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Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 18-10486

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NAUM MORGOVSKY,
Defendant-Appellant.

No. 18-10448

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
IRINA MORGOVSKY,
Defendant-Appellant.

Filed September 22, 2020

MEMORANDUM*
NOT FOR PUBLICATION

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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Appeals from the United States
District Court for the Northern District of California
Vince Chhabria, District Judge, Presiding
D.C. Nos. 3:16-cr-00411-VC-1 & VC-3

Submitted September 16, 2020**
San Francisco, California

Before: WALLACE, TASHIMA, and BADE, Circuit
Judges.

Naum and Irina Morgovsky appeal from their convictions and sentences, following guilty pleas, for conspiracy to violate the International Traffic in Arms Regulations (ITAR) in violation of the Arms Export Control Act (AECA), 22 U.S.C. §§ 2751–2799aa-2. Naum also appeals his convictions and sentences for money laundering in violation of 18 U.S.C. § 1956(a)(1)(B) and (a)(2)(A). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. The Morgovskys argue that the district court committed a variety of errors during each of their plea proceedings. Because the Morgovskys raised none of these challenges in the district court, we review for plain error. *United States v. Pena*, 314 F.3d 1152, 1155 (9th Cir. 2003). “Plain error is (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, we may then exercise our discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Yijun Zhou*, 838 F.3d 1007, 1012 (9th Cir. 2016) (quotation marks omitted).

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Naum and Irina point out that the district court failed to recite the elements of their offenses during both their plea colloquies. A district court must state the elements of an offense during a plea colloquy, and the failure to do so is error under well-settled Ninth Circuit precedent. *United States v. Covian-Sandoval*, 462 F.3d 1090, 1095 (9th Cir. 2006). However, neither Naum nor Irina proves that the error affected their substantial rights, as the third step of the plain error standard requires. *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004). An error affects substantial rights where there is “a reasonable probability that, but for the error, [the defendant] would not have entered the plea.” *Id.* Here, both Naum and Irina confirmed in writing and during their plea colloquies that they fully understood the charges made against them. These facts, combined with the Morgovskys’ representation by counsel in the district court, strongly support their “full comprehension of the nature of the offense[s].” *Covian-Sandoval*, 462 F.3d at 1095.

Next, Naum and Irina argue that the district court failed to determine a sufficient factual basis for their guilty pleas. “[A] court need not rely on the plea colloquy alone and may conclude that a factual basis exists from anything that appears on the record.” *United States v. Mancinas-Flores*, 588 F.3d 677, 682 (9th Cir. 2009) (internal quotation marks and citation omitted). The statements that the district court relied on (particularly from the Morgovskys’ presentence reports (PSRs) and their admissions during plea proceedings) establish a basis for each of the facts the Morgovskys now dispute: specifically, that they lacked the requisite license to export ITAR-controlled

equipment to Russia, that they intentionally agreed to join the conspiracy, and that they knew their conspiracy was illegal.¹

The Morgovskys also argue that the district court failed to ensure their pleas were voluntary because Irina's plea agreement was contingent on Naum's guilty plea. Apart from citing generic statements that a district court should closely scrutinize "package plea deal" arrangements, *see, e.g., United States v. Caro*, 997 F.2d 657, 659 (9th Cir. 1993), the only specific argument they make on this issue is that the district court failed to advise Irina that she could decline to enter a guilty plea even after she signed the plea agreement. But the record flatly contradicts this assertion: the court stated at her plea hearing, "You do have the right to continue to plead not guilty. Do you understand that?" Irina responded, "Yes."

Irina also argues that the district court failed to determine her competence adequately once it learned that she was taking an antidepressant. But after learning that Irina was "under the influence of some medication," the district court satisfied its obligations to determine "what type of drug [she] ha[d] taken" and "whether the drug [was] affecting [her] mental state." *United States v. Carter*, 795 F.3d 947, 954 (9th Cir. 2015).

¹ The Morgovskys fault the district court for relying on "totally defective PSRs, virtually identical for both Morgovskys." They are correct that many of the relevant portions of their PSRs are similar, but they cite no authority that it is improper for two co-conspirators' PSRs to closely mirror each other, and they fail to show that the factual findings the district court adopted from the PSRs were unreliable.

The court asked Irina whether she was “currently under the influence of any drug, medication or alcoholic beverage that would hinder [her] ability to understand the proceedings here today.” She responded, “No, I’m taking some antidepressant, but they’re not affect [sic] my ability to understand any of the proceedings.” Irina suggests that her “short and contradictory answers” were “red flags” that the district court failed to investigate, but she fails to explain how her answers were contradictory, or what about them should have raised the district court’s suspicion.

Next, Naum and Irina argue that their pleas were “not knowing and voluntary as a constitutional matter because the district court failed to advise [them] of the law in relation to facts and demonstrate on the record that [they] understood the complex charg[es] to which [they were] pleading.” We reject this general argument for the same reasons we rejected the Morgovskys’ specific challenges above: the record amply demonstrates that they understood the charges to which they were pleading guilty, they were represented by counsel, and they gave no indication that their decisions to plead guilty were anything but voluntary and intelligent. Finally, the Morgovskys’ cumulative error arguments necessarily fail because only one error occurred. *United States v. Solorio*, 669 F.3d 943, 956 (9th Cir. 2012).

2. The Morgovskys argue that their conspiracy convictions under ITAR and the AECA should be vacated because Congress, when it enacted 22 U.S.C.

§ 2778, did not establish criminal conspiracy liability.² Because Irina has generally waived her appeal rights pursuant to her plea agreement, we do not entertain her challenge. *United States v. Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011).³ Moreover, because Naum did not raise this challenge in the district court as Federal Rule of Criminal Procedure 12(b)(3) requires, and he has not shown good cause, *United States v. Guerrero*, 921 F.3d 895, 897 (9th Cir. 2019) (per curiam), *cert. denied*, 140 S. Ct. 1300 (2020), he has waived his challenge on appeal except insofar as he “attack[s] the constitutionality of the law under which he is charged,” *United States v. Parker*, 761 F.3d 986, 991 (9th Cir. 2014) (internal quotation marks and citation omitted). However, we review de novo Naum’s constitutional argument that “under the separation of powers, Congress had no power and thus could not validly delegate to the Executive Branch the authority

² Notwithstanding the Morgovskys’ own inconsistent characterizations of their challenge, it plainly consists of two distinct arguments: (1) that “Congress did not delegate to the Executive Branch its legislative authority . . . to create a separate crime of conspiracy,” and (2) that even if Congress purported to delegate this authority, such a delegation violates the separation of powers.

³ Although “even a valid appellate waiver does not prevent courts from reviewing an illegal sentence,” *United States v. Pollard*, 850 F.3d 1038, 1041 (9th Cir. 2017), the rationale underlying this exception does not extend to challenging a statute of conviction because nothing prevents a defendant from raising the latter during pretrial proceedings. *See, e.g., United States v. Johnson*, 67 F.3d 200, 203 n.6 (9th Cir. 1995) (discussing “the possibility that a sentencing error could be entirely unforeseeable and therefore not barred by the defendant’s appeal waiver”).

to create new generic crimes, such as conspiracy, separate and distinct from those proscribed by the statute enacted by Congress.”⁴ *United States v. Tabacca*, 924 F.2d 906, 912 (9th Cir. 1991); *United States v. Gilbert*, 813 F.2d 1523, 1526 (9th Cir. 1987).

In *United States v. Gurrola-Garcia*, we rejected the argument that an earlier, similarly-worded version of the same AECA provision “constitute[d] an unconstitutional congressional delegation of legislative power to the executive” insofar as it “empower[ed] the President to criminalize ‘attempt’ conduct.” 547 F.2d 1075, 1078 (9th Cir. 1976). We reasoned, “It is well established that Congress may constitutionally provide a criminal sanction for the violation of regulations which it has empowered the President or an agency to promulgate.” *Id.* at 1079 (collecting cases); *see also United States v. Chi Tong Kuok*, 671 F.3d 931, 934, 939 (9th Cir. 2012) (holding that Congress set forth an intelligible principle in charging the President to designate, and regulate the export of, “defense articles and defense services”). Naum argues that *Gurrola-Garcia* is distinguishable because it addressed attempt liability, not conspiracy liability, but this difference is immaterial to our analysis. Thus, we affirm the Morgovskys’ conspiracy convictions.

⁴ Naum’s argument that Congress did not delegate the authority to criminalize conspiracy (contrasted with his argument that Congress could not do so) is not a constitutional challenge. *See Dalton v. Specter*, 511 U.S. 462, 472 (1994) (collecting cases and distinguishing “between claims of constitutional violations and claims that an official has acted in excess of his statutory authority”).

3. Naum argues that the district court violated his Sixth Amendment right to counsel by denying his request for substitution of counsel before his sentencing hearing. “We review a district court’s denial of a motion for substitution of counsel for abuse of discretion.” *United States v. Rivera-Corona*, 618 F.3d 976, 978 (9th Cir. 2010) (citation omitted). “[W]e consider (1) the timeliness of the substitution motion and the extent of resulting inconvenience or delay; (2) the adequacy of the district court’s inquiry into the defendant’s complaint; and (3) whether the conflict between the defendant and his attorney was so great that it prevented an adequate defense.” *Id.* (citation omitted). Here, the district court plainly did not abuse its discretion. After holding both open and ex parte hearings, the district court found that Naum was attempting to delay the proceedings and that his last-minute request and criticism of his counsel fit a pattern of manipulative behavior the court had observed from Naum throughout the proceedings. Given the last-minute timing of the substitution request, Naum’s lack of a convincing reason for requesting the substitution, and the district court’s findings that Naum had pressured his wife to fire her lawyers and had illicitly filed documents in his lawyer’s name, we hold that the district court’s application of the standard was not “illogical,” “implausible,” or “without support in the record.” *United States v. Robertson*, 895 F.3d 1206, 1213 (9th Cir. 2018) (internal quotation marks omitted).

4. Naum argues that the district court improperly conditioned its acceptance of his guilty plea on his admission of forfeiture allegations. We review unpreserved challenges to forfeiture proceedings for

plain error, *United States v. Soto*, 915 F.3d 675, 678 (9th Cir. 2019), and we find no plain error here. By pressing Naum to indicate whether he understood the forfeiture allegations against him, the district court merely followed Federal Rule of Criminal Procedure 11(b)(1)(J), which requires “the court [to] inform the defendant of, and determine that the defendant understands, . . . any applicable forfeiture.” We also reject Naum’s arguments that the district court failed to “determine what property is subject to forfeiture” and to hold a forfeiture hearing. *See* Fed. R. Crim. P. 32.2. The district court satisfied Rule 32.2’s first requirement when it adopted the PSR’s recommendation on forfeiture, and it was not required to hold a hearing because the parties never requested one. *See id.* (b)(1)(B) (requiring a hearing “on either party’s request”).

5. Naum argues that the district court erred in imposing a \$1 million fine based on its finding, contrary to the PSR, that Naum had the ability to pay. In his opening brief, Naum asserts both that he lacks the present ability to pay the fine and that he lacks the future earning capacity to pay. The only argument Naum preserved for appeal is that the district court erred by finding that Naum had the ability to pay because he was hiding assets. He has waived the argument that the district court erred on any other ground. “A district court’s finding of whether a defendant is able to pay [a] fine is reviewed for clear error.” *United States v. Orlando*, 553 F.3d 1235, 1240 (9th Cir. 2009). Even assuming that the district court erroneously determined Naum was hiding assets, Naum’s challenge still fails because the district court clearly based its fine decision on two alternative,

independently sufficient grounds: after Naum's counsel objected to the court's finding that Naum was hiding assets, the district court clarified that "even if he lacks the ability to pay now, he's . . . not likely to lack the ability to pay in the future." Because Naum has waived any argument that the district court erred on the latter ground, we affirm the district court's imposition of a fine.

AFFIRMED.⁵

⁵ Because we affirm the district court, we do not reach Naum's request for reassignment to a different district court judge on remand.

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Appendix B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 18-10486

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NAUM MORGOVSKY,

Defendant-Appellant.

No. 18-10448

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IRINA MORGOVSKY,

Defendant-Appellant.

Filed December 14, 2020

D.C. Nos. 3:16-cr-00411-VC-1 & VC-3

ORDER

Before: WALLACE, TASHIMA, and BADE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Bade has voted to deny the petition for rehearing en banc, and Judges Wallace and

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Tashima have so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. *See* Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

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Appendix C

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

USDC Case Number: CR-16-00411-003 VC
BOP Case Number: DCAN316CR00411-003
USM Number: 24239-111
Defendant's Attorney: Shaffy Moeel (Retained)

UNITED STATES OF AMERICA

v.

IRINA MORGOVSKY

Filed November 5, 2018

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

- ☒ pleaded guilty to count: Nine of the Superseding Indictment.
- ☐ pleaded nolo contendere to count(s): which was accepted by the court.
- ☐ was found guilty on count(s): after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
22 U.S.C. §§ 2778 and 2778(c)	Conspiracy to Violate the International Traffic in Arms Regulations in Violations of the Arms Export Control Act	August 25, 2016	9

The defendant is sentenced as provided in pages 2 through 8 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 6 is 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.

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10/31/2018

Date of Imposition of Judgment



Signature of Judge

The Honorable Vince Chhabria
United States District Judge

Name & Title of Judge

11/5/2018

Date

DEFENDANT: Irina Morgovsky

CASE NUMBER: CR-16-00411-003 VC

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 18 months.

The appearance bond is hereby exonerated, or upon surrender of the defendant as noted below. Any cash bail plus interest shall be returned to the owner(s) listed on the Affidavit of Owner of Cash Security form on file in the Clerk's Office.

- ☒ The Court makes the following recommendations to the Bureau of Prisons: Designation to a facility in Southern Florida to facilitate family visits.
- ☐ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:

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- ☐ at on (no later than 2:00 pm).
- ☐ as notified by the United States Marshal.
- ☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - ☒ by 2:00 pm on 1/4/2019 (no later than 2:00 pm). If a B.O.P. Facility has not been designated by this date, the defendant is ordered to resport to the U.S. Marshal's Office at 450 Golden Gate Ave., 20th Floor, San Francisco.
- ☐ 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 _____ at
_____,
with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Irina Morgovsky

CASE NUMBER: CR-16-00411-003 VC

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Three (3) years.

MANDATORY CONDITIONS OF SUPERVISION

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance.
- 3) You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. (*check if applicable*)
- 4) ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)
- 5) ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)

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- 6) ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
- 7) ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: Irina Morgovsky

CASE NUMBER: CR-16-00411-003 VC

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court, and bring about improvements in your conduct and condition.

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of RELEASE, unless the probation officer instructs you to report to a different probation office or within a different time frame.

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- 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- 4) You must follow the instructions of the probation officer related to the conditions of supervision.
- 5) You must answer truthfully the questions asked by your probation officer.
- 6) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with, for example), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 7) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by these and the special conditions of your supervision that he or she observes in plain view.
- 8) You must work at least part-time (defined as 20 hours per week) at a lawful type of employment unless excused from doing so by the probation

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officer for schooling, training, community service or other acceptable activities. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

- 9) You must not communicate or interact with someone you know is engaged in criminal activity. You must not associate, communicate, or interact with any person you know has been convicted of a felony, unless granted permission to do so by the probation officer.
 - 10) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
 - 11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
 - 12) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- ☐ If the probation officer determines that you pose a risk to a third party, the probation officer may require you to notify the person about the risk and

you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk. (*check if applicable*)

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision upon a finding of a violation of probation or supervised release.

(Signed)

Defendant

Date

U.S. Probation Officer/
Designated Witness

Date

DEFENDANT: Irina Morgovsky

CASE NUMBER: CR-16-00411-003 VC

SPECIAL CONDITIONS OF SUPERVISION

1. You must pay any special assessment and fine that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.
2. You must not open any new lines of credit and/or incur new debt without the prior permission of the probation officer.
3. You must provide the probation officer with access to any financial information, including tax returns, and shall authorize the probation officer

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to conduct credit checks and obtain copies of income tax returns.

4. You must not possess any false identification and shall provide your true identity at all times.
5. You must cooperate in the collection of DNA as directed by the probation officer.
6. You must not own or possess any firearms, ammunition, destructive devices, or other dangerous weapons.
7. You must submit your person, residence, office, vehicle, electronic devices and their data (including cell phones, computers, and electronic storage media), or any property under your control to a search. Such a search shall be conducted by a United States Probation Officer or any federal, state or local law enforcement officer at any time with or without suspicion. Failure to submit to such a search may be grounds for revocation; you must warn any residents that the premises may be subject to searches.

DEFENDANT: Irina Morgovsky

CASE NUMBER: CR-16-00411-003 VC

CRIMINAL MONETARY PENALTIES

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

	<u>Assess-</u> <u>ment</u>	<u>JVTA</u> <u>Assess-</u> <u>ment</u> *	<u>Fine</u>	<u>Resti-</u> <u>tution</u>
TOTALS	\$100	N/A	\$15,000	N/A

- ☐ 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.

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

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Name of Payee	Total Loss**	Restitution Ordered	Priority of 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 .
 - ☐ the interest requirement is waived for the 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.

DEFENDANT: Irina Morgovsky

CASE NUMBER: CR-16-00411-003 VC

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 _____
due immediately, balance due
 - ☐ not later than, or
 - ☐ in accordance with ☐C, ☐D, or ☐E,
and/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

* 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.

- 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:
When incarcerated, payment of criminal monetary penalties, totaling \$15,100, are due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program. Once the defendant is on supervised release, criminal monetary payments must be paid in monthly payments of not less than \$500 or at least 10 percent of earnings, whichever is greater, to commence no later than 60 days from placement on supervision. Any established payment plan does not preclude enforcement efforts by the US Attorney's Office if the defendant has the ability to pay more than the minimum due. The payments shall be made to the Clerk of U.S. District Court, Attention: Financial Unit, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102. Criminal monetary payments shall be made to the Clerk of U.S. District Court, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102.

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

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	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:
 - a) Three Infratech night-vision rifle scopes seized by the FBI from Irina Morgovsky's residence on August 25, 2016 and identified

in the United States' Bill of Particulars (ECF No. 183) as follows:

- i. One optic lens, size small, tube serial number 4654898, tube type F9815SLG;
 - ii. One optic lens, size medium, tube serial number 4656232, tube type F9815SLG; and
 - iii. One optic lens, size large, tube serial number 4732440, tube type F9815SLG.
 - b) A United States Passport Number 420799715 issued in the name of Victoria Ferrara.
- The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future, but such future orders do not affect the defendant's responsibility for the full amount of the restitution ordered.

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

USDC Case Number: CR-16-00411-001 VC

BOP Case Number: DCAN316CR00411-001

USM Number: 92623-111

Defendant's Attorney:

William L. Osterhoudt (Retained)

UNITED STATES OF AMERICA

v.

NAUM MORGOVSKY

Filed December 13, 2018

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

- ☒ pleaded guilty to count: Nine, Ten, and Eleventh of the Superseding Indictment.
- ☐ pleaded nolo contendere to count(s): which was accepted by the court.
- ☐ was found guilty on count(s): after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
22 U.S.C. §§ 2778 and 2778(c)	Conspiracy to Violate the International Traffic in Arms Regulations in Violations of the Arms Export Control Act	August 25, 2016	9
18 U.S.C. § 1956(a)(1)(B)	Money Laundering	February 9, 2015	10
18 U.S.C. § 1956(a)(2)(A)	Money Laundering	June 13, 2016	11

The defendant is sentenced as provided in pages 2 through 8 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) 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

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notify the court and United States attorney of material changes in economic circumstances.

11/13/2018

Date of Imposition of Judgment

A handwritten signature in black ink, appearing to read 'V. Chhabria', written over a horizontal line.

Signature of Judge

The Honorable Vince Chhabria

United States District Judge

Name & Title of Judge

12/13/2018

Date

DEFENDANT: Naum Morgovsky

CASE NUMBER: CR-16-00411-001 VC

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 108 months. This term consists of terms of 108 months on each of Counts 9, 10, and 11, all counts to be served concurrently.

The appearance bond is hereby exonerated, or upon surrender of the defendant as noted below. Any cash bail plus interest shall be returned to the owner(s) listed on the Affidavit of Owner of Cash Security form on file in the Clerk's Office.

- ☒ The Court makes the following recommendations to the Bureau of Prisons: Mr. Morgovsky be designated to Taft Camp in Taft, California or if unavailable, then Lompoc Camp in Lompoc, California and if these two facilities are not available, then the Federal Correctional Institution in Terminal Island, California to facilitate family visitation.
- ☐ 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 on (no later than 2:00 pm).
 - ☐ as notified by the United States Marshal.
- ☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

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- ☒ by 2:00 pm on 1/4/2019 (no later than 2:00 pm). If a B.O.P. Facility has not been designated by this date, the defendant is ordered to resport to the U.S. Marshal's Office at 450 Golden Gate Ave., 20th Floor, San Francisco.
- ☐ 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 _____ at
_____,
with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Naum Morgovsky

CASE NUMBER: CR-16-00411-001 VC

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Three years. This term consists of terms of three years on each of Counts 9, 10, and 11, all such terms to run concurrently.

MANDATORY CONDITIONS OF SUPERVISION

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance.
- 3) You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. (*check if applicable*)
- 4) ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)
- 5) ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)

- 6) ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
- 7) ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: Naum Morgovsky

CASE NUMBER: CR-16-00411-001 VC

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court, and bring about improvements in your conduct and condition.

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of RELEASE, unless the probation officer instructs you to report to a different probation office or within a different time frame.

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- 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- 4) You must follow the instructions of the probation officer related to the conditions of supervision.
- 5) You must answer truthfully the questions asked by your probation officer.
- 6) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with, for example), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 7) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by these and the special conditions of your supervision that he or she observes in plain view.
- 8) You must work at least part-time (defined as 20 hours per week) at a lawful type of employment unless excused from doing so by the probation

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officer for schooling, training, community service or other acceptable activities. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

- 9) You must not communicate or interact with someone you know is engaged in criminal activity. You must not associate, communicate, or interact with any person you know has been convicted of a felony, unless granted permission to do so by the probation officer.
 - 10) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
 - 11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
 - 12) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- ☐ If the probation officer determines that you pose a risk to a third party, the probation officer may require you to notify the person about the risk and

you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk. (*check if applicable*)

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision upon a finding of a violation of probation or supervised release.

(Signed)

Defendant

Date

U.S. Probation Officer/
Designated Witness

Date

DEFENDANT: Naum Morgovsky

CASE NUMBER: CR-16-00411-001 VC

SPECIAL CONDITIONS OF SUPERVISION

1. You must pay any special assessment and fine that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.
2. You must not open any new lines of credit and/or incur new debt without the prior permission of the probation officer.
3. You must provide the probation officer with access to any financial information, including tax returns, and shall authorize the probation officer

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to conduct credit checks and obtain copies of income tax returns.

4. You must not possess any false identification and shall provide your true identity at all times.
5. You must cooperate in the collection of DNA as directed by the probation officer.
6. You must not own or possess any firearms, ammunition, destructive devices, or other dangerous weapons.
7. You must submit your person, residence, office, vehicle, electronic devices and their data (including cell phones, computers, and electronic storage media), or any property under your control to a search. Such a search shall be conducted by a United States Probation Officer or any federal, state or local law enforcement officer at any time with or without suspicion. Failure to submit to such a search may be grounds for revocation; you must warn any residents that the premises may be subject to searches.

DEFENDANT: Naum Morgovsky

CASE NUMBER: CR-16-00411-001 VC

CRIMINAL MONETARY PENALTIES

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

	<u>Assess-</u>	<u>JVTA</u> <u>Assess-</u>		<u>Resti-</u>
	<u>ment</u>	<u>ment</u> *	<u>Fine</u>	<u>tution</u>
TOTALS	\$300	N/A	\$1,000,000	N/A

- ☐ 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.

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

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Name of Payee	Total Loss**	Restitution Ordered	Priority of 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 .
 - ☐ the interest requirement is waived for the 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.

DEFENDANT: Naum Morgovsky

CASE NUMBER: CR-16-00411-001 VC

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 _____
due immediately, balance due
 - ☐ not later than, or
 - ☐ in accordance with ☐C, ☐D, or ☐E,
and/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

* 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.

- 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:
During imprisonment, payment of monetary penalties, totaling \$1,000,300, is due at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program. Once the defendant is on supervised release, the monetary penalties must be paid in monthly payments of not less than \$28,000 or at least 10 percent of earnings, whichever is greater, to commence no later than 30 days from placement on supervision. Notwithstanding any payment schedule set by the Court, the United States Attorney's Office may pursue collection through all available means in accordance with 18 U.S.C. §§3613 and 3644(m). Criminal monetary payments shall be made to the Clerk of U.S. District Court, Attention: Financial Unit, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102.

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

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	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:
 - a) \$222,929.61
 - b) Three Infratech night-vision rifle scopes seized by the FBI from Naum Morgovsky's residence on August 25, 2016 and identified in the United States' Bill of Particulars (ECF No. 183) as follows:

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- i. One optic lens, size small, tube serial number 4654898, tube type F9815SLG;
 - ii. One optic lens, size medium, tube serial number 4656232, tube type F9815SLG; and
 - iii. One optic lens, size large, tube serial number 4732440, tube type F9815SLG.
- The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future, but such future orders do not affect the defendant's responsibility for the full amount of the restitution ordered.

Appendix D

Excerpts of Transcript

**[1] UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

No. CR-16-00411 VC

UNITED STATES OF AMERICA,
Plaintiff,

v.

NAUM MORGOVSKY; IRINA MORGOVSKY,
Defendants.

Before the Honorable Vince Chhabria, Judge
San Francisco, California
Wednesday, January 16, 2019
Filed January 17, 2019

* * *

[53] MR. SAMPSON: There's two money laundering counts. The Court sentenced Mr. Morgovsky to nine years on those counts concurrently. And so it is unlikely that he would receive a zero jail sentence.

THE COURT: Does it matter? I meant to ask that question to Ms. Falk. But the money laundering, does it matter that the money laundering was in furtherance of this conspiracy?

MR. SAMPSON: It does not say that the money laundering is in furtherance of the conspiracy, Your

Honor. It says it's to promote the carrying on of violations of the ITAR statute.

[54] THE COURT: What's the difference?

MR. SAMPSON: Well, they would have to succeed in not just winning on the idea that the conspiracy is not allowed by statute but that the entire statute itself is invalidated.

And, Your Honor, just going back 30 minutes or so, I'm not aware of any authority that says that a conspiracy has to be in a different statute than the substantive crime.

And, Your Honor, there's only one criminal statute that -- under Title 22, as far as I'm aware. It says violations of this statute and any -- of this title and the rules promulgated thereunder are punishable by 20 years.

So it provides the penalty, and it says --

THE COURT: I'm sorry, could you say that one more time? I apologize. I didn't follow.

MR. SAMPSON: It said that violations --

THE COURT: What said?

MR. SAMPSON: The criminal statute 2778, 22 U.S.C --

THE COURT: Okay.

MR. SAMPSON: -- says that violations of the rules promulgated under the title, Title 22, governing exports, are punishable by 20 years of prison. And it then explicitly delegates it to the agency to define the violations of that statute. * * *

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Appendix E

**Relevant Constitutional Provisions,
Statute, Regulation, & Rule**

U.S. Const. art. I, § 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — [between a State and Citizens of another State;] between citizens of different States;— between Citizens of the same State claiming Lands under Grants of different States [and between a State, or the Citizens thereof; — and foreign States, Citizens or Subjects.]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

22 U.S.C. § 2778 Control of arms exports and imports

(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 weapons 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 issued 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. Such regulations shall prohibit the return to the United States for sale in the United States (other than for the Armed Forces of the United States and its allies or for any State or local law enforcement agency) of any military firearms or ammunition of United States manufacture furnished to foreign governments by the United States under this chapter or any other foreign assistance or sales program of the United States, whether or not enhanced in value or improved in condition in a foreign country. This prohibition shall not extend to similar firearms that have been so substantially transformed as to become, in effect, articles of foreign manufacture.

(ii)(I) As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States

Government acting in official capacity) who engages in the business of brokering activities with respect to the manufacture, export, import, or transfer of any defense article or defense service designated by the President under subsection (a)(1) of this section, or in the business of brokering activities with respect to the manufacture, export, import, or transfer of any foreign defense article or defense service (as defined in subclause (IV)), 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.

(II) Such brokering activities shall include the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import of a defense article or defense service.

(III) No person may engage in the business of brokering activities described in subclause (I) without a license, issued in accordance with this chapter, except that no license shall be required for such activities undertaken by or for an agency of the United States Government—

(aa) for use by an agency of the United States Government; or

(bb) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.

(IV) For purposes of this clause, the term “foreign defense article or defense service” includes any non-United States defense article or defense service of a nature described on the United States Munitions List regardless of whether such article or service is of United States origin or whether such article or service contains United States origin components.

(B) The prohibition under such regulations required by the second sentence of subparagraph (A) shall not extend to any military firearms (or ammunition, components, parts, accessories, and attachments for such firearms) of United States manufacture furnished to any foreign government by the United States under this chapter or any other foreign assistance or sales program of the United States if—

(i) such firearms are among those firearms that the Secretary of the Treasury is, or was at any time, required to authorize the importation of by reason of the provisions of section 925(e) of title 18 (including the requirement for the listing of such firearms as curios or relics under section 921(a)(13) of that title); and

(ii) such foreign government certifies to the United States Government that such firearms are owned by such foreign government.

(B) A copy of each registration made under this paragraph shall be transmitted to the Secretary of the Treasury for review regarding law enforcement concerns. The Secretary shall report to the President regarding such concerns as necessary.

(2) Except as otherwise specifically provided in regulations issued under subsection (a)(1) of this section, no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license for such export or import, issued in accordance with this chapter and regulations issued under this chapter, except that no license shall be required for exports or imports made by or for an agency of the United States Government (A) for official use by a department or agency of the United States Government, or (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.

(3)(A) For each of the fiscal years 1988 and 1989, \$250,000 of registration fees collected pursuant to paragraph (1) shall be credited to a Department of State account, to be available without fiscal year limitation. Fees credited to that account shall be available only for the payment of expenses incurred for—

- (i) contract personnel to assist in the evaluation of munitions control license applications, reduce processing time for license applications, and improve monitoring of compliance with the terms of licenses; and
- (ii) the automation of munitions control functions and the processing of munitions control license applications, including the development, procurement, and utilization of computer equipment and related software.

(B) The authority of this paragraph may be exercised only to such extent or in such amounts as are provided in advance in appropriation Acts.

(c) Criminal violations; punishment

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.

(d) Repealed. Pub. L. 96–70, title III, §3303(a)(4), Sept. 27, 1979, 93 Stat. 499

(e) Enforcement powers of President

In carrying out functions under this section with respect to the export of defense articles and defense services, including defense articles and defense services exported or imported pursuant to a treaty referred to in subsection (j)(1)(C)(i), the President is authorized to exercise the same powers concerning violations and enforcement which are conferred upon departments, agencies and officials by subsections (c), (d), (e), and (g) of section 11 of the Export Administration Act of 1979 [50 U.S.C. App. 2410(c), (d), (e), and (g)], and by subsections (a) and (c) of

section 12 of such Act [50 U.S.C. App. 2411(a) and (c)], subject to the same terms and conditions as are applicable to such powers under such Act [50 U.S.C. App. 2401 et seq.], except that section 11(c)(2)(B) of such Act shall not apply, and instead, as prescribed in regulations issued under this section, the Secretary of State may assess civil penalties for violations of this chapter and regulations prescribed thereunder and further may commence a civil action to recover such civil penalties, and except further that the names of the countries and the types and quantities of defense articles for which licenses are issued under this section shall not be withheld from public disclosure unless the President determines that the release of such information would be contrary to the national interest. Nothing in this subsection shall be construed as authorizing the withholding of information from the Congress. Notwithstanding section 11(c) of the Export Administration Act of 1979, the civil penalty for each violation involving controls imposed on the export of defense articles and defense services under this section may not exceed \$500,000.

(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 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 in accordance with the procedures applicable to reprogramming notifications under section 2394–1(a) of this title. Such notice shall describe the nature of any controls to be imposed on that item under any other provision of law.

(2) The President may not authorize an exemption for a foreign country from the licensing requirements of this chapter for the export of defense items under subsection (j) of this section or any other provision of this chapter until 30 days after the date on which the President has transmitted to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate a notification that includes—

(A) a description of the scope of the exemption, including a detailed summary of the defense articles, defense services, and related technical data covered by the exemption; and

(B) a determination by the Attorney General that the bilateral agreement concluded under subsection (j) of this section requires the compilation and maintenance of sufficient documentation relating to the export of United States defense articles, defense services, and related technical data to facilitate law enforcement efforts to detect, prevent, and prosecute criminal violations of any provision of this chapter, including the efforts on the part of countries and factions engaged in international

terrorism to illicitly acquire sophisticated United States defense items.

(3) Paragraph (2) shall not apply with respect to an exemption for Canada from the licensing requirements of this chapter for the export of defense items.

(4) Paragraph (2) shall not apply with respect to an exemption under subsection (j)(1) to give effect to a treaty referred to in subsection (j)(1)(C)(i) (and any implementing arrangements to such treaty), provided that the President promulgates regulations to implement and enforce such treaty under this section and section 2779 of this title.

(g) Identification of persons convicted or subject to indictment for violations of certain provisions

(1) The President shall develop appropriate mechanisms to identify, in connection with the export licensing process under this section—

(A) persons who are the subject of an indictment for, or have been convicted of, a violation under—

(i) this section,

(ii) section 11 of the Export Administration Act of 1979 (50 U.S.C. App. 2410),

(iii) section 793, 794, or 798 of title 18 (relating to espionage involving defense or classified information) or section 2339A of such title (relating to providing material support to terrorists),

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(iv) section 16 of the Trading with the Enemy Act (50 U.S.C. App. 16),

(v) section 206 of the International Emergency Economic Powers Act (relating to foreign assets controls; 50 U.S.C. App. 1705) [50 U.S.C. 1705],

(vi) section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) or section 104 of the Foreign Corrupt Practices Act (15 U.S.C. 78dd-2),

(vii) chapter 105 of title 18 (relating to sabotage),

(viii) section 4(b) of the Internal Security Act of 1950 (relating to communication of classified information; 50 U.S.C. 783(b)),

(ix) section 57, 92, 101, 104, 222, 224, 225, or 226 of the Atomic Energy Act of 1954 (42 U.S.C. 2077, 2122, 2131, 2134, 2272, 2274, 2275, and 2276),

(x) section 601 of the National Security Act of 1947 (relating to intelligence identities protection; [50 U.S.C. 3121]),

(xi) section 603(b) or (c) of the Comprehensive Anti-Apartheid Act of 1986 (22 U.S.C. 5113(b) and (c)); or

(xii) section 3, 4, 5, and 6 of the Prevention of Terrorist Access to Destructive Weapons Act of 2004, relating to missile systems designed to destroy aircraft (18 U.S.C. 2332g), prohibitions governing atomic weapons (42 U.S.C. 2122), radiological

dispersal devices (18 U.S.C. 2332h), and variola virus (18 U.S.C. 175b);

(B) persons who are the subject of an indictment or have been convicted under section 371 of title 18 for conspiracy to violate any of the statutes cited in subparagraph (A); and

(C) persons who are ineligible—

(i) to contract with,

(ii) to receive a license or other form of authorization to export from, or

(iii) to receive a license or other form of authorization to import defense articles or defense services from, any agency of the United States Government.

(2) The President shall require that each applicant for a license to export an item on the United States Munitions List identify in the application all consignees and freight forwarders involved in the proposed export.

(3) If the President determines—

(A) that an applicant for a license to export under this section is the subject of an indictment for a violation of any of the statutes cited in paragraph (1),

(B) that there is reasonable cause to believe that an applicant for a license to export under this section has violated any of the statutes cited in paragraph (1), or

(C) that an applicant for a license to export under this section is ineligible to contract with, or to receive a license or other form of authorization

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to import defense articles or defense services from, any agency of the United States Government, the President may disapprove the application. The President shall consider requests by the Secretary of the Treasury to disapprove any export license application based on these criteria.

(4) A license to export an item on the United States Munitions List may not be issued to a person—

(A) if that person, or any party to the export, has been convicted of violating a statute cited in paragraph (1), or

(B) if that person, or any party to the export, is at the time of the license review ineligible to receive export licenses (or other forms of authorization to export) from any agency of the United States Government, except as may be determined on a case-by-case basis by the President, after consultation with the Secretary of the Treasury, after a thorough review of the circumstances surrounding the conviction or ineligibility to export and a finding by the President that appropriate steps have been taken to mitigate any law enforcement concerns.

(5) A license to export an item on the United States Munitions List may not be issued to a foreign person (other than a foreign government).

(6) The President may require a license (or other form of authorization) before any item on the United States Munitions List is sold or otherwise transferred to the control or possession of a foreign person or a person acting on behalf of a foreign person.

(7) The President shall, in coordination with law enforcement and national security agencies, develop standards for identifying high-risk exports for regular end-use verification. These standards shall be published in the Federal Register and the initial standards shall be published not later than October 1, 1988.

(8) Upon request of the Secretary of State, the Secretary of Defense and the Secretary of the Treasury shall detail to the office primarily responsible for export licensing functions under this section, on a nonreimbursable basis, personnel with appropriate expertise to assist in the initial screening of applications for export licenses under this section in order to determine the need for further review of those applications for foreign policy, national security, and law enforcement concerns.

(9) For purposes of this subsection—

(A) the term “foreign corporation” means a corporation that is not incorporated in the United States;

(B) the term "foreign government" includes any agency or subdivision of a foreign government, including an official mission of a foreign government;

(C) the term "foreign person" means any person who is not a citizen or national of the United States or lawfully admitted to the United States for permanent residence under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], and includes foreign corporations, international organizations, and foreign governments;

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(D) the term "party to the export" means—

(i) the president, the chief executive officer, and other senior officers of the license applicant;

(ii) the freight forwarders or designated exporting agent of the license application; and

(iii) any consignee or end user of any item to be exported; and

(E) the term "person" means a natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization, or group, including governmental entities.

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

The designation by the President (or by an official to whom the President's functions under subsection (a) of this section have been duly delegated), in regulations issued under this section, of items as defense articles or defense services for purposes of this section shall not be subject to judicial review.

(i) Report to Department of State

As prescribed in regulations issued under this section, a United States person to whom a license has been granted to export an item on the United States Munitions List shall, not later than 15 days after the item is exported, submit to the Department of State a report containing all shipment information, including a description of the item and the quantity, value, port of exit, and end-user and country of destination of the item.

(j) Requirements relating to country exemptions for licensing of defense items for export to foreign countries

(1) Requirement for bilateral agreement

(A) In general

The President may utilize the regulatory or other authority pursuant to this chapter to exempt a foreign country from the licensing requirements of this chapter with respect to exports of defense items only if the United States Government has concluded a binding bilateral agreement with the foreign country. Such agreement shall—

(i) meet the requirements set forth in paragraph (2); and

(ii) be implemented by the United States and the foreign country in a manner that is legally-binding under their domestic laws.

(B) Exception for Canada

The requirement to conclude a bilateral agreement in accordance with subparagraph (A) shall not apply with respect to an exemption for Canada from the licensing requirements of this chapter for the export of defense items.

(C) Exception for defense trade cooperation treaties

(i) In general

The requirement to conclude a bilateral agreement in accordance with subparagraph (A) shall not apply with respect to an exemption from the licensing requirements of

this chapter for the export of defense items to give effect to any of the following defense trade cooperation treaties, provided that the treaty has entered into force pursuant to article II, section 2, clause 2 of the Constitution of the United States:

(I) The Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, done at Washington and London on June 21 and 26, 2007 (and any implementing arrangement thereto).

(II) The Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Sydney September 5, 2007 (and any implementing arrangement thereto).

(ii) Limitation of scope

The United States shall exempt from the scope of a treaty referred to in clause (i)—

(I) complete rocket systems (including ballistic missile systems, space launch vehicles, and sounding rockets) or complete unmanned aerial vehicle systems (including cruise missile systems, target drones, and reconnaissance drones) capable of delivering at least a 500 kilogram payload to a range of 300 kilometers, and associated production facilities, software, or technology for these

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systems, as defined in the Missile Technology Control Regime Annex Category I, Item 1;

(II) individual rocket stages, re-entry vehicles and equipment, solid or liquid propellant motors or engines, guidance sets, thrust vector control systems, and associated production facilities, software, and technology, as defined in the Missile Technology Control Regime Annex Category I, Item 2;

(III) defense articles and defense services listed in the Missile Technology Control Regime Annex Category II that are for use in rocket systems, as that term is used in such Annex, including associated production facilities, software, or technology;

(IV) toxicological agents, biological agents, and associated equipment, as listed in the United States Munitions List (part 121.1 of chapter I of title 22, Code of Federal Regulations), Category XIV, subcategories (a), (b), (f)(1), (i), (j) as it pertains to (f)(1), (l) as it pertains to (f)(1), and (m) as it pertains to all of the subcategories cited in this paragraph;

(V) defense articles and defense services specific to the design and testing of nuclear weapons which are controlled under United States Munitions List Category XVI(a) and (b), along with

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associated defense articles in Category XVI(d) and technology in Category XVI(e);

(VI) with regard to the treaty cited in clause (i)(I), defense articles and defense services that the United States controls under the United States Munitions List that are not controlled by the United Kingdom, as defined in the United Kingdom Military List or Annex 4 to the United Kingdom Dual Use List, or any successor lists thereto; and

(VII) with regard to the treaty cited in clause (i)(II), defense articles for which Australian laws, regulations, or other commitments would prevent Australia from enforcing the control measures specified in such treaty.

(2) Requirements of bilateral agreement

A bilateral agreement referred to 5 paragraph (1)—

(A) shall, at a minimum, require the foreign country, as necessary, to revise its policies and practices, and promulgate or enact necessary modifications to its laws and regulations to establish an export control regime that is at least comparable to United States law, regulation, and policy requiring—

(i) conditions on the handling of all United States-origin defense items exported to the foreign country, including prior written United States Government approval for any reexports to third countries;

(ii) end-use and retransfer control commitments, including securing binding end-use and retransfer control commitments from all end-users, including such documentation as is needed in order to ensure compliance and enforcement, with respect to such United States-origin defense items;

(iii) establishment of a procedure comparable to a “watchlist” (if such a watchlist does not exist) and full cooperation with United States Government law enforcement agencies to allow for sharing of export and import documentation and background information on foreign businesses and individuals employed by or otherwise connected to those businesses; and

(iv) establishment of a list of controlled defense items to ensure coverage of those items to be exported under the exemption; and

(B) should, at a minimum, require the foreign country, as necessary, to revise its policies and practices, and promulgate or enact necessary modifications to its laws and regulations to establish an export control regime that is at least comparable to United States law, regulation, and policy regarding—

(i) controls on the export of tangible or intangible technology, including via fax, phone, and electronic media;

(ii) appropriate controls on unclassified information relating to defense items exported to foreign nationals;

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(iii) controls on international arms trafficking and brokering;

(iv) cooperation with United States Government agencies, including intelligence agencies, to combat efforts by third countries to acquire defense items, the export of which to such countries would not be authorized pursuant to the export control regimes of the foreign country and the United States; and

(v) violations of export control laws, and penalties for such violations.

(3) Advance certification

Not less than 30 days before authorizing an exemption for a foreign country from the licensing requirements of this chapter for the export of defense items, the President shall transmit to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate a certification that—

(A) the United States has entered into a bilateral agreement with that foreign country satisfying all requirements set forth in paragraph (2);

(B) the foreign country has promulgated or enacted all necessary modifications to its laws and regulations to comply with its obligations under the bilateral agreement with the United States; and

(C) the appropriate congressional committees will continue to receive notifications pursuant to the authorities, procedures, and practices of section 2776 of this title for defense exports to a

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foreign country to which that section would apply and without regard to any form of defense export licensing exemption otherwise available for that country.

(4) Definitions

In this section:

(A) Defense items

The term “defense items” means defense articles, defense services, and related technical data.

(B) Appropriate congressional committees

The term “appropriate congressional committees” means—

(i) the Committee on International Relations and the Committee on Appropriations of the House of Representatives; and

(ii) the Committee on Foreign Relations and the Committee on Appropriations of the Senate.

22 C.F.R. § 127.1 Violations.

(a) Without first obtaining the required license or other written approval from the Directorate of Defense Trade Controls, it is unlawful:

(1) To export or attempt to export from the United States any defense article or technical data or to furnish or attempt to furnish any defense service for which a license or written approval is required by this subchapter;

(2) To reexport or retransfer or attempt to reexport or retransfer any defense article, technical data, or defense service from one foreign end-user, end-use, or destination to another foreign end-user, end-use, or destination for which a license or written approval is required by this subchapter, including, as specified in § 126.16(h) and § 126.17(h) of this subchapter, any defense article, technical data, or defense service that was exported from the United States without a license pursuant to any exemption under this subchapter;

(3) To import or attempt to import any defense article whenever a license is required by this subchapter;

(4) To conspire to export, import, reexport, retransfer, furnish or cause to be exported, imported, reexported, retransferred or furnished, any defense article, technical data, or defense service for which a license or written approval is required by this subchapter; or

(5) To possess or attempt to possess any defense article with intent to export or transfer

such defense article in violation of 22 U.S.C. 2778 and 2779, or any regulation, license, approval, or order issued thereunder.

(b) It is unlawful:

(1) To violate any of the terms or conditions of a license or approval granted pursuant to this subchapter, any exemption contained in this subchapter, or any rule or regulation contained in this subchapter;

(2) To engage in the business of brokering activities for which registration and a license or written approval is required by this subchapter without first registering or obtaining the required license or written approval from the Directorate of Defense Trade Controls. For the purposes of this subchapter, engaging in the business of brokering activities requires only one occasion of engaging in an activity as reflected in § 129.2(b) of this subchapter.

(3) To engage in the United States in the business of either manufacturing or exporting defense articles or furnishing defense services without complying with the registration requirements. For the purposes of this subchapter, engaging in the business of manufacturing or exporting defense articles or furnishing defense services requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service.

(c) Any person who is granted a license or other approval or acts pursuant to an exemption under this subchapter is responsible for the acts of employees, agents, brokers, and all authorized persons to whom

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possession of the defense article, which includes technical data, has been entrusted regarding the operation, use, possession, transportation, and handling of such defense article abroad. All persons abroad subject to U.S. jurisdiction who obtain custody of a defense article exported from the United States or produced under an agreement described in part 124 of this subchapter, and regardless of the number of intermediate transfers, are bound by the regulations of this subchapter in the same manner and to the same extent as the original owner or transferor.

(d) A person who is ineligible pursuant to § 120.1(c)(2) of this subchapter, or a person with knowledge that another person is ineligible pursuant to § 120.1(c)(2) of this subchapter, may not, directly or indirectly, in any manner or capacity, without prior disclosure of the facts to and written authorization from the Directorate of Defense Trade Controls:

(1) Apply for, obtain, or use any export control document as defined in § 127.2(b) for such ineligible person; or

(2) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any manner in any transaction subject to this subchapter that may involve any defense article, which includes technical data, defense services, or brokering activities, where such ineligible person may obtain any benefit therefrom or have any direct or indirect interest therein.

(e) No person may knowingly or willfully attempt, solicit, cause, or aid, abet, counsel, demand, induce, procure, or permit the commission of any act

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prohibited by, or the omission of any act required by 22 U.S.C. 2778, 22 U.S.C. 2779, or any regulation, license, approval, or order issued thereunder.

Fed. R. Crim. P. 12(b)(3)

(b) Pretrial Motions. * * *

(3) *Motions That Must Be Made Before Trial.* The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a defect in instituting the prosecution, including:

- (i) improper venue;
- (ii) preindictment delay;
- (iii) a violation of the constitutional right to a speedy trial;
- (iv) selective or vindictive prosecution; and
- (v) an error in the grand-jury proceeding or preliminary hearing;

(B) a defect in the indictment or information, including:

- (i) joining two or more offenses in the same count (duplicity);
- (ii) charging the same offense in more than one count (multiplicity);
- (iii) lack of specificity;
- (iv) improper joinder; and
- (v) failure to state an offense;

(C) suppression of evidence;

(D) severance of charges or defendants under Rule 14; and

(E) discovery under Rule 16.