[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No.: 10-225 (CKK)
	)	
v.	)	
	)	
STEPHEN JIN-WOO KIM,	)	
also known as Stephen Jin Kim,	)	
also known as Stephen Kim,	)	
also known as Leo Grace,	)	
	)	
Defendant.	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S RULINGS ON HIS THIRD MOTION TO COMPEL DISCOVERY

(U) I. INTRODUCTION

(U) Having unsuccessfully sought to convince the Court to adopt the Fourth Circuit's definition of the term "national defense information," the defendant asks for reconsideration. Because this Court correctly rejected that request when it issued its Memorandum Opinion on May 30, 2013, denying the defendant's third motion to compel, the Court should deny the defendant's motion for reconsideration. The defendant raises a number of arguments that we address in turn below. His chief complaint, however, is that he is being prosecuted in the District of Columbia, where the Supreme Court's broad interpretation of the term "national defense information" (see Gorin v. United States, 312 U.S. 19 (1941)) controls, but where the Fourth Circuit's more restrictive interpretation of that term (see United States v. Morison, 844 F.2d 1057 (4th Cir. 1988)) does not. Rhetoric aside, there is nothing unusual about a federal district court, sitting in one federal circuit, declining to follow a non-binding decision of another federal circuit. It is certainly no basis for a motion for reconsideration.

[redacted]

[redacted]

(U) **II. ARGUMENT**

(U) **A. Defendant's Motion for Reconsideration Should be Denied Because It Restates Arguments Already Decided By this Court**

(U) Motions for reconsideration are not provided for in the Federal Rules of Criminal Procedure. See United States v. Bloch, 794 F. Supp. 2d 15, 18-19 (D.D.C. 2011). Nevertheless, the Supreme Court has "recognized the appropriateness" of such motions in the criminal context. United States v. Healy, 376 U.S. 75, 78 (1964). To prevail on a motion for reconsideration in a criminal case, this Court has held that the moving party must demonstrate either that (1) there has been an intervening change in controlling law, (2) there is new evidence, or (3) there is a need to correct clear error or prevent manifest injustice. See United States v. Booker, 613 F. Supp. 2d 32, 34 (D.D.C. 2009); United States v. Ferguson, 574 F. Supp. 2d 111, 113 (D.D.C. 2008); United States v. Libby, 429 F. Supp. 2d 46, 47 (D.D.C. 2006); cf. United States v. Sunia, 643 F. Supp. 2d 51, 60-61(D.D.C. 2009) (permitting reconsideration of an interlocutory order in a criminal case "as justice requires"). The moving party must also demonstrate "that some harm . . . would flow from a denial of reconsideration." Bloch, 794 F. Supp. 2d at 19; see also Sunia, 643 F. Supp. 2d at 61. "Arguments that could have been, but were not, raised previously and arguments that the court has already rejected are not appropriately raised in a motion for reconsideration." Booker, 613 F. Supp. 2d at 34 (citing cases).

(U) Here, the defendant does not even suggest that "there has been an intervening change in controlling law" or that "there is new evidence." Booker, 613 F. Supp. 2d at 34. Nor does the defendant demonstrate that the Court committed a "clear error" of law in deciding its Memorandum Opinion. Id. Rather, the defendant complains that the differences in law on the "other side" of the Potomac River somehow equates to manifest injustice here. The defendant's

[redacted]

[redacted]

argument must fail. Although the defendant's motion is styled as a "Motion for Reconsideration," it is effectively a "rehas[h] [of] previously rejected arguments" in an effort to get this Court again to consider adopting the Fourth Circuit's more restrictive interpretation of "national defense information." Ferguson, 574 F. Supp. 2d at 113 (citations and internal quotations omitted); cf. Def.'s Reply to the Gov'ts Omnibus Opposition to Def.'s Motions to Compel Discovery at 23-24 (defendant making the same arguments as those below). Thus, the defendant has failed to demonstrate that reconsideration is warranted.

(U) **B. The Court Correctly Denied the Defendant's Third Motion to Compel**

(U) In its Memorandum Opinion denying the defendant's third motion to compel ("Mem. Op."), the Court provided five separate reasons for declining to adopt the Fourth Circuit's construction of Section 793(d) in Morison. See Mem. Op. at 7-10. In his motion for reconsideration ("Mot. Reconsider."), the defendant challenges each of those reasons. The defendant's arguments are addressed below.

(U) **1. The Defendant Misreads the Court's Reference to Morison**

(U) The defendant claims that the Court incorrectly described Morison in its Memorandum Opinion. See Mot. Reconsider. at 6. But it is the defendant who misreads the Court's Memorandum Opinion. The defendant claims that the Court's Memorandum Opinion states that the "potentially damaging" requirement was adopted by the Fourth Circuit in Morison "solely as a means to avoid potential overbreath issues." See Mot. Reconsider. at 7 (emphasis added). The defendant added the word "solely." The Court never said that the Fourth Circuit used the "potentially damaging" limiting instruction "solely" to reject the overbreadth challenge before it. Rather, the Court merely stated – correctly – that the Fourth Circuit in Morison

[redacted]

[redacted]

employed the limiting instruction as a means to avoid potential overbreadth issues and that the defendant did not bring such a challenge here. Mem. Op. at 7.

(U) As the defendant notes, the Fourth Circuit also employed the "potentially damaging" limiting instruction to address, in part, the constitutional vagueness challenge raised in Morison. See Mot. Reconsider. at 6. But that is irrelevant. This Court had previously and correctly concluded in its August 2011 published opinion that the defendant's constitutional vagueness argument failed, without resort to the Morison limiting instruction. This was so, given the Supreme Court's rejection of a nearly identical vagueness challenge in Gorin, the narrowing effect of Section 793(d)'s scienter requirement, and the undisputed facts here that the defendant was an experienced government intelligence professional charged with the unauthorized disclosure of TOP SECRET//SENSITIVE COMPARTMENTED INFORMATION, who had no conceivable basis to dispute the application of the criminal statute to his charged conduct. United States v. Kim, 808 F. Supp.2d 44, 53-54 (D.D.C. 2011).

(U) In its August 2011 decision denying the defendant's vagueness challenge, the Court cited to Morison not in support of Fourth Circuit's adoption of the "potentially damaging" judicial gloss but, as the Court explained in its Memorandum Opinion in this limited respect, i.e., "for the proposition that the phrase 'relating to the national defense' was not constitutionally vague in the context of an unauthorized disclosure of classified information." Kim, 808 F. Supp.2d at 53-54; Mem. Op. at 8. See also Morison, 844 F.2d at 1074 ("The definition of the [classified] material [in the Executive Order] may be considered in reviewing the constitutionality of the statute under which a defendant with the knowledge of security classification that the defendant had is charged."). The defendant ignores this statement in the Court's Memorandum Opinion because he disagrees with the Court's rejection of Morison's

[redacted]

[redacted]

"potentially damaging" limiting instruction. That disagreement, however, provides no basis for reconsideration of the Court's decision, as the issue was fully litigated by the parties and decided by the Court in its Memorandum Opinion. As another judge of this Court has directed, "where litigants have once battled for the Court's decision, they should [not] , . . . without good reason[,] [be] permitted to battle for it again." Sunia, 643 F. Supp. 2d at 61 (citation and internal quotations omitted); see also Bloch, 794 F. Supp. 2d at 20 ("Defendant's disagreement with the court's conclusion . . . does not warrant a finding that the court 'fail[ed] to consider controlling decisions or data.'").

(U) Thus, contrary to the defendant's assertion in his motion for reconsideration, this Court's description of the Morison decision in its Memorandum Opinion was accurate. Moreover, the Court's limited reliance on Morison nearly two years ago to deny the defendant's vagueness challenge was appropriate. And the Court's ultimate conclusion that, "[a]bsent any constitutional concerns, the Court is bound by the broader definition of 'national defense' provided by the Supreme Court in Gorin," was plainly correct and should not now be reversed. Mem. Op. at 8.

(U) **2. The Defendant Concedes that Morison's "Potentially Damaging" Judicial Gloss is Inconsistent with the Language of Section 793(d)**

(U) The defendant's next argument in support of reconsideration is somewhat odd. The defendant "agrees with the Court that the 'enemy' language employed in Morison is inconsistent with § 793(d), as the statute plainly speaks in terms of an advantage to any 'foreign nation,' not just an enemy." See Mot. Reconsider. at 7; Cf. Mem. Op. at 8. Nevertheless, the defendant faults the Court for "focusing on the specific verbiage employed in Morison." Mot. Reconsider. at 7. Of course, that is precisely what this Court should have done. The Court

[redacted]

[redacted]

analyzed the specific language of the limiting interpretation that the defendant had requested, compared that language to the statute and controlling Supreme Court precedent, and found that language wanting. The inconsistency that this Court identified between the Morison language and both Section 793(d) and the Supreme Court's Gorin decision, was an appropriate basis for the Court to decline to follow that part of Morison. See Mem. Op. at 8. Certainly, the defendant's admission that the Fourth Circuit's language, in this respect, is both "imprecise" and "inconsistent with § 793(d)," can provide no basis for reconsideration of this Court's ruling.

(U) The defendant's motion also highlights another weakness of Morison – the fractured and vague nature of the Fourth Circuit's opinion. See Mot. Reconsider. at 6, n. 3. Overlaying the three judges' separate opinions, and determining what exactly the Fourth Circuit held, is no easy task. As this Court noted in its Memorandum Opinion, district court judges in the Fourth Circuit have disagreed on the burden that the Morison judicial gloss imposes on the prosecution. See Mem. Op. at 10. Indeed, the defendant proposes in a footnote to his motion yet another formulation of the Morison judicial gloss: "[h]owever the inquiry is framed, the key point is that the Act is targeted at those disclosures which genuinely affect national security." See Mot. Reconsider. at 7, n. 4 (emphasis added). The continuing uncertainty as to Morison's meaning and application confirms the wisdom of this Court's decision not to follow Morison.

(U) The defendant's related argument that Section 793(d)'s "reason to believe" scienter requirement supports adoption of the Fourth Circuit's "potentially damaging" judicial gloss, fares no better. Mot. Reconsider. at 7. According to the defendant, because the scienter requirement requires the prosecution to prove that the defendant had "reason to believe [that the information] could be used to the injury of the United States or to the advantage of any foreign nation," it would be "illogical" to require such a showing unless, in fact, Section 793(d) applies

[redacted]

[redacted]

"only to information that 'could be used to the injury of the United States or to the advantage of any foreign nation.'" Id. The defendant's argument is incorrect for at least two reasons.

(U) First, as the defendant did multiple times in his motions to compel, he conflates Section 793(d)'s separate scienter requirement with its "national defense information" requirement. This Court should reject (again) the defendant's attempt to blur these two distinct statutory requirements and the confusion it causes. See Mem. Op. at 12-13 ("The [defendant's] argument confuses two separate inquiries: the question whether the Defendant had reason to believe that the information could be used to the injury of the United States or the advantage of a foreign nation is a separate question from whether the information allegedly disclosed related to the national defense."). Section 793(d)'s "reason to believe" scienter requirement and the Fourth Circuit's "potentially damaging" limiting instruction are two different concepts. The former focuses on the defendant's mens rea, while the latter focuses on the nature of the documents or information disclosed. Indeed, if the defendant's argument were correct, then there would have been no need for the Fourth Circuit to have imposed the judicial gloss on Section 793(d) – or for the defendant to make the argument he is making now. "Potentially damaging" would simply be an element of the statute. As this Court recognized in its Memorandum Opinion, it is not.[1]

(U) Second, accepting the defendant's argument that the Morison "potentially damaging" judicial gloss is the equivalent of the "reason to believe" mens rea requirement, and imposing that additional burden on the prosecution, would effectively read the scienter

[1] (U) Section 793(d)'s "reason to believe" scienter requirement also imposes an evidentiary burden on the prosecution that is less intrusive of Intelligence Community equities than that required by the Morison "potentially damaging" judicial gloss. As this Court recognized in its Memorandum Opinion, requiring proof of the Morison judicial gloss for violations of Section 793 could render the statute a nullity. Mem. Op. at 9.

[redacted]

[redacted]

requirement into any Section 793 charge. That would be clear error. As this Court has previously held, the "reason to believe" scienter requirement is only applicable to oral disclosures of national defense information, not to disclosures of the list of tangible items specified in Section 793(d). See Kim, 808 F. Supp. 2d at 51-52.

(U) **3. The Defendant Confuses the Relationship Between National Defense and Classified Information**

(U) The defendant next argues that the Court clearly erred when it considered the interplay between the definition of "national defense information" (NDI) and the classification status of such information. Mot. Reconsider. at 8-13. Of course, the former (NDI) is an element of a Section 793(d) violation, while the latter (classification status) is not. The defendant does not argue otherwise; indeed, he cites approvingly cases that make clear that there is a distinction between "national defense information" and "classified information." See id. at 10 (citations omitted). Yet, the defendant confusingly states in this section of his motion both that "classification status is not an issue for the jury to decide" (id. at 10) and that the "second guessing" of classification decisions is part of his "defense" and the jury should be permitted "to reconsider the classification of the information at issue" (id. at 13).

(U) To be clear, the fact of the classification of a document may be relevant for a jury's consideration in a prosecution for an unauthorized disclosure, in violation of 18 U.S.C. § 793(d). For example, the classification markings on a document, and a defendant's knowledge of them and their meaning, may be relevant evidence to establish the defendant's willfulness in disclosing national defense information from such a document to an unauthorized person. Likewise, a defendant may, in an appropriate case, seek to introduce evidence that such a document contained no classification markings to demonstrate that he or she did not act

[redacted]

[redacted]

willfully. The same considerations could come into play in an oral disclosure case, where the prosecution must establish the defendant's "reason to believe" that the information he or she is charged with disclosing could harm the United States or benefit a foreign nation. That is, classification markings (or their absence) could be relevant evidence to prove (or contest) the "reason to believe" prong of Section 793(d) in such a oral disclosure case. As yet another example, the fact of the classification of a document may be relevant to show whether the information in such a document was closely held. But, again, the United States has no obligation to prove that the "national defense information" at issue was properly classified under the applicable Executive Order(s) at the time of the charged disclosure. Classification status is simply not an element of a Section 793(d) offense (Unauthorized Disclosure of National Defense Information).

(U) The defendant contends that the Court clearly erred by considering the D.C. Circuit's decision in Scarbeck v. United States, 317 F.2d 546 (D.C. Cir. 1962), in its analysis. Mot. Reconsider. at 9. The defendant complains that the Court's reliance on Scarbeck was mistaken because that case concerned "a separate statute, covering a different offense." Id. To be sure, as this Court recognized, Scarbeck involved a violation of Title 50, United States Code, Section 783(b). Mem. Op. at 9. But the pertinent difference between the two statutes (Title 18, United States Code, Section 793(d); and Title 50, United States Code, Section 783(b)) makes plain that the Court's reliance on Scarbeck was well reasoned and appropriate.

(U) Unlike in the instant case (involving a Section 793(d) offense), in a prosecution under Section 783(b) the United States is required to prove that the information at issue was in fact classified at the time of its unlawful disclosure. In other words, classification status is an element of the offense of Section 783(b). In contrast, the government need not prove that the

[redacted]

[redacted]

information was classified in a Section 793(d) prosecution. Yet, even where classification status is an element of the offense, the Scarbeck Court held that the defendant cannot convert his or her trial for the unlawful disclosure of such classified information into a trial about the classification determination. 317 F.2d at 560 ("Neither the employee [i.e., the defendant] nor the jury is permitted to ignore the classification given under Presidential authority."). As the D.C. Circuit observed, "[m]erely to describe such a litigation is enough to show its absurdity." Id. It necessarily follows from Scarbeck that where the United States need not prove the classification status of the information that the defendant is charged with disclosing, the defendant cannot challenge the underlying classification decisions.

(U) The rationale behind Scarbeck's holding applies equally to this case. In Scarbeck, the D.C. Circuit observed that:

> Appellant is urging that after such an employee has obtained and delivered a classified document to an agent of a foreign power, knowing that document to be classified, he can present proof that his superior officer had no justification for classifying the document, and can obtain an instruction from the court to the jury that one of their duties is to determine whether the document, admittedly classified, was of such a nature that the superior was justified in classifying it. The trial of the employee would be converted into a trial of the superior. The Government might well be compelled either to withdraw the prosecution or to reveal policies and information going far beyond the scope of the classified documents transferred by the employee. The embarrassments and hazards of such a proceeding could soon render Section 783(b) an entirely useless statute.

317 F.2d at 560. Like Scarbeck, the defendant suggests that he intended as part of his "defense" to present proof that the Intelligence Community had no justification in classifying the TOP SECRET intelligence report at issue, the contents of which he is charged with disclosing to James Rosen of Fox News. See Mot. Reconsider. at 13. The defendant appears to want to go even further than Scarbeck and put the entire classification system on trial. See id. at 11 (citing statistics about over-classification) and 12 (challenging classification markings on "but one

[redacted]

[redacted]

example" from classified discovery in this case). Requiring the prosecution to justify the classification decisions that resulted in the classification markings on a document that a defendant is charged with unlawfully disclosing to a reporter, let alone to justify the entire classification system, could render Section 793(d) "an entirely useless statute." Scarbeck, 317 F.2d at 560. That may be the result that the defendant seeks. But his argument is contrary to the law of this Circuit.

(U) Finally, in this section of his motion the defendant makes two other arguments that merit only brief mention. One, the defendant claims that the Court's Memorandum Opinion "leaves nothing for the jury to decide." Mot. Reconsider. at 11. That is simply incorrect. The jury will still have to decide whether (or not) the prosecution has proven beyond a reasonable doubt that the defendant disclosed "national defense information," as the Supreme Court defined that term in Gorin. The defendant's real complaint is not that there is nothing for the jury to decide, but rather than it will be quite easy for the jury to decide for the prosecution, given the nature of the information at issue here. No doubt in recognition of this point, the defendant has already conceded that the information at issue meets the Gorin standard. See Defendant's Third Motion to Compel at 2, n. 3 (conceding that "[i]n this case, . . . the information satisfied this basic requirement [of Gorin]").[2]

---

[2] [redacted] It is difficult to reconcile this clear concession with the suggestion in the defendant's motion for reconsideration that he intends to contest whether the information that he is charged with disclosing to James Rosen and Fox News was, in fact, national defense information. See Mot. Reconsider. at 14-15. Although the defendant seems to suggest that he would like to argue to the jury that the information in the [redacted] report was inaccurate and "flat wrong," id. at 14 (citation omitted), he does not develop that argument here. Nevertheless, the defendant can hardly contend that the [redacted] report inaccurately stated [redacted] Nor can the defendant seriously claim that the substance of the [redacted]

[redacted]

(U) Two, the defendant argues that the Court's Memorandum Opinion conflicts with the Court's August 2011 published opinion, denying the defendant's motions to dismiss the indictment. Mot. Reconsider. at 13 (citing United States v. Kim, 808 F. Supp. 2d 44, 55 (D.D.C. 2011)). The defendant seizes on one clause of one sentence from the Court's published opinion: "To the extent that Defendant intends to argue that the information he is charged with leaking was previously disclosed or was not properly classified, he may do so as part of his defense, but such arguments to do not render the statute vague." Id. (emphasis supplied by the defendant). The defendant neglects to mention that the Court made this prior statement in response to the defendant's argument that Section 793(d) wa s constitutionally infirm, at least in an oral disclosure case, "because not all information contained within a classified document is necessarily classified." 808 F. Supp. 2d at 55. The Court's passing reference to this possibility in response to a specific legal argument in a very different context does not "contradict" (Mot. Reconsider. at 13) the Court's Memorandum Opinion.

(U) **4. The Court Properly Followed Binding Precedent**

(U) The defendant criticizes the Court's Memorandum Opinion as "[i]nconsistent with [p]recedent" and as unfairly subjecting him to legal standards that differ from those that apply in the Fourth Circuit. Mot. Reconsider. at 13-14. Suffice it to say, in the federal legal system all lower federal courts are bound by the holdings of the United States Supreme Court and by the holdings of their respective federal courts of appeals. See United States v. Torres, 115 F.3d 1033, 1036 (D.C. Cir. 1987) (district court is only "obligated to follow controlling

---

[redacted] The Gorin standard is far broader than that.

[redacted]

[redacted]

circuit precedent" and Supreme Court precedent in reaching its decision). The defendant's protestations to the contrary, there is nothing unusual or surprising for the federal courts of appeals to reach different conclusions on points of law, resulting in differing – or even conflicting – precedents for their respective district courts to follow. Indeed, one of the functions of the Supreme Court is to decide which such lower federal court conflicts merit resolution by the Nation's highest court. See Supreme Court Rule 10(a).

(U) While the defendant may wish it were otherwise, the Supreme Court's decision in Gorin and the D.C. Circuit's decision in Scarbeck bind this Court. The Fourth Circuit's decision in Morison does not. In criticizing this Court's decision not to follow Morison, the defendant states that "the fact remains that no court has expressly rejected Morison or its limiting construction of the statute [i.e., Section 793(d)] until the Court's Memorandum Opinion." Mot. Reconsider. at 14 (emphasis in original). Notably, the defendant does not reference the Fourth Circuit's subsequent decision in United States v. Squillacote, 221 F.3d 542 (4th Cir. 2000), in which that circuit court acknowledged that Morison's judicial gloss on the meaning of "information related to the national defense" arguably "offers more protection to defendants than required by Gorin." 221 F.3d at 580, n. 23. Similarly, the defendant claims that this Court incorrectly drew support from the district court's decision in United States v. Abu-Jihaad, 600 F. Supp. 2d 362 (D. Conn. 2009), aff'd 630 F.3d 102 (2d Cir. 2010). See Mot. Reconsider. at 14. Yet the defendant neglects to mention that the district court applied the Gorin definition of "national defense information." See Abu-Jihaad, 600 F. Supp. 2d at 385-389. However the prosecution and the defense chose to litigate that case, in Abu-Jihaad neither the district court nor the Second Circuit adopted the Morison judicial gloss that the defendant seeks to have imposed here.

[redacted]

[redacted]

(U) **III. CONCLUSION**

(U) For the foregoing reasons, the Court should deny the defendant's motion for reconsideration of the Court's rulings on his third motion to compel discovery.

Respectfully submitted,

RONALD C. MACHEN JR.
UNITED STATES ATTORNEY
D.C. Bar No. 447889

G. Michael Harvey (D.C. Bar No. 447465)
Assistant United States Attorney
(202) 252-7810
Michael.Harvey2@usdoj.gov

Jonathan M. Malis (D.C. Bar No. 454548)
Assistant United States Attorney
(202) 252-7806
Jonathan.M.Malis@usdoj.gov

Deborah A. Curtis (CA Bar No. 172208)
U.S. Department of Justice Trial Attorney
(202) 233-2113
Deborah.Curtis@usdoj.gov

Date: July 12, 2013

CERTIFICATE OF SERVICE

On this 12th of July, 2013, the undersigned served a copy of the foregoing on defense counsel of record through the Classified Information Security Officer.

G. Michael Harvey
Assistant United States Attorney

[redacted]