures that "whatever testimony a defendant gives is honestly reported,"[72] and that the court has taken the necessary steps to safeguard the defendant's right to a fair trial. Requiring the use of an interpreter when necessary also ensures the accuracy and completeness of the trial record, and helps to preserve a defendant's rights in the event that he chooses to appeal. Allowing the district court the discretion to determine whether waiver is reasonable under the circumstances

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[71] *Cf. Huang*, 960 F.2d at 1136 ("We are unable to conclude that the district court exercised sound discretion in [denying defendant's request for waiver]."); *see also Sims v. Blot* (*In re Sims*), 534 F.3d 117, 131–32 (2008) (holding that a district court's finding that a party has waived a privilege is reviewed under the abuse-of-discretion standard, and defining the non-pejorative term of art "abuse of discretion"); *United States v. Johnson*, 248 F.3d 655, 664 (7th Cir. 2001) ("[U]nder the CIA, the appointment of an interpreter as a constitutional matter is within the district court's discretion.").

[72] *Moon*, 718 F.2d at 1231.

presented is the best way to preserve the animating principles of the Sixth Amendment.

The CIA already takes this approach. It permits a defendant to waive the use of an interpreter, but it makes the waiver contingent on the informed discretion of the presiding judge.[73] A defendant's ability to waive the right to an interpreter at trial or in the course of related proceedings is not absolute, and a district judge faced with a request for a waiver must weigh a defendant's wishes against the need for an interpreter in order to safeguard the defendant's right to a fair and speedy trial and the public's right to a comprehensible trial.

2. The District Court did not abuse its discretion

We now turn to whether the District Court in this case abused its discretion by requiring that Henry use a court-appointed interpreter throughout the trial and use a standby interpreter while he testified in English. We conclude that the District Court did not abuse its discretion.

The District Court engaged in an extensive colloquy with both Henry and defense counsel to ascertain the need for an interpreter. It found that Henry had a working knowledge of English, but had trouble with more technical language, requiring Henry's lawyer to frequently repeat the more complex phrases for him during trial

[73] *See* 28 U.S.C. 1827(f)(1) ("Any individual other than a witness who is entitled to interpretation . . . may waive such interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding judicial officer . . . .").

preparation. This finding was supported by the record. Henry had used a court-appointed interpreter at every court proceeding until just before trial, when he requested to proceed without one. Henry's lawyer informed the District Court that Henry's primary language was Mandarin. He admitted his client spoke "good English," but not "great English."[74] Defense counsel also expressed concern that his client would not understand some of the concepts elicited at trial if he was permitted to proceed without the use of an interpreter. When questioned by the District Court, the defendant likewise conceded that some of the technical terms used at trial might be difficult for him to understand in light of his limited English language competence.

The District Court considered solving this problem by having defense counsel quietly explain to his client various complex concepts as they came up at trial. It concluded, however, that such a procedure would cause unnecessary delay. It also concluded that permitting Henry the intermittent use of a standby interpreter would be impracticable, as the witness would have to repeat previously given testimony for the interpreter every time the defendant indicated that he did not understand what had been said.

The District Court ultimately required the use of an interpreter throughout the trial with one exception: Henry was permitted to testify in English, with the ability to call on an interpreter if he could not understand a question or clearly articulate his response. The District Court hoped that this compromise would assuage Henry's

[74] A69.

concern that testifying with an interpreter would somehow prejudice the jury against him. Henry did testify in English, and he indeed required the use of an interpreter on several occasions during his testimony.

The District Court respected Henry's desire to invoke his waiver and fashioned an appropriate compromise solution. The District Court also clearly and properly instructed the jury that they were to draw no adverse inference from the fact that the defendant occasionally required the use of an interpreter.

The District Court's handling of this complex question was careful and thoughtful. It properly balanced Henry's wishes against the need for the jury and the public to understand the defendant's testimony, ensuring that he was afforded a fair trial.

CONCLUSION

To summarize, we hold that:

(1) the Arms Control Export Act is not an unconstitutional delegation of legislative authority to the executive;

(2) the District Court's instructions to the jury on "willfulness" and "conscious avoidance" were not error;

(3) a defendant's right to waive the use of a court-appointed interpreter under the Court Interpreters Act is not absolute;

(4) the District Court's decision to place reasonable restrictions on Henry's request for a waiver did not violate his Sixth Amendment rights; and

(5) the District Court did not abuse its discretion in requiring that Henry be provided the assistance of a court-appointed Mandarin interpreter throughout trial.

For the reasons set out above, we **AFFIRM** the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of October, two thousand eighteen.

United States of America,

Appellee,

v.

Mark Henry, AKA Weida Zheng, AKA Scott Russel, AKA Bob Wilson, AKA Joanna Zhong,

Defendant - Appellant.

ORDER

Docket No: 15-3814

Appellant, Mark Henry, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA
v.
MARK HENRY

JUDGMENT IN A CRIMINAL CASE

Case Number: 13-CR-0091-01(RRM)

USM Number: 75602-053

Paul Goldberger, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) counts one and two
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18U.S.C.§371	Conspiracy to Violate the Arms Export Control Act	12/6/2012	1
22U.S.C.§§2778(b)(2)& (c)	Violation of the Arms Export Control Act	12/6/2012	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) No open counts ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/19/2015
Date of Imposition of Judgment

S/ Roslynn R.
Signature of Judge

Roslynn R. Mauskopf U.S.D.J.
Name and Title of Judge

11/23/2015
Date

DEFENDANT: MARK HENRY
CASE NUMBER: 13-CR-0091-01(RRM)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Count Two: Seventy eight (78) months
Count 1: Sixty (60) months to run concurrently to Count Two.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☑ The defendant shall surrender to the United States Marshal for this district:

☑ at 12:00 ☐ a.m. ☑ p.m. on 1/5/2016 .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MARK HENRY
CASE NUMBER: 13-CR-0091-01(RRM)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Count One: Three (3) years
Count Two: Three (3) years to run concurrent to one another.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment, or if such prior notification is not possible, then within forty eight hours after such change.
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MARK HENRY
CASE NUMBER: 13-CR-0091-01(RRM)

SPECIAL CONDITIONS OF SUPERVISION

1) The defendant shall submit his person, property, house, residence, vehicle, papers,computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

2) The defendant shall cooperate with the United States Probation Department's Computer and Internet Monitoring program. Cooperation shall include, but not be limited to, identifying computer systems, Internet capable devices, and/or similar electronic devices the defendant has access to, and allowing the installation of monitoring software/hardware on said devices, at the defendant's expense. The defendant shall inform all parties that access a monitored computer, or similar electronic device, that the device is subject to search and monitoring. The defendant may be limited to possessing only one personal Internet capable device, to facilitate our department's ability to effectively monitor his Internet related activities. The defendant shall also permit random examinations of said computer systems, Internet capable devices, and similar electronic devices, and related computer peripherals, such as CD's, under his control.

3) The defendant is to be evaluated upon release for need for mental health treatment. Probation Department shall apply to court to have the treatment included, if needed

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: MARK HENRY
CASE NUMBER: 13-CR-0091-01(RRM)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: MARK HENRY
CASE NUMBER: 13-CR-0091-01(RRM)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

Payment shall be made payable to the Clerk of the Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of July, two thousand and eighteen.

United States of America,

Appellee,

v.

Mark Henry, AKA Weida Zheng, AKA Scott Russel, AKA Bob Wilson, AKA Joanna Zhong,

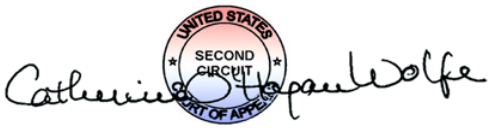
Defendant - Appellant.

ORDER
Docket No. 15-3814

IT IS HEREBY ORDERED that Lucas Anderson, Esq. of Rothman, Schneider, Soloway & Stern, LLP, 100 Lafayette Street, Suite 501, New York, NY 10013, is assigned as new counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. Appellant's petition for rehearing is due August 21, 2018.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court



REQUEST NO. 10

Counts One and Two - AECA - Fourth Element:
Meaning of "Knowingly" and "Willfully"

The fourth element the government must prove is that the defendant acted knowingly and willfully.

As I previously instructed you, a person acts "knowingly" if he acts voluntarily and deliberately, **rather than mistakenly or inadvertently.**

A person acts "willfully" if he acts knowing that his conduct is unlawful and that he intends to do something that the law forbids. In other words, the person acts with a purpose to disobey or disregard the law.

The defendant need not, however, have any evil motive or bad purpose other than the purpose to disobey or disregard the law. The defendant also does not need to know of the existence and meaning of the particular statute or regulation making his conduct unlawful. **In this regard, the Government is not required to prove that the defendant knew the existence or details of the Arms Export Control Act or the International Traffic in Arms Regulations; rather, the Government must prove that the defendant knew his actions were somehow contrary to what the law requires.**

Authority: See Bryan v. United States, 524 U.S. 184, 189-96 (1998) (); United States v. Homa Int'l Trading Corp., 387 F.3d 144, 146 (2d Cir. 2004) (defining willfulness; proof of OFAC correspondence alerting defendant to Embargo's regulations, along with stealthy manner in which defendant conducted transfers, was sufficient to prove willfulness).

DEFENDANT'S PROPOSED REQUEST NO. 10A

Counts One and Two - AECA - Meaning of "Knowingly" and "Willfully"

The fourth element the government must prove is that the defendant acted knowingly and willfully.

As I previously instructed you, a person acts "knowingly" if he acts voluntarily and deliberately, and not because of mistake, accident or other innocent reason or motive.

A person acts "willfully" if he acts knowing that his conduct is unlawful and that he intends to do something that the law forbids, and not by mistake, accident or in good faith or other innocent reason or motive. In other words, the person acts with a purpose to disobey or disregard the law. Negligence, even gross negligence, is not enough to meet the "willfully" requirement.

The defendant need not, however, have any evil motive or bad purpose other than the purpose to disobey or disregard the law. The defendant also does not need to know of the existence and meaning of the particular statute or regulation making his conduct unlawful.

The government must prove beyond a reasonable doubt that the defendant knew the articles and items were subject to licensing controls, and in light of that knowledge, defendant

intentionally exported, or attempted to export the materials, without first obtaining the requisite licenses to do so.

If you conclude that the government has failed to prove beyond a reasonable doubt that defendant knew that the items at issue constituted defense articles on the United States Munitions List, and that he intentionally and knowingly exported or attempted to export them without a license, you must acquit him of the alleged violations of the Arms Export Control Act.

Authority: 22 U.S.C. § 2778; 22 C.F.R. § 120 et seq.; Cheek v. United States, 498 U.S. 192, 196 (1991); United States v. Smith, 918 F.2d 1032 (2d Cir. 1990); United States v. Durrani, 835 F.2d 410, 423 (2d Cir. 1987); United States v. Roth, 628 F.3d 827 (6th Cir. 2011); United States v. Quinn, 403 F.Supp.2d 57 (D.D.C. 2005).

Government Objection: The Government objects to this instruction in its entirety. *See Bryan* v. *United States*, 524 U.S. 184, 196 (U.S. 1998) (holding that "willfulness requirement of § 924(a)(1)(D) [which concerns unlicensed dealing in firearms] does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required.") (emphasis added); *United States* v. *Dien Duc Huynh*, 246 F.3d 734, 742 (5th Cir. 2001) (with respect to the willfulness requirement of the Trading With the Enemy Act ("TWEA"), the court held that "[t]he government . . . need not show that appellants had knowledge of the specific regulations governing transactions with Vietnamese nationals. . . . Rather, the government must prove only that the defendants knew that their planned conduct was legally prohibited and they therefore acted with an evil-meaning mind.") (internal citations and quotations omitted); *United States* v. *Reyes*, 270 F.3d 1158, 1169 (7th Cir. 2001) (upholding jury verdict concluding defendant willfully violated the IEEPA and an Executive Order where the government established he knowingly shipped to an

embargoed country without a license, and was aware that shipping in this manner was illegal); *United States* v *Murphy*, 852 F.2d 1, 7 (1st Cir. 1988) (upholding instruction that "it is not necessary for the government to show that the defendants were aware of or had consulted the United States Munitions List or the licensing and registration provisions of the Arms Export Control Act and its regulations or the National Registration & Transfer Record or the Federal Firearms Law involved . . . Ignorance of the law in this respect, in this case, is not an excuse. In this case, what is required is proof that the defendants acted knowingly and willfully with the specific intent to violate the law."); *United States* v. *Durrani*, 835 F.2d 410, 422 (2d Cir. 1987) (noting, in the context of the Arms Export Control Act, that "[i]t is well settled that ignorance of the law or mistake as to the law's requirements is no defense to criminal conduct."); *United States* v. *Lizarraga-Lizarraga*, 541 F.2d 826, 828-29 (9th Cir. 1976) (holding that defendant need not know that he is specifically required to have an export license, but rather that his conduct in exporting from the United States articles proscribed by the statute is violative of the law); *United States* v. *Quinn*, 403 F. Supp.2d 57, 61 (D.D.C. 2005) ("Surely neither Congress in passing IEEPA nor the Executive Branch in promulgating the [Iranian Transaction Regulations] intended to foreclose prosecution of persons who knew the gist, but not the exact details, of the law they are accused of violating. A defendant's assertion, no matter how credible, that he 'had not brushed up on the law' has never been deemed a sufficient defense to a crime requiring knowledge of illegality").

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DEFENDANT'S PROPOSED REQUEST NO. 43A

Ignorance of the Law is a Defense

Defendant acted knowingly and willfully in regards to Counts One and Two if he knew he was unlawfully exporting defense articles on the United States Munitions List or, in regards to Count Three, products controlled by the Export Administration Regulations. The defendant has asserted that he was not aware that the export control laws prohibited by the export of the products at issue in this case to Taiwan and China.

As a general rule, ignorance of the law is no excuse. However, the export control laws in this case provide that ignorance of the law is a defense to the crimes charged against the defendant. An innocent or negligent mistake by the defendant is insufficient to support a finding of a knowing and willful export. So if defendant was ignorant of the requirements of the Arms Export Control Act or the International Emergency Economic Powers Act or was aware of the requirements of those Acts but believed that he was complying with those requirements, he did not act knowingly or willfully, and you must find him not guilty.

Authority: Bryan v. United States, 524 U.S. 184, 191-195 (1998); Ratzlaf v. United States, 510 U.S. 135, 137 (1994); Cheek v. United States, 498 U.S. 192, 196 (1991)("In the course of its instructions, the trial court advised the jury to prove 'willfulness' the

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> Government must prove the voluntary and intentional violation of a known legal duty, a burden that could not be proved by showing mistake, ignorance, or negligence."); United States v Hernandez, 662 F.2d 289, 292 (5th Cir. 1981); United States v Adames, 878 F.2d 1374, 1377 (11th Cir. 1989); United States v. Davis, 583 F.2d 190, 193-94(5th Cir. 1978); United States v. Lizarraga-Lizarraga, 541 F.2d 826, 828 (9th Cir. 1976).

Government Objection: The Government objects to this instruction in its entirety. *See Bryan* v. *United States*, 524 U.S. 184, 196 (1998) (holding that "willfulness requirement of § 924(a)(1)(D) [which concerns unlicensed dealing in firearms] does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required.") (emphasis added); *United States* v *Murphy*, 852 F.2d 1, 7 (1st Cir. 1988) (upholding instruction that "it is not necessary for the government to show that the defendants were aware of or had consulted the United States Munitions List or the licensing and registration provisions of the Arms Export Control Act and its regulations or the National Registration & Transfer Record or the Federal Firearms Law involved . . . Ignorance of the law in this respect, in this case, is not an excuse. In this case, what is required is proof that the defendants acted knowingly and willfully with the specific intent to violate the law."); *United States* v. *Durrani*, 835 F.2d 410, 422 (2d Cir. 1987) (noting, in the context of the Arms Export Control Act, that "[i]t is well settled that ignorance of the law or mistake as to the law's requirements is no defense to criminal conduct."); *United States* v. *Quinn*, 403 F. Supp.2d 57, 61 (D.D.C. 2005) ("Surely neither Congress in passing IEEPA nor the Executive Branch in promulgating the [Iranian Transaction Regulations] intended to foreclose prosecution of persons who knew the gist, but not the exact details, of the law they are accused of violating. A defendant's assertion, no matter how credible, that he 'had not brushed up on the law' has never been deemed a sufficient defense to a crime requiring knowledge of illegality").

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DEFENDANT'S PROPOSED REQUEST NO. 44A

Good Faith Defense

A defendant's good faith is a complete defense to the charges in this case. The export control statutes in this case are meant to impose criminal punishment only on those people who willfully violated the law. Good faith on the part of a defendant is simply inconsistent with a willful violation of the export control laws.

A person who acts on a belief or an opinion honestly held is not punishable under the Arms Export Control Act or the International Emergency Economic Powers Act merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct.

The burden of providing good faith does not rest with the Defendant, because the Defendant does not have any obligation to prove anything in this case. It is the government's burden to prove to you, beyond a reasonable doubt, that the Defendant acted with the intent to wilfully violate the export control laws charged in this case. If the evidence in this case leaves you with a reasonable doubt as to whether the Defendant acted with the intent, you must acquit him.

Authority: Cheek v. United States, 498 U.S. 192, 202 (1991); See IA, O'Malley, Grenig & Lee, Federal Jury Practice and Instructions "The Good

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Faith Defense - Explained" § 19.06, pp. 855-56 (5'h ed. 2000).

Government Objection: The Government objects to this instruction in its entirety for the reasons articulated above with respect to the Government's proposed instructions and objections regarding the "willfully" requirement.

DS:NMA/JMK/AH
F.#2008R00052

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

- v. -

MARK HENRY,
also known as "Weida Zheng,"
"Scott Russel,"
"Bob Wilson" and
"Joanna Zhong,"

Defendant.

I N D I C T M E N T

CR No. 13 00091

(T. 18, U.S.C., §§ 371, 981, 2 and 3551 et seq.; T. 22, U.S.C., §§ 2778(b)(2) and (c); T. 28, U.S.C., § 2461; T. 22, C.F.R., Parts 121.1, 123.1, and 127.1; T. 50, U.S.C., § 1705; and T. 15, C.F.R., Part 764.2)

- X

MAUSKOPF, J.
AZRACK, M.J.

THE GRAND JURY CHARGES:

INTRODUCTION

Background on the Arms Export Control Act and the International Emergency Economic Powers Act

1. At all time relevant to this Indictment, the Arms Export Control Act ("AECA") has authorized the President to control the export of "defense articles" deemed critical to the national security and foreign policy interests of the United States. Among other things, the AECA authorizes the President to designate items as "defense articles" by listing them on the United States Munitions List ("USML"). In addition, the AECA authorizes the President to require licenses for the export of defense articles and to promulgate regulations for the export of

defense articles. Section 2778(c) of the AECA established criminal penalties for any violation of Section 2778 or any rule or regulation promulgated thereunder.

2. The United States Department of State ("State Department") implemented the statutory provisions of the AECA by adopting the International Traffic in Arms Regulations ("ITAR"), Title 22, Code of Federal Regulations, Parts 120 to 130. These regulations, promulgated pursuant to Title 22, United States Code, Section 2778, require that an export license be obtained for the export of any item on the USML.

3. The USML is set forth at Title 22, Code of Federal Regulations, Part 121.1. Category IV of the USML, titled "Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines" includes, inter alia, "(f) Ablative materials fabricated or semi-fabricated from advanced composites (e.g., silica, graphite, carbon, carbon/carbon, and boron filaments) for the articles in this category that are derived directly from or specifically developed or modified for defense articles."

4. The International Emergency Economic Powers Act ("IEEPA"), codified at Title 50, United States Code, Sections 1701-1706, confers upon the President authority to deal with unusual and extraordinary threats to the national security and foreign policy of the United States. Section 1705 provides, in

part, that "[i]t shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this title." 50 U.S.C. § 1705(a).

5. Pursuant to the provisions of IEEPA, the Department of Commerce ("DOC") regulates and licenses the export of dual-use items and technology under the Export Administration Regulations, 15 C.F.R. §§ 730-774 (the "EAR"), which contain licensing requirements and other limitations based upon the nature of the exported item, the foreign end-destination, the foreign end-user, or the foreign end-use. See 15 C.F.R. § 730.

6. Generally speaking, the EAR applies to goods, technology, and software that are "dual use" in nature, meaning that they have military and non-military uses. Among other things, the EAR prohibits the export of certain goods and commodities to specific countries, absent permission from the DOC issued in the form of an export license. Specifically, the DOC has devised the "Commerce Control List" ("CCL"), see 15 C.F.R. § 774, which consists of general categories of goods that are controlled for export and are so designated by an "Export Control Classification Number" ("ECCN"). The DOC also has devised the "Commerce Country Chart," see 15 C.F.R. § 738. In the event that a commodity or good is on the CCL, then an exporter must consult the Commerce Country Chart to determine whether an export license

from the DOC is required to export the CCL item to a given country.

7. Microwave amplifiers (the "Amplifiers") are listed on the CCL under ECCN 3A001 because they have military applications, and require a license from the DOC prior to exportation to, as relevant here, the People's Republic of China ("PRC").

The Defendant and Dahua Electronics Corporation

8. From at least in or about and between April 2009 and May 2012, both dates being approximate and inclusive, and at all other times relevant to this Indictment, within the Eastern District of New York and elsewhere, the defendant MARK HENRY, also known as "Weida Zheng," "Scott Russel," "Bob Wilson," and "Joanna Zhong," operated an export company known as Dahua Electronics Corporation also known as Bao An Corporation (the "Export Company").

9. The Export Company's business was the purchase and export of various items, including tools, machine parts, materials used in machinery, and industrial chemicals, from companies located in the United States to end-users or customers located in Asia, including Taiwan and the PRC. In connection with that business, HENRY received requests for products from customers located overseas and then solicited orders for those products from suppliers and manufacturers located in the United

States.

10. From in or about and between April 2009 and September 2012, HENRY sought to purchase ablative materials from a company located in Colorado ("U.S. Company 1") and caused those materials to be shipped from the United States to a Taiwanese company (the "Taiwanese Company").

11. The ablative materials referenced in paragraph 10 are used for, among other things, a protective coating for rocket nozzles. According to the Department of State, Directorate of Defense Trade Controls (DDTC), the ablative materials are controlled under the USML and cannot be exported without a license from the Department of State.

12. From in or about and between January 2012 and April 2012, HENRY purchased two Amplifiers from a manufacturer located in Pennsylvania ("U.S. Company 2") and attempted to ship them to an end-user located in the PRC. HENRY falsely informed U.S. Company 2 that the end-user was an educational institution located in New York and that the educational institution intended to use the Amplifiers for research purposes. Prior to the sale, U.S. Company 2 provided HENRY with a document entitled, "Advisement of Export-Controlled Item," which informed HENRY that the Amplifier required a license from the Commerce Department prior to export to the PRC. HENRY signed and provided the document to U.S. Company 2, falsely certifying that the Amplifier

would not be exported in violation of United States law.

13. According to the Department of Commerce, the Amplifiers are categorized under ECCN 3A001 of the CCL, for national security and anti-terrorism reasons, because the Amplifiers could significantly contribute to the military potential of another country. As such, the Amplifiers cannot be exported to the PRC without a license from the Commerce Department.

14. During the period of time relevant to this Indictment, HENRY never applied for or received an export license from the Department of State or the Department of Commerce.

COUNT ONE
(Conspiracy to Violate the AECA)

15. The allegations contained in paragraphs 1 through 14 are realleged and incorporated as if fully set forth in this paragraph.

16. In or about and between April 2009 and February 2012, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant MARK HENRY, also known as "Weida Zheng," "Scott Russel," "Bob Wilson" and "Joanna Zhong," together with others, did willfully and knowingly combine, conspire, confederate, and agree together and with each other to commit an offense against the United States, to wit, to violate Title 22, United States Code, Section 2778.

17. It was a part and an object of the conspiracy that

the defendant MARK HENRY, together with others, willfully and knowingly exported, and caused to be exported, from the United States to co-conspirators not named as defendants herein located in Taiwan, defense articles listed on the USML, to wit, ablative materials for, among other things, use as a protective coating for rocket nozzles, without having first obtained from the DDTC a license or other written authorization for such export, in violation of Title 22, United States Code, Sections 2778(b)(2) and 2778(c), and regulations promulgated thereunder.

OVERT ACTS

18. In furtherance of the conspiracy and to effect the illegal object thereof, the defendant MARK HENRY, together with others, committed and caused to be committed, among others, the following overt acts:

a. On or about April 15, 2009, a co-conspirator not named herein ("CC-1"), whose identity is known to the Grand Jury, affiliated with the Taiwanese Company in Taiwan, communicated a request to purchase ablative material to HENRY.

b. On or about April 15, 2009, HENRY replied to CC-1, provided certain pricing and shipping information and advised, in part, "THIS PRODUCT NEED LICENSE OBTAINED FROM UNITED STATES DEPT OF DEFENSE."

c. On or about October 29, 2009, HENRY placed a purchase order for approximately 12 drums of ablative material

from U.S. Company 1.

d. On or about December 11, 2009, HENRY caused approximately 10 drums of ablative material purchased from U.S. Company 1 to be shipped to the Taiwanese Company in Taipei, Taiwan.

e. In or about September 2010, HENRY placed an order for ablative material with U.S. Company 1.

g. In or about February 2012, HENRY placed an order for ablative material with U.S. Company 1.

(Title 18, United States Code, Section 371 and 3551 et seq.)

COUNT TWO
(Violation of AECA)

19. The allegations contained in paragraphs 1 through 14 are realleged and incorporated as if fully set forth in this paragraph.

20. In or about and between April 2009 and February 2012, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant MARK HENRY, also known as "Weida Zheng," "Scott Russel," "Bob Wilson" and "Joanna Zhong," willfully and knowingly exported, caused to be exported, and attempted to export from the United States to Taiwan one or more defense articles listed on the USML, to wit, ablative materials for, among other things, use as a protective coating for rocket nozzles, without having first obtained a

license or other written authorization for such export from the DDTC.

(Title 18, United States Code, Section 2 and 3551 et seq.; Title 22, United States Code, Sections 2778(b)(2) and (c); Title 22, Code of Federal Regulations, Parts 121.1, 123.1 and 127.1)

COUNT THREE
(Attempt to Violate the IEEPA)

21. The allegations contained in paragraphs 1 through 14 are realleged and incorporated as if fully set forth in this paragraph.

22. On or about April 30, 2012, the defendant MARK HENRY, also known as "Weida Zheng," "Scott Russel," "Bob Wilson" and "Joanna Zhong," within the Eastern District of New York and elsewhere, willfully and knowingly attempted to export, cause to be exported, sell, and supply, directly and indirectly, from the United States, goods and technology, to wit, microwave amplifiers, to the PRC, without having first obtained a license for such export from the Department of Commerce.

(Title 18, United States Code, Section 2 and 3551 et seq.; Title 50, United States Code, Section 1705; Title 15, Code of Federal Regulations, Part 764.2)

CRIMINAL FORFEITURE ALLEGATION AS TO COUNTS ONE, TWO AND THREE

23. As a result of committing the offenses alleged in Counts One, Two, and Three of this Indictment, the defendant MARK

HENRY, also known as "Weida Zheng," "Scott Russel," "Bob Wilson" and "Joanna Zhong," shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461, all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offenses alleged in Counts One, Two, and Three of this Indictment, including but not limited to a sum of money representing the amount of proceeds obtained as a result of the offenses.

24. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any

other property of said defendant up to the value of the above forfeitable property.

(Title 18, United States Code, Section 981; Title 28, United States Code, Section 2461)

A TRUE BILL

FOREPERSON

LORETTA E. LYNCH
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

F. #2010R02047
FORM DBD-34
JUN. 85

No.

UNITED STATES DISTRICT COURT

EASTERN *District of* NEW YORK

CRIMINAL DIVISION

THE UNITED STATES OF AMERICA

vs.

MARK HENRY,
a/k/a "Weida Zheng," a/k/a "Scott Russel,"
a/k/a "Bob Wilson,"a/k/a "Joanna Zhong,"

Defendant.

INDICTMENT

(T. 18 U.S.C. §§ 371 & 2; T. 22 U.S.C. § 2778(c); T. 22 C.F.R. §§ 121.1 (Category IV), 123.1, & 127.1; T. 50 U.S.C. § 1705; T.15 C.F.R. § 764.2))

A true bill.

Kendra Creighton

_____ *Foreman*

Filed in open court this _____ *day,*

of _____ *A.D. 20* _____

_____
Clerk

Bail, $ _____

Aimee Hector and Michael Lockard, Special Assistant U.S. Attorneys (212-637-2203/2193)

INFORMATION SHEET

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

1. Title of Case: **United States v. Mark Henry**

2. Related Magistrate Docket Number(s):
None (X)

CR 13 00091

3. Arrest Date:

4. Nature of offense(s): ☒ Felony
☐ Misdemeanor

MAUSKOPF, J.

5. Related Cases - Title and Docket No(s). (Pursuant to Rule 50.3 of the Local E.D.N.Y. Division of Business Rules): _____

AZRACK, M.

6. Projected Length of Trial: Less than 6 weeks (X)
More than 6 weeks ( )

7. County in which crime was allegedly committed: Queens County and others
(Pursuant to Rule 50.1(d) of the Local E.D.N.Y. Division of Business Rules)

8. Has this indictment/information been ordered sealed? ( ) Yes (X) No

9. Has an arrest warrant been ordered? (X) Yes () No

LORETTA E. LYNCH
UNITED STATES ATTORNEY

By: _____
Aimee Hector / Michael Lockard
Special Assistant United States Attorneys
(212) 637-2203 / 2193

Rev. 3/22/01

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	13CR91(RRM)
versus	United States Courthouse 225 Cadman Plaza East Brooklyn, N.Y. 11201
MARK HENRY, also known as "Weida Zheng," "Scott Russel," Bob Wilson," and "Joanna Zhong,"	Monday, June 23, 2014 9:15 a.m.
DEFENDANT.	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE ROSLYNN R. MAUSKOPF
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

For the Government:

LORETTA LYNCH
United States Attorney
BY: AIMEE HECTOR, ESQ.
MICHAEL LOCKARD, ESQ.
Assistant United States Attorney
271 Cadman Plaza East
Brooklyn, New York 11201

ALSO PRESENT: GINA MAKOWSKI, AGENT
BRIAN STRUZIK, AGENT
MARY DELSENER, PARALEGAL
JOHN LAU, INTERPRETER
PATSY ONG, INTERPRETER

headset.

THE COURT: Mr. Ferrari, why don't you tell me what you want the interpreters to do for Mr. Ferrari.

MR. FERRARI: Actually, I wanted to bring that up anyway, your Honor.

Mr. Henry has requested not to use interpreters, in light of the fact that he doesn't want his credibility questioned on the fact that he is using an interpreter, and that the jury should hear how he speaks and understands English, which I know is something we haven't been doing in this case but something he requested after last Tuesday's suppression hearing.

THE COURT: I understand his request.

What is your application? Are you making an application?

MR. FERRARI: Yes, your Honor, we are making an application.

THE COURT: Why don't you tell me, Mr. Ferrari, a little bit more about the defendant's facility with the English language.

Have you been able to communicate with him in English at all times?

Give me some sense as to why I should allow the defendant to abandon the use of the interpreters.

MR. FERRARI: Yes, your Honor.

At all times I have communicated with the defendant in English. There are -- he speaks good English, but I wouldn't say it's great English. I think there are terms in this case and there are issues reading certain documents that he has.

I can tell you that these client meetings take longer than they usually would have to take because we have to go back and forth so many times, but to say he speaks no English is not true.

THE COURT: But that's not the standard. The standard is whether or not the defendant has sufficient facility with the English language to understand all of the proceedings that are going to go on in court here today and every day.

MR. FERRARI: I do think he has a sufficient understanding of English to understand the proceedings.

THE COURT: That's a conclusion. Tell me why.

MR. FERRARI: Because he has spoken English for the last 50 years. I have engaged, in all my conversations, in English with him. He obviously runs a business where he communicates in English. So he has sufficient facility to communicate in the English language.

I do think there are some words that are going to be used in this case and some concepts that may be foreign to him and he may not understand, however.

THE COURT: How do you propose abandoning the -- if we abandon the use of the interpreters, how is the defendant going to understand those portions that you have admitted the defendant will not understand?

MR. FERRARI: Well, your Honor, we have gone over the documents with him sufficiently; and I believe that we will be able to cure any misunderstandings he has through our counseling the defendant.

So we have gone over all of the exhibits with him, your Honor, we have talked about the evidence in detail, and we believe he has an understanding of all of that now. There is a concern that maybe some of the terminology used by either the witnesses from Department of State or Department of Commerce may sound foreign to him, specifically, but I think we can talk to him and relate that information to him to the level where he understands it.

THE COURT: Let me just hear from the government on this first.

MS. HECTOR: Your Honor, we have significant concerns, especially given counsel's representation to the court that there are terms or issues in their communications that are difficult and that take extra time to go over.

The defendant, as Mr. Ferrari has said, has gone through the documents in this case, but he hasn't heard the testimony of our witnesses. And if issues come up or things

are described that he has a problem understanding, that could be a significant problem for his understanding and participation in this case and the appeal record.

I understand Mr. Ferrari's concerns about the defendant's credibility, but those issues only arise to the extent that the defendant claims that he doesn't understand English to the extent he truly does or to the extent that he has used it in communicating with customers, suppliers, et cetera. So it really is in the defendant's hands whether the use of the interpreter impairs his credibility.

We are -- our biggest concern, your Honor, and I think the court's biggest concern is that this defendant understands the proceedings. He has been using an interpreter for every single proceeding up until this point; and, given defense counsel's representation that he cannot tell this court right now that his client understands everything in a way that he will be able to hear the testimony, review the documents, and understand it in English, we are concerned.

THE COURT: And you are opposing the application?

MS. HECTOR: We are opposing the application.

THE COURT: Mr. Ferrari, why aren't they right?

MR. FERRARI: Why aren't they right? Well, your Honor, I think they are stating it as if he is saying he doesn't speak any English. He does speak English.

Again, I go back to this point, there are certain

terms and concepts.

THE COURT: Tell me why you think -- tell me what types of terms and concepts you believe the defendant will not be able to understand.

MR. FERRARI: Right. I think he is going to have a problem understanding some of the terminology around the ITAR, the International Trafficking and Arms Regulations, I think he is going to have some problems with the different codes, what is S4 commodity classification, things of that nature.

THE COURT: Central to the case?

MR. FERRARI: Those are central to the case, certainly.

THE COURT: All right. Should I hear from the defendant in English?

MR. FERRARI: Your Honor, we would agree that you should.

THE COURT: All right. Mr. Henry, I'm going to ask you some questions. And you've just taken off the headphones, and I see that Mr. Lau is no longer interpreting for you.

Do you understand what I'm saying so far?

THE DEFENDANT: (In English) Yes.

THE COURT: All right. So, Mr. Henry, tell me where were you born.

THE DEFENDANT: Shanghai, China.

THE COURT: And when did you come to the United

States?

THE DEFENDANT: In 1999.

THE COURT: All right. Tell me when -- did you speak -- did you learn English in China?

THE DEFENDANT: Yes.

THE COURT: Tell me about your schooling, your educational background.

THE DEFENDANT: Meiji University.

THE COURT: I'm sorry. I can't hear you.

THE DEFENDANT: Meiji University.

THE COURT: Why don't you both be seated and why doesn't Mr. Henry use the microphone. I'm having difficulty actually hearing him. You can sit down, Mr. Henry.

THE DEFENDANT: I went to --

THE COURT: Beijing University?

THE DEFENDANT: In Japan.

THE COURT: Can you spell the name of the university?

THE DEFENDANT: M-E-I-J-I.

THE COURT: All right. In Japan.

Tell me where you learned English. How did you learn to speak English?

THE DEFENDANT: I study in middle school, and then also learned English in university.

THE COURT: Okay. Are you having any difficulty

understanding any of the questions that I am asking you at this time?

THE DEFENDANT: No.

THE COURT: Are you having any difficulty answering my questions in English?

THE DEFENDANT: No.

THE COURT: All right. Now, you heard Mr. Ferrari talk about some of the difficulties that he believes you might have in understanding some of the documents and testimony in this case.

Do you recall that?

THE DEFENDANT: Yes.

THE COURT: And why don't you tell me what you think you are going to have problems understanding, if you were not to use the interpreters in this case.

THE DEFENDANT: If I -- the regular English is no problem, but some like technical term may be.

THE COURT: Both the technical terms in the testimony would be difficult for you to understand if it were only in English?

THE DEFENDANT: I think I can, because I was already to this case more than two years. So I should know now.

THE COURT: You have not heard the testimony; is that right?

THE DEFENDANT: No.

THE COURT: And what about the documents? You don't know what documents are coming into evidence in this case; is that right?

THE DEFENDANT: No, I see the documents.

THE COURT: I have a sense of Mr. Henry's facility with English. He obviously can speak and understand English.

I am concerned about the technical aspects of the case, the regulations. I am concerned about the documents. Having looked at -- the government has proposed as exhibits -- I'm not sure there is an entire series, but we are up into the 700 series.

So there is a large volume of documents here, e-mails, applications for export licenses. All of them -- many of them look the same. Many of them have, although they look the same, have different technical information on them; and I don't -- Mr. Ferrari, you are not disputing that the vast majority of documents here involve the type of technical terms that you believe Mr. Henry would have difficulty understanding without an interpreter?

MR. FERRARI: Just so that I understand the court's question, you are asking if I'm not disputing that the vast majority of documents have those types of technical?

THE COURT: Correct.

MR. FERRARI: I don't know the vast majority. There is certainly a substantial number that do.

THE COURT: Okay, okay. And you also agree that many of them are the same type of document for different applications and different exports, correct?

MR. FERRARI: Yes, your Honor.

THE COURT: And the technical terms on those documents are the types of technical terms that you believe — that you have indicated Mr. Henry would have difficulty with understanding without an interpreter?

MR. FERRARI: Yes, your Honor.

THE COURT: And I understand your point, that you have gone over those documents with Mr. Henry prior to the trial; and I also understand the point that those meetings took an inordinate amount of time because you were doing them in English and living up to your responsibilities as counsel for the defendant. I appreciate that.

But in this trial, I don't see how you will be able, you, the lawyers, will adequately be able to, as you said, correct or counsel Mr. Henry with respect to the technical aspects of the testimony or the technical aspects of the documents given how many will be coming in here, how often they will be coming in as evidence potentially; and I am concerned about foregoing the use of the interpreter.

I will give you another opportunity to address that.

MR. FERRARI: Your Honor, I would have nothing new to add except perhaps as an alternative if we could have --

and I don't even know if this is possible; I haven't seen it done -- but if we can have an interpreter on standby in case he is having some difficulties with certain concepts, and they can translate those for him. I'm particularly concerned when he is going to provide his testimony during the defense case.

THE COURT: What about the hybrid?

MS. HECTOR: Your Honor, to the extent that your Honor is inclined to do so, we would ask that the defendant be instructed that if at any time he does not understand testimony, documents, or some concept that is being described in the courtroom that he immediately alert his counsel and that that interpreter be utilized to explain those concepts or to interpret that information so that Mr. Henry is clear that it is his obligation, to the extent that he does not want an interpreter, to do that, and that at the end of this trial, to the extent that he has not done that, that he is expressing to the court that he has understood everything.

The only problem with that is that if someone is testifying and then all of a sudden the defendant says, okay, I didn't understand the last 15 minutes, we are going to be in a situation where the interpreter has to now take the transcript and explain it to this defendant, and that's going to delay things.

THE COURT: Mr. Ferrari, let me just understand the hybrid application that you are making.

Are you suggesting that -- I understand you don't want to use the interpreter at all; but if the court is inclined to require the use of an interpreter, is your alternative position use the interpreter while the defendant is seated at counsel table for the bulk of the testimony but allow the use of the interpreter only as a standby if and when Mr. Henry testifies in his own defense because you want him to testify in English?

MR. FERRARI: I don't think that's the way I contemplated it, but that's certainly one way we can do it. I think what I had contemplated was the interpreter being next to Mr. Henry and him being able to ask at the moment that something was said where he didn't understand, from the interpreter.

THE COURT: I'm uncomfortable doing that because, for example, let's say Mr. Henry says I didn't understand what the witness just said. The interpreter is still continuing to interpret what's going on in the trial, and how is the interpreter going to recall the last question and answer to read back? That's the way it would have to be done. The interpreter can't just say, oh, well, the witness just testified essentially X; and so I don't think that is going to work.

So I think if part of the defendant's need to testify is to show his facility with the English language or

lack thereof, that poses a different issue at the time that the defendant testifies.

So that's an alternative application?

MR. FERRARI: Yes, your Honor.

THE COURT: All right. So what about that?

MS. HECTOR: Your Honor, the government does not object to that because at the time of his testimony it will be clear exactly what his facility is; and, if he doesn't understand something, it will be clear in his answer presumably that he didn't understand the question or we can have the interpreter interpret the question at that point.

THE COURT: So I think my ruling here is that I'm not going to allow the defendant to abandon the use of the interpreters throughout the trial, given the highly technical nature of the evidence in this case, both the testimony and the documentary evidence, and the difficulties that would be posed with counsel's application in putting the onus on counsel and/or a standby interpreter to assist Mr. Henry in understanding those aspects of the evidence that he doesn't understand as it is playing itself out.

I will allow, should he wish, Mr. Henry, to testify in whole or in part in English with the assistance of the standby interpreter, who we should talk a little bit more about how that is actually going to work, if and when the time comes.

THE COURT: Okay. And the interpreters? Where are the interpreters, and why are you not interpreting? Okay.

Let me make things clear. Every word that is spoken in this courtroom must be interpreted for the defendant. Ms. Ong, is that clear?

INTERPRETER ONG: Yes, your Honor.

THE COURT: And, Mr. Lau, is that clear?

INTERPRETER LAU: Yes. In light of your ruling, I asked defendant would he want to listen from the headset; he said no. Now he put it on.

THE COURT: Mr. Henry, I have denied -- you can stay seated. You can stay seated. Okay.

If the interpreters do not begin interpreting now, I am not going to let you continue on this trial. Do you understand that? Mr. Ong, do you understand that?

INTERPRETER ONG: Yes, your Honor.

THE COURT: Ms. Ong, do you understand that?

Mr. Lau, do you understand that?

INTERPRETER ONG: We were just switching.

THE COURT: I understand that, but switching -- someone needs to be interpreting what I am saying. Switching is no excuse for not interpreting.

I have had this difficulty in this courthouse with other trials and interpreters in other languages, and I want to make it crystal clear: The interpreters are to interpret

every word that is spoken in this courtroom.

Mr. Lau, do you understand that?

INTERPRETER LAU: Yes, your Honor.

THE COURT: Ms. Ong, do you understand that?

INTERPRETER ONG: Yes.

THE COURT: And, Mr. Henry, you are directed to use the interpreters throughout this trial, unless and until someone tells you — unless I tell you that it is fine for you to listen to the testimony in English.

Do you understand that?

THE DEFENDANT: (In English) Yes.

THE COURT: All right. Do we need to swear the interpreters also today? Let's do that before we go any further. They were sworn last week. Out of an abundance of caution, I'm going to swear them in again.

(Interpreters sworn.)

THE CLERK: Please state your names for the record.

INTERPRETER ONG: Patsy Ong.

INTERPRETER LAU: John Lau.

THE COURT: Thank you.

INTERPRETER LAU: Judge, your mic is not on.

THE COURT: Okay. I will turn my mic on. Okay. This is a direction to all of the parties. In order for the interpreters to properly do their jobs, we all need to speak into microphones because the interpreters are wearing

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	13CR91(RRM)
versus	:	United States Courthouse 225 Cadman Plaza East Brooklyn, N.Y. 11201
MARK HENRY, also known as "Weida Zheng," "Scott Russel," Bob Wilson," and "Joanna Zhong,"	:	Thursday, June 26, 2014 9:45 a.m.
DEFENDANT.	:	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE ROSLYNN R. MAUSKOPF
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

For the Government:

LORETTA LYNCH
United States Attorney
BY: AIMEE HECTOR, ESQ.
MICHAEL LOCKARD, ESQ.
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271 Cadman Plaza East
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ALSO PRESENT: GINA MAKOWSKI, AGENT
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THE COURT: That's all right.

MR. FERRARI: No, your Honor, I don't believe.

THE COURT: All right. So Mr. Savitt is here. For Mr. Savitt's edification, the government, when we bring the jury in, the government intends to rest and the defense intends to call Mr. Zheng as its first witness on the case. So are you prepared to have that happen, Mr. Savitt?

MR. SAVITT: Absolutely, your Honor.

THE COURT: Okay. And Mr. Chang -- we need Mr. Chang to translate for the witness. Correct? That's the other thing we need to do. And I think the witness is here, Mr. Savitt.

MR. SAVITT: He must be outside. Should I just alert him that in a few minutes --

THE COURT: Yes.

MR. SAVITT: Yes, your Honor.

THE COURT: Ms. Hector.

MS. HECTOR: Your Honor, our only concern is that to the extent that there are two translations going on, the witness may be hearing a slightly different translation than the defendant is hearing. So it would be our position that for purposes of Mr. Zheng's testimony, the court interpreter could interpret his testimony and that way he's hearing the same thing that the defendant is hearing and we have no issues of there being no transcript of what the actual interpreter

who is sitting next to the witness is saying versus what the -- the defendant is hearing.

THE COURT: That's the usual practice that I'm used to but in some cases the government has taken the position that another interpreter is needed for the witness.

MS. HECTOR: And, your Honor, I understand that for purposes of potential defendant meetings -- I mean witness meetings between counsel and all of that, but for purposes of the court we have no problem of doing that.

THE COURT: Mr. Ferrari.

MR. FERRARI: We have no objection.

THE COURT: All right. So our interpreters, let me just ask you how you -- let me ask you how you want to proceed? Do you want to continue to -- so you're going to be interpreting just the same way you would be interpreting. Correct? And the witness will have -- well. . .

THE INTERPRETER: I can do it for the defendant if the witness is using another interpreter. I don't exactly know how one do this to proceed. Because sometimes we go over there and then the defendant can hear for himself what's going on because we are translating simultaneously, consecutively for both, the court and the defendant.

THE COURT: Right. So sometimes what's -- what happens with a witness, which really shouldn't happen with the witness, is that the witness doesn't understand the question.

THE COURT: Okay. So let's set that up. Okay, we'll get you a microphone over here.

THE INTERPRETER: Your Honor, because there may be some colloquy going on between the lawyers and yourself during the testimony, so maybe one of us can be standing -- sitting here for those colloquy and the other person will be up there for the consecutive testimony. I think that would work.

THE COURT: Right.

THE INTERPRETER: Because I cannot translate colloquy at the same time and doing the witness because sometimes there are discussions going on.

THE COURT: That's fine. And our court reporter pointed out that Mr. Henry needs to hear a Mandarin answer, which means Mr. Henry would need to hear the witness's answer while the interpreters are translating back into English, which is why I think we often use two different interpreters.

THE INTERPRETER: We can both use the mike over at the stand and everybody can hear us.

THE COURT: Right. Because I've ordered that Mr. Henry get everything in Mandarin. So if the interpreter's focus is to translate the witness's answer from Mandarin to English, how is Mr. Henry getting his Mandarin version of the answer? The only way is either through another interpreter or -- not -- directly through the witness, is the answer.

MS. HECTOR: Your Honor, I'm not sure that I'm

following. Because every time I've ever had someone testify in another language, we've used one interpreter who sits there.

THE COURT: Has the defendant required the same translation?

MS. HECTOR: Yes.

THE COURT: Okay.

MS. HECTOR: And so the interpreter sits there and we ask the question in English, the interpreter interprets it into Mandarin through the headphones. Mr. Henry and the witness, who both have headphones in, hear the Mandarin version and then the witness into the microphone answers in Mandarin, then the interpreter translates that into English for the rest of the courtroom.

THE COURT: That's right. That's right. I just want to make sure that the headphones that Mr. Henry will be using will hear both the interpreter and the microphone that the witness is using, and I am told that can't be done. That's the problem.

THE INTERPRETER: But he can hear from the natural acoustics. He still can hear. As long as that mike is on, he can still hear.

THE COURT: Isn't the answer, though, that Mr. Henry -- because the testimony will be in Mandarin -- doesn't need the translation? Because he too speaks Mandarin?

That's the answer. Right? Mr. Ferrari? Ms. Ververis?

MR. FERRARI: That's right, yes.

THE COURT: So for purposes of Mr. Zheng's testimony, no one needs to translate anything for Mr. Henry. He should just listen to the Mandarin answer given by the witness which will be into the microphone that's broadcast to everyone, and it is that Mandarin answer that interpreters will be hearing in their headset. So that's what we need to do. That microphone on the witness stand has to get piped in to the interpreter's headset.

THE INTERPRETER: It is.

THE COURT: Okay. And you feel more comfortable sitting next to the witness?

THE INTERPRETER: Yes, your Honor.

THE COURT: That's fine. So let me just make sure Mr. Henry understands.

THE DEFENDANT: I understand.

THE COURT: Okay. Mr. Savitt, are you ready to go?

MR. SAVITT: Yes, your Honor. I don't know what transpired while I was out, but. . .

THE COURT: Nothing, other than trying to figure out the translation. The translators will be at the witness stand to assist your client in interpreting.

MR. SAVITT: I understand. I understand. So the government hasn't had a formal chance to rest in front of the

THE COURT: And, Ms. Ververis and Mr. Ferrari, do you agree with the proposed instruction?

MS. VERVERIS: I mean, we agree.

MR. FERRARI: I don't think we have been in disagreement with the government on this issue at all.

THE COURT: You haven't?

MR. FERRARI: No.

THE COURT: Okay. Then I will charge it. Okay. I guess there will be a similar modification, but we should go through it word for word when we get there.

Why don't -- let me just flip back to where I need to be.

MR. LOCKARD: So that brings us to the one area of lack of agreement, which is on 36.

THE COURT: Let me guess, knowing and willful.

MR. LOCKARD: Knowing and willful. It's not a huge disagreement. It comes down to two words actually.

THE COURT: Okay.

MR. LOCKARD: So the government would object to including the word "carelessness" in the second sentence and the word "negligence" in the last sentence of the third paragraph.

THE COURT: Where is carelessness?

MR. LOCKARD: Carelessness is at the end of the second sentence, a person acts willfully --

THE COURT: Oh, okay.

MR. LOCKARD: The reason for that objection is knowingly and willfully are terms that deal with a person's state of mind, whereas carelessness and negligence have more to do with the person's standards of conduct; and, to the extent that they include a mental aspect, that mental aspect is covered by ignorance, mistake, and accident or inadvertence. But a person can be acting at a low standard of care but also have the state of mind that would make them willful. He can be sloppy but also knowing.

THE COURT: I understand the distinction that you are making. I'm looking at the charge that -- I'm looking at the proposed charge that you all wrote. Carelessness doesn't appear anywhere. The defense wants to put in negligence, even gross negligence, citing Cheek. So let me hear what the defense has to say about that.

MS. VERVERIS: Sure. Well, your Honor, I mean, we think that -- I mean, we didn't use the term carelessness in our proposed charge, but we think it definitely goes to, you know, his conduct goes to his state of mind and whether he acted knowingly.

Same -- in the same regard negligence. You know, his conduct was definitely a factor in his state of mind and whether he acted willfully. And as we explained in our letter brief, we think the line of cases supports not only including

language as to negligence, but it should be a consideration that when the jury is determining his state of mind.

THE COURT: So it's the same argument you are making with respect to the additional charges that you want, mistake of law and the like, the more what I will call the amplified or more specific version of willful. It's based on the same line of cases.

MS. VERVERIS: Correct.

THE COURT: I don't think that line of cases applies. And I think -- I mean, this language is lifted from Sand, but Sand includes crimes where there is the more, quote-unquote, specific intent, like Cheek and Ratzlaff, and I forgot some of the other cases, which I find I agree with the government's analysis here. The AECA and IEEPA are not the types of crimes that require that type of specific intent.

So I'm going to take out carelessness, I'm going to take out negligence; and for the same reasons I'm not going to charge the defense-proposed instruction at absence, mistake of law being a defense, right? I think it's that one.

MS. VERVERIS: Correct.

THE COURT: Ignorance of the law as a defense, the request at 43A. I don't know where you stand on good faith, which is somewhat related.

MS. VERVERIS: I think we would still advocate for that inclusion.

THE COURT: Well, let me just ask you a question. I know we haven't finished the defendant's testimony yet, and maybe this is a question that's better put after all of the testimony is in.

The good faith defense that you are proposing here, even if it were legally correct, what is the factual basis for it in this case? Isn't the defense here that he absolutely didn't know about the law? And it's not that he had a good faith believe that the law was one way, but he was wrong.

MS. VERVERIS: Well, he had a good faith -- we would argue that he had a good faith belief that the products at issue here did not require a license prior to export; and that mistaken judgment is directly relevant to his state of mind.

THE COURT: Okay. So it's a mistake, and the government has argued -- I mean I don't want to belabor this because I do have the letter briefs. The government has argued -- and case law, I think, is fairly clear here -- that if the willfulness instruction encompasses that type of mistake for these types of crimes, in contrast to the Ratzlaff and Cheek types of crimes, that an additional instruction is not required.

So for those reasons, unless something changes, I don't see how the mistake of law or a good faith defense are necessary. In fact, I don't think mistake of law, ignorance of the law, I don't think is legally proper, and I think the

willfulness instruction covers factually and legally what you are asking me to do in the good faith defense. Okay. So carelessness and negligence are coming out on page 36.

Again, we are doing this before all of the testimony is in. I will ask you before we actually -- I actually give the charge, or the night before, if there is anything that has changed; and if you want to raise any -- I mean you are always free to raise anything at any time. So you can always double back, if need be. Okay.

Next.

MS. HECTOR: The next page is 42. The first comment is that the first line suggests there is four elements. There are three.

THE COURT: Oh, that's right, because I did the four-element version and then collapsed it. I'm sorry. What page, 40?

MS. HECTOR: Forty-two.

THE COURT: Sorry. Each of the following three. Thank you.

MS. HECTOR: The next comment is knowingly and willfully, in the second element.

THE COURT: Uh-huh?

MS. HECTOR: We think that this is importing the willfulness requirement into the decision to become a member of the conspiracy. Whereas the willfulness requirement really

semicolon, should you need to examine -- it's not obviously a firearm and ammunition. I'm assuming microwave amplifiers.

THE COURT: That one I'm going to blame my Amy for, the last trial.

MS. HECTOR: Then the only remaining comment.

THE COURT: Do we care about sending in the microwave amplifiers?

MS. HECTOR: We could check with the Department of Commerce. We have not checked with them, if they have any concerns about that. They may not.

MR. LOCKARD: They are heavy and they are expensive and they are in evidence. So we just want to check with them.

THE COURT: Okay, and the defense wouldn't have any objection to actually sending them in?

MR. FERRARI: No, your Honor.

MS. VERVERIS: No, your Honor.

MS. HECTOR: Finally, your Honor, we would just request a willful blindness instruction.

THE COURT: What's the defense position on willful blindness? Have you had a chance to think about that.

MR. FERRARI: We really haven't, your Honor. Initial thought is that we object to it. It's not a well thought out objection at this point.

THE COURT: That's okay. And I was thinking about it as I was listening, and I'm not all that familiar with the

case law and how it would play out in this context.

So maybe if there is an objection, let's just look -- let me just look at the charge while we are all here and see if I have to ask the government to propose a charge. Conscious avoidance. This is Sand. In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with, and then in presence, or, that the defendant's ignorance was solely and entirely the result of a conscious purpose to avoid learning the truth, e.g., that the same was false. I guess here about the warnings, then this element my be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligence, foolish, or mistaken. If you find that the defendant was aware of a high probability that the warnings weren't there, I guess, or something like that, and that the defendant acted with deliberate disregard of the facts, you may find that the defendant acted knowingly, or if you find that the defendant actually believed that the statement was true, no, he may not be convicted.

That would have to be modified. It's entirely up to you whether to find the defendant deliberately closed his eyes and any inferences to be drawn from the evidence on this issue.

I mean the first paragraph seems like the guts of it, the high probability that the evidence is deliberate disregard, conscious avoidance.

So do you want to propose a charge?

MS. HECTOR: We are happy to do so, your Honor, if you would like.

THE COURT: If you could by tomorrow morning. Just pull something together by noontime, and this way the defense can send me a letter objecting, and then the government can give me a quick letter responding.

MR. FERRARI: When do you want that objection letter by? 5:00 o'clock?

THE COURT: That would be great. I mean you can already start thinking about it and working on it. I don't think their proposed instruction is going to make a difference to the objection. So if you can get me something by the end of the day tomorrow that would be good.

MS. VERVERIS: Fine, your Honor.

THE COURT: Why don't we do it this way. Why don't I just ask both of you by the end of the day to just get me letters, why you want it, why you don't want it, propose your charge and include it. I don't think the charge is going to matter to your objection, right? If I'm going to give it we can talk about fine tuning it afterwards. So that's good. By the end of the day tomorrow that would be great. Great.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	13CR91(RRM)
versus	United States Courthouse 225 Cadman Plaza East Brooklyn, N.Y. 11201
MARK HENRY, also known as "Weida Zheng," "Scott Russel," Bob Wilson," and "Joanna Zhong,"	Tuesday, July 1, 2014 9:30 a.m.
DEFENDANT.	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE ROSLYNN R. MAUSKOPF
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Government:

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United States Attorney
BY: AIMEE HECTOR, ESQ.
MICHAEL LOCKARD, ESQ.
Assistant United States Attorney
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Brooklyn, New York 11201

ALSO PRESENT: GINA MAKOWSKI, AGENT
BRIAN STRUZIK, AGENT
MARY DELSENER, PARALEGAL
JOHN LAU, INTERPRETER
PATSY ONG, INTERPRETER

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Proceedings recorded by mechanical stenography, transcription by computer-aided transcription.

the charge contained in count two, category four of the United States Munitions list, titled launch vehicles, guided missiles, ballistic missiles, rockets, torpedoes, bombs and mines, designates as defense articles, subdivision F, ablative material, fabricated or semi-fabricated from advance composites, for example, silica, graphite, carbon, carbon/carbon and boron filaments for the articles in this category that are derived directly from or specifically developed or modified for defense articles.

The government has presented evidence in the form of a certification from the Directorate of Defense Trade Controls, stating that it has determined that the ablative materials charged in count two are in fact defense articles under the United States Munitions list. You have also heard testimony on this subject. You may give the evidence and testimony such weight as you believe they deserve.

I instruct you that the correctness of the Directorate of Defense Trade Controls' determination that the ablative materials charged in count two are defense articles on the United States Munitions list is not a question of fact for you, the jury, to decide.

The third element the government must prove is that the defendant did not obtain a license from the Directorate of Defense Trade Controls, DDTC, before exporting or attempting to export the item charged, unless specifically exempted

persons engaged in the export of defense articles covered by the United States Munitions list, must be registered with the DDTC and must apply for and receive a valid license or other approval to export a defense article from the United States.

The fourth and final element that the government must prove, is that the defendant acted knowingly and willfully. A person acts knowingly if he acts intentionally and voluntarily and not because of ignorance, mistake, accident, or carelessness.

Willfully means to act with knowledge that one's conduct is unlawful and with the intent to do something that the law forbids. That is to say, with a bad purpose, either to disobey or disregard the law. The defendant's conduct was not willful if it was due to negligence, inadvertence, or mistake.

However, it is not necessary for the government to prove that the defendant knew the precise terms of the statute or regulatory provision he is charged with violating — that is, the government is not required to prove that the defendant knew the existence or details of the Arms Export Control Act or the related regulations. All that is required is that the government prove that the defendant acted with the intent to disobey or disregard the law.

In determining whether the defendant acted knowingly and willfully, you may consider whether the defendant

deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid learning the truth that exporting the ablative material without a license was unlawful, then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish, or mistaken.

If you find that the defendant was aware of a high probability that exporting the ablative materials without a license was unlawful and that the defendant acted with deliberate disregard of that fact, you may find that the defendant acted knowingly and willfully. However, if you find that the defendant actually believed that exporting the ablative material without a license was lawful, he may not be convicted. It is entirely up to you whether you find that the defendant deliberately closed his eyes and any inferences to be drawn from the evidence on this issue.

The issues of knowledge and intent require you to make a determination about a defendant's state of mind, something that can rarely be proved directly. Such direct proof is not required; rather, the government may prove the reference — let me start again.

Rather, the government may prove by reference to the facts and circumstances surrounding the case that the

defendant knew his conduct was illegal. Knowledge and intent may be established by circumstantial evidence based upon a person's outward manifestations, his words, his conduct, his acts, and all the surrounding circumstances disclosed by the evidence and the rationale or logical inferences that may be drawn from the evidence.

A wise and careful consideration of all the circumstances before you may permit you to make a determination as to a defendant's state of mind. In your everyday fairs, you are frequently called upon to determine a person's state of mind from his words and actions in given circumstances. You are asked to do the same here.

As I have already instructed you, the defendant is charged in Count 2 with knowingly and willfully exporting or attempting to export, without a license, the defense articles at issue. I have already defined the meaning of the export. Let me now instruct you on the meaning of attempt.

To prove the attempted exportation as charged in Count 2, the government must prove beyond a reasonable doubt the following two elements:

First, that the defendant intended to commit the crime charged — that is, he intended to knowingly and willfully export from the United States defense articles, namely, the ablative materials at issue in Count 2 without first having obtained a license from the Directorate of

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Arms Export Control Act, 22 U.S.C. § 2278

(a) Presidential control of exports and imports of defense articles and services, guidance of policy, etc.; designation of United States Munitions List; issuance of export licenses; negotiations information

(1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.

(2) Decisions on issuing export licenses under this section shall take into account whether the export of an article would contribute to an arms race, aid in the development of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.

(3) In exercising the authorities conferred by this section, the President may require that any defense article or defense service be sold under this chapter as a condition of its eligibility for export, and may require that persons engaged in the negotiation for the export of defense articles and services keep the President fully and currently informed of the progress and future prospects of such negotiations.

(b) Registration and licensing requirements for manufacturers, exporters, or importers of designated defense articles and defense services

(1)(A)(i) As prescribed in regulations under this section, every person (other than an officer or employee of the United States Government acting in an official capacity) who engages in the

business of manufacturing, exporting, or importing any defense articles or defense services designated by the President under subsection (a)(1) of this section shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations. . . .

(c) Criminal violations; punishment

Any person who willfully violates any provision of this section . . .or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than 20 years, or both.

*** * ***

(f) Periodic review of items on Munitions List; exemptions

(1) The President shall periodically review the items on the United States Munitions List to determine what items, if any, no longer warrant export controls under this section. The results of such reviews shall be reported to the Speaker of the House of Representatives, the Committee on Foreign Affairs of the House of Representatives, and to the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate. The President may not remove any item from the Munitions List until 30 days after the date on which the President has provided notice of the proposed removal to the Committee on International Relations of the House of Representatives and to the Committee on Foreign Relations of the Senate . . .

*** * ***

(h) Judicial review of designation of items as defense articles or services

The designation by the President . . . in regulations issued under this section, or items as defense articles or defense services for purposes of this section shall not be subject to judicial review.

The United States Munitions List 22 C.F.R. § 121.1

(a) In this part, articles, services, and related technical data are designated as defense articles or defense services . . . and constitute the U.S. Munitions List (USML). . . .

(1) Composition of U.S. Munitions List categories. USML categories are organized by paragraphs and subparagraphs identified alphanumerically. They usually start by enumerating or otherwise describing end-items, followed by major systems and equipment; parts, components, accessories, and attachments; and technical data and defense services directly related to the defense articles of that USML category.

* * *

(b) Order of review. Articles are controlled on the U.S. Munitions List because they are either:

(1) Enumerated in a category; or

(2) Described in a "catch-all" paragraph that incorporates "specially designed" (see § 120.41 of this subchapter) as a control parameter. In order to classify an item on the USML, begin with a review of the general characteristics of the item. This should guide you to the appropriate category, whereupon you should attempt to match the particular characteristics and functions of the article to a specific entry within that category. . . .

* * *

Category XIII – Materials and Miscellaneous Articles

(c) Materials, as follows:

(1) Ablative materials fabricated or semi-fabricated from advanced composites (e.g., silica, graphite, carbon, carbon/carbon, and boron filaments) specially designed for the articles in USML Category IV or XV (MT if usable for nozzles, re-entry vehicles, nose tips, or nozzle flaps usable in rockets, space launch vehicles (SLVs), or missiles capable of achieving a range greater than or equal to 300 km . . .

Court Interpreters Act, 28 U.S.C. § 1827

(d)(1) The presiding judicial officer . . . shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise qualified interpreter, in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings—(A) speaks only or primarily a language other than the English language[] . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.

* * *

(f)(1) Any individual other than a witness who is entitled to interpretation under subsection (d) of this section may waive such interpretation in whole or in part. Such a waiver shall be effective only if approved by the presiding judicial officer and made expressly by such individual on the record after opportunity to consult with counsel and after the presiding judicial officer has explained to such individual, utilizing the services of the most available certified interpreter . . . the nature and effect of the waiver.