No. 22-5442

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

XIAORONG YOU,

Defendant-Appellant.

On Appeal From the United States District Court
For the Eastern District of Tennessee
Case No. 2:19-cr-00014-1
The Honorable J. Ronnie Greer

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STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument to address the complex legal and factual questions that this case presents and to respond to the Court's questions.

JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The appeal is from a judgment of conviction that disposed of all claims with respect to all parties. The district court pronounced sentence on May 9, 2022 and entered judgment on May 13, 2022. RE422, Judgment.[1] Appellant filed her notice of appeal on May 23, 2022. RE424, Notice of Appeal. This Court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

ISSUES PRESENTED

1. Whether expert testimony that all educated Chinese people know the Chinese government has an interest in illegally obtained technology; expert testimony that the attitude among Chinese scientists and businesspeople is predominantly that "the economic interests of the collectivity of we Chinese people is much more important than the property rights of some foreign company"; and

[1] Hearing transcripts ("T"), trial transcripts ("TT"), and sentencing transcripts ("ST") are cited by record number ("RE") followed by the PageID number. Pleadings and orders are cited by record number, description, and PageID number. Government exhibits are cited as "GX" and defense exhibits as "DX." All cited exhibits are included in appellant's sealed appendix ("App.") and cited by the page number stamped at the bottom of each page.

testimony that "the Chinese are very well-known to steal the technology" denied appellant--a scientist born in China and charged with stealing trade secrets--a fair trial.

2. Whether the district court erred in instructing the jury on the trade secret counts that the government was not required to prove that appellant knew the information at issue met all the legal requirements of a trade secret, as long as she knew the information was "proprietary"--that is, that the owner treated the information as a secret and she was taking the information without authorization from the owner.

3. Whether the district court erred in refusing to instruct the jury on the economic espionage counts that a benefit to a foreign country or instrumentality is more than a benefit that might flow simply from doing business in that country.

4. Whether the errors require reversal when considered cumulatively, even if the Court finds them individually harmless.

5. Whether the district court erred in calculating the Sentencing Guidelines by adding 24 levels for intended loss.

STATEMENT OF THE CASE

The grand jury indicted Dr. Xiaorong You on February 12, 2019. RE3, Indictment. She was arrested two days later and has been incarcerated ever since.

Count 1 of the indictment charged Dr. You under 18 U.S.C. § 1832(a)(5) with conspiracy to commit theft of trade secrets. RE3, Indictment, 3-13. Counts 2 through 8 charged her with possession of stolen trade secrets from seven companies (Akzo-Nobel, BASF, Dow Chemical, PPG, Sherwin-Williams, ToyoChem, and Eastman Chemical Company), in violation of 18 U.S.C. § 1832(a)(3). RE3, Indictment, 13-14. Count 9 charged her with wire fraud, based on her alleged "upload[ing] of trade secret information" belonging to her employer, Eastman Chemical Company, and her allegedly false representation to Eastman that she had not "retained copies of [its] trade secret information." RE3, Indictment, 14-15.

On August 4, 2020, the government obtained a superseding indictment. That indictment added charges of conspiracy to commit economic espionage (Count 10) and economic espionage (Count 11) under 18 U.S.C. § 1831. RE217, First Superseding Indictment, 3024-29.

Trial began on April 6, 2021. On April 22, the jury found Dr. You guilty on all counts. RE301, Verdict. On May 9, 2022, the district court sentenced Dr. You to 168 months in prison on Counts 9, 10, and 11 and 120-month terms on Counts 1 through 8, with all sentences to run concurrently. The court imposed a $200,000 fine. RE427:ST7906-07. It entered judgment on May 13, 2022. RE422, Judgment. Dr. You filed a timely notice of appeal. RE424, Notice of Appeal.

STATEMENT OF THE FACTS

Dr. You was born in China. She immigrated to the United States, renounced her Chinese citizenship, and became a United States citizen. She is married and has a daughter, who at the time of trial worked as a computer scientist at Google. RE382:TT7324-26.

Dr. You obtained her undergraduate degree in China. She obtained a Masters of Science from Kent State University and a Ph.D from Lehigh University. Her expertise is organic polymer chemistry. She has obtained a number of patents for her inventions. GX6-A (App.107-11).

Between 1992 and 2012, Dr. You worked for a series of companies in the United States. GX6-A (App.107-11); GX8-B at 3 (App.114). There was no evidence at trial that any of these companies raised concerns about her handling of trade secrets. In 2012, Dr. You began work at Coca-Cola. GX6-A at 1 (App.107); GX8-B at 3 (App.114). She was principally responsible for evaluating can coatings used to separate the beverage from the metal used to construct the can.

For many years, can coatings contained the chemical bisphenol-A, known as BPA. In 2013, however, France banned the use of BPA in can coatings because of possible harmful effects, and California soon followed suit. RE309:TT4132-33. As a result, Coca-Cola and other beverage companies looked for coatings without BPA. The new coatings were known as "BPA-free" or "BPA-NI." Chemical companies

such as Dow Chemical, BASF, and Eastman Chemical developed BPA-free chemicals for use in the new coatings. Coating formulators such as Akzo-Nobel, Sherwin-Williams/Valspar, PPG, ToyoChem, and Metlac developed the coatings and sought to sell them to Coca-Cola and other beverage manufacturers.

In her role at Coca-Cola, Dr. You had access to information from the chemical companies and the coating formulators concerning their BPA-free products. RE309:TT4106-07; RE289:TT3635-40; RE292:TT3747-52; RE311:TT4298-4301; RE314:TT4361-62. Her use of this information was governed by non-disclosure agreements. RE309:TT4146-51, 4171-72; RE289:TT3640-45; RE292:TT3747-50; RE311:TT4292-98, 4336-39; RE314:TT4363-66; RE315:TT4469-73; GX5-A, 5-B, 5-C, 5-D, 5-E, 5-F (App.42-106).

In mid-2017, Coca-Cola embarked on a company-wide downsizing. On June 30, 2017, Dr. You was notified that she would lose her job at the end of August 2017. RE341:TT5617. In mid-August, Dr. You sought to download to a personal USB drive information from Akzo-Nobel, Sherwin-Williams, PPG, ToyoChem, Dow Chemical, and BASF relating to their BPA-free products. RE363:TT6338; RE341:TT5622-26. At the end of August, Dr. You transferred the files to her Google Drive account and then to a USB drive. RE341:TT5635-37.

Eastman Chemical Company hired Dr. You soon after she left Coca-Cola. RE336:TT5130-31. She worked there until she was fired on June 22, 2018.

RE319:TT4601-04. On June 21, aware that her job was in jeopardy, she transferred Eastman information to her personal Google Drive account and to the USB drive with the other companies' information. Eastman detected the transfer to the USB drive and asked that Dr. You produce it. She complied. RE336:TT5153-69, 5172-76, 5203-11, 5235-37, 5257-60; RE365:TT6707-11; RE363:TT6395-6400. Eastman officials reviewed the material on the USB drive and returned to Dr. You information they deemed purely personal. RE336:TT5203-11, 5238-42, 5266-77. Eastman then reported the matter to the FBI, which launched an investigation. RE365:TT6681.

In June 2017, Dr. You applied to China's Thousand Talents program, through which the Chinese government attempts to attract top scientific talent. GX8-B (App.112). She also applied to a provincial program--known as the Yishi-Yiyi program--involving Shandong Province and the city of Weihai. Both applications touted her expertise with BPA-free coatings and focused on her ability to promote the local manufacture of these coatings. As part of the application process, Dr. You agreed with the Weihai Jinhong Group--a company based in Weihai, China--to form a new company that would manufacture the BPA-free chemical for use in coatings.

RE364:TT6520-23.[2] Dr. You attempted unsuccessfully to persuade Metlac, an Italian coatings formulator, to form a partnership with the new company.

On February 14, 2019, the FBI arrested Dr. You in Lansing, Michigan, where she had moved for a new job. It seized a USB drive and other devices. RE365:TT6721-27. On the USB drive seized in Lansing it found many of the same files that had been on the USB drive that Eastman received from Dr. You. Some of the names of those files had been changed to remove the company names. RE314:TT4403-07; RE338:TT5394-5401; RE363:TT6308-31.

There was no evidence that Dr. You shared any of the information she transferred with any other person. RE241-1, Bocchio Deposition, 3272 (pages 30-31); RE241-2, Mazzilli Deposition, 3307-08 (pages 78-81); RE364:TT6665. Nor was there evidence that any of the alleged victim companies suffered any loss as a result of her conduct.

These facts were largely uncontested at trial. The case turned on two principal issues. First, the parties disputed whether the information found on Dr. You's USB and Google drives included trade secrets. The government called witnesses from

[2] There is no evidence in the record that Weihai Jinhong Group is wholly or partially owned by the government of China or any other government entity. When asked about the company's status, the government's China expert, Dr. Naughton, professed not to know. RE342:TT5669. In Dr. You's Thousand Talents Plan application, the company described itself as a "private enterprise." GX8-B at 17 (App.128).

each of the seven companies whose information she possessed. Each witness described the importance of the information at issue, the steps taken to protect it, and the cost to the company of developing it. Each testified that certain information Dr. You possessed constituted a trade secret. RE309:TT4121-22, 4173-99; RE289:TT3650-71; RE292:TT3750-56, 3764-65; RE311:TT4310-15; RE314:TT4370-97; RE315:TT4479-4501; RE319:TT4634-54; GX35 (chart listing exhibits with alleged trade secrets) (App.162).

The defense focused on the requirement that trade secret information be "not . . . generally known to, and not . . . readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information." 18 U.S.C. § 1839(3)(B). Principally through its expert witness, intellectual property attorney J.D. Harriman, the defense maintained that the alleged trade secrets were either publicly disclosed in, or "readily ascertainable through proper means" from, two patents and other public disclosures. The first patent is held by Coca-Cola. Dr. You is a named inventor. GX32O (App.131). The second patent is owned by Valspar, later acquired by Sherwin-Williams. DX15 (App.164); *see* DX81 (compilation of publicly disclosed Valspar information) (App.195).

The defense also introduced an article by two Valspar employees, which refers to the bisphemol for Valspar's non-BPA epoxy, Valpure V70. The article asserts: "[R]ather than claim this new molecule and coating as trade secret, Valspar

thoroughly protected the intellectual property, which includes 49 patents. This allowed us to invite the public to review the data themselves by making the V70 polymer chemical identity and hazard data publicly available on Valspar's website." DX65 at 3 (App.194); *see* RE289:TT3690-96. Harriman detailed the overlap between the alleged trade secret information and the information disclosed in the patents and other public documents. RE377:TT7015-42; DX3 (App.163).

Second, the parties disputed Dr. You's mens rea. The defense maintained that she did not know the information amounted to trade secrets (an issue the district court largely removed from the case through its instructions, as we discuss below); that she did not intend to harm the companies whose information she possessed, as demonstrated by the fact that she did not share the information with anyone; and that she did not intend to confer any benefit on the government of China or its instrumentalities, an element of the economic espionage charges. The government challenged each of these contentions, based principally on the manner in which Dr. You acquired the information, Thousand Talents Plan submissions on her behalf, her WeChat messages, and a custodial interview the FBI conducted after her arrest.

We address in more detail below the facts relevant to the issues on appeal.

SUMMARY OF ARGUMENT

1. The trial of this case occurred during the height of the Covid-19 pandemic. The district court recognized the danger that anti-Chinese prejudice

arising from the pandemic posed to the fairness of the proceedings. Just a month before trial, the court noted that since the outbreak of the pandemic, Asian American and Pacific Islander communities "have been the targets of xenophobic backlash, racial harassment, and violence, as China and the Chinese have been blamed for the spread of the COVID-19 virus." RE248, Order, 3368.

Despite the virulently anti-Chinese environment in which the trial occurred, the court permitted the government's China expert, University of California economist Barry Naughton, to testify that "every educated Chinese person is aware of" the Chinese government's interest in acquiring illegally obtained technology. Dr. Naughton also testified that, based on conversations with science and policy experts and businesspeople in China and abroad, "the attitude predominantly is China is catching up, the economic interests of the collectivity of we Chinese people is much more important than the property rights of some foreign company." Shortly after Dr. Naughton's testimony, the government played the deposition of the Metlac CEO, in which he testified that he refused to do business in China "because first of all, I didn't trust the Chinese. Especially they are very well-known to steal the technology. It's possible." The district court denied Dr. You's motion for a mistrial.

These blatantly anti-Chinese statements should never have been admitted. They denied Dr. You a fair trial.

2. The counts charging violations of 18 U.S.C. §§ 1831 and 1832--Counts 1 through 8, 10, and 11--required proof that Dr. You knew the information at issue was a trade secret. But the district court did not instruct the jury on this element. Instead, the court instructed the jury that "[t]he government is not required to prove the defendant . . . knew that all of the information met all of the legal requirements of a trade secret as I have defined that term." Because this instruction misstated a vital element of the trade secret charges, Dr. You's conviction on Counts 1 through 8, 10, and 11 must be reversed.

3. The economic espionage counts (Counts 10 and 11) required proof that the defendant "intend[s] or know[s] that the offense will benefit any foreign government, foreign instrumentality, or foreign agent." 18 U.S.C. § 1831(a). The district court refused a proposed defense instruction that "[a] benefit to a foreign government or its instrumentality is more than a benefit that might flow simply from doing business in that country." The defense instruction was a correct statement of the law; it was not covered by other instructions; and it went to the heart of Dr. You's defense on Counts 10 and 11. The court's failure to give the instruction requires reversal on those counts.

4. This Court recognizes that "errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *United States v. Blackwell*, 459

F.3d 739, 770 (6th Cir. 2006) (quotations omitted). The errors outlined above--all of which bear directly on the fairness of Dr. You's trial--require reversal when viewed cumulatively, even if the Court concludes, contrary to our position, that they are individually harmless.

5. Even if the Court declines to vacate Dr. You's convictions, it should remand for resentencing. In calculating the Sentencing Guidelines, the parties agreed there was no actual loss. The district court turned to intended loss, concluded that the appropriate intended loss amount was $121,800,000, and increased Dr. You's Guidelines offense level by 24 levels.

The court's loss determination was erroneous in two respects. First, the relevant Guideline--U.S.S.G. § 2B1.1--refers only to "loss"; it makes no mention of "intended" loss. Intended loss as an alternative to actual loss is solely a creation of the commentary to § 2B1.1. This Court has recently made clear that the commentary to the Guidelines cannot expand the scope of the Guidelines themselves. *See United States v. Riccardi*, 989 F.3d 476, 483-89 (6th Cir. 2021). The commentary's use of intended loss as an alternative to actual loss does just that. As one court recently concluded, the word "loss" in § 2B1.1 means harm that has actually occurred; it does not encompass harm that has not yet materialized. *United States v. Alford*, 2022 U.S. Dist. LEXIS 149494, at *7-*9 (N.D. Fla. Aug. 20, 2022). The district court thus

erred in relying on the commentary to construe "loss" in § 2B1.1 to include harm that was intended but never actually occurred.

Second, to the extent intended loss is a permissible basis for calculating the offense level under § 2B1.1, the district court clearly erred in determining that loss. The court's intended loss calculation confused *sales* with *profits* and rested on impermissible speculation about Dr. You's intent and about the market for BPA-free coating products in China.

ARGUMENT

I. THE ANTI-CHINESE TESTIMONY OF TWO GOVERNMENT WITNESSES DENIED DR. YOU A FAIR TRIAL.

The Supreme Court has declared that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Accordingly, the Court has "engaged in unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (quotation omitted). This Court as well has long held that "[a]ppeals to racial prejudice are foul blows and the courts of this country reject them." *United States v. Grey*, 422 F.2d 1043, 1046 (6th Cir. 1970).

Dr. You's trial fell short of the ideals expressed in *Mitchell*, *McCleskey*, and *Grey*. In March 2021, a month before trial, the district court noted "the recent spike of anti-Asian hate crimes in America since the COVID-19 pandemic." RE248,

Order, 3367. The court added that since the outbreak of the pandemic, Asian American and Pacific Islander communities "have been the targets of xenophobic backlash, racial harassment, and violence, as China and the Chinese have been blamed for the spread of the COVID-19 virus." RE248, Order, 3368. The Magistrate Judge similarly observed that the "linking of Defendant to the Chinese government would . . . be likely to invoke a particularly strong emotional response from many of the jurors in light of the fact that the trial of this cause will take place in the midst of the COVID-19 global pandemic, with the virus having originated in China." RE193, Order, 2354.

The danger of anti-Chinese bias arising from the COVID-19 pandemic was particularly great because former President Trump--who had left office just a few months before trial began--repeatedly denounced coronavirus as the "China virus"and "kung flu."[3] The President also spent years publicly condemning China

[3] For example, in a September 2020 address to the United Nations, President Trump declared: "Seventy-five years after the end of World War II and the founding of the United Nations, we are once again engaged in a great global struggle. We have waged a fierce battle against an invisible enemy--the China virus--which has claimed lives in 188 countries. . . . We must hold accountable the nation which unleashed this plague onto the world: China." *See* https://www.stripes.com/full-text-of-president-trump-s-speech-to-the-un-sept-22-2020-1.646018. As another example, at a campaign rally on June 20, 2020, the President called coronavirus "kung flu" and "the Chinese virus." https://www.youtube.com/watch?v=EEJogV-xUIM. A Google search produces many other examples.

for stealing this country's technology and inflicting other harms on the United States.[4]

The President's repeated attacks on China required special care that anti-Chinese bias did not infect Dr. You's trial. As we discuss below, however, the district court failed in that effort. Dr. Barry Naughton, an economist who appeared as the government's expert on China, testified that "every educated Chinese person" knew of the Chinese government's willingness to accept illegally acquired technology. The same expert testified to the "predominant[]" attitude among Chinese scientists and businesspeople that "the economic interests of the collectivity of we Chinese people is much more important than the property rights of some foreign company." Pier Bocchio, the CEO of Metlac, an Italian coatings manufacturer, testified that he would never do business in China because "I didn't trust the Chinese. Especially they are very well-known to steal the technology."

This testimony poisoned a trial that occurred in an already poisonous atmosphere. Reversal is required.

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[4] For example, in a 2020 proclamation, President Trump suspended visas for Chinese graduate students and researchers because they were part of a "wide-ranging and heavily resourced campaign to acquire sensitive United States technologies and intellectual property." Proclamation 10043, 85 Fed. Reg. 34353 (May 29, 2020). In a news conference discussing the proclamation, President Trump declared that "China raided our factories, offshored our jobs, gutted our industries, stole our intellectual property, and violated their commitments under the World Trade Organization." *See* https://www.youtube.com/watch?v=iSsc5jcXZF0. The President made dozens of similar comments during his four years in office.

A. Standard of Review.

This Court reviews the district court's decision to admit evidence for abuse of discretion. *See, e.g., United States v. Adams*, 722 F.3d 788, 810 (6th Cir. 2013). When the defendant fails to object, the Court reviews for plain error. *See, e.g., United States v. Collins*, 799 F.3d 554, 575-76 (6th Cir. 2015); *United States v. Marrero*, 651 F.3d 453, 470-71 (6th Cir. 2011). The defense objected to Dr. Naughton's testimony under Fed. R. Evid. 702 and 403 but did not object under Rule 704(b). RE252, Motion to Exclude; RE384:TT7405-06.

Defense counsel moved for a mistrial after the Bocchio statement was played for the jury, in violation of the district court's prior ruling excluding it. RE385:TT7470; RE382:TT7248-55. The district court denied the motion. RE385:TT7470-71; RE382:TT7279-81. This Court reviews the district court's denial of a mistrial for abuse of discretion. *See, e.g., United States v. Wandahsega*, 924 F.3d 868, 878 (6th Cir. 2019).

B. The Naughton Testimony.

After the district court indicated that it would exclude the government's initial China expert, General Robert S. Spalding (Ret.), RE248, Order, the government withdrew him and substituted Dr. Naughton, RE249, Notice of Expert Testimony.

The defense moved to exclude Dr. Naughton's testimony under Rules 702 and 403. RE252, Motion to Exclude. At a status conference, the government explained

that Dr. Naughton would testify (among other topics) that "the PRC talent programs in which the defendant participated are known by people in the defendant's position to be sponsored by the Chinese government, and they are indifferent to the source of the technology." RE259:T3473-74. At a later hearing, the government made explicit that it offered Dr. Naughton's testimony for the "core" reason of showing Dr. You's intent and knowledge. RE384:TT7410.

The defense objected that Dr. Naughton's testimony would be highly prejudicial, because of an unfair concentration on issues already raised in the case concerning China. RE384:TT7405-06. The district court overruled the objection, concluding that "intent and knowledge on the part of the defendant is a crucial issue in this case," and "Dr. Naughton's testimony provides circumstantial evidence in my view of the defendant's knowledge and intent." RE384:TT7420-21; *see id*. at 7422-24; RE284, Memorandum Opinion and Order, 3574.

Some of Dr. Naughton's trial testimony--for example, testimony describing the Chinese government's general strategy of modernizing the country's technology, including through the Thousand Talents Program--was unobjectionable. But two portions of his testimony should have been excluded. First, the prosecution elicited Dr. Naughton's opinion that "the Chinese government is interested in acquiring both legally and perhaps gray or even illegally acquired technology in pursuit of their objectives." RE342:TT5670-71. Then, exactly as it had forecast, the prosecution

linked this alleged strategy directly to Dr. You's knowledge: "Q. Is it fair to say that scientists with ties to China would be aware of this overall strategy that you described? A. Yes, definitely. I think every educated Chinese person is aware of this." RE342:TT5673.

Second, Dr. Naughton testified that, based on conversations with science and policy experts and businesspeople in China and abroad, "the attitude predominantly is China is catching up, the economic interests of the collectivity of we Chinese people is much more important than the property rights of some foreign company." RE342:TT5676.

This testimony should have been excluded under Rule 403, as we discuss below. But it also contravened Fed. R. Evid. 704(b), which provides: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Dr. Naughton's testimony did exactly what Rule 704(b) prohibits: it attributed to "every educated Chinese person"--a group that includes Dr. You--knowledge that China seeks illegally acquired technology. And his testimony described as the "predominant" view among science and policy experts and businesspeople in China and abroad--again, a group that includes Dr. You--that "the economic interests of the collectivity of we Chinese people is much more important than the property rights of some

foreign company." RE342:TT5676.[5] The testimony was plainly inadmissible and, coming from a well-credentialed expert, profoundly prejudicial. *See, e.g., Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1006-09 (9th Cir. 2001) (in suit brought by Korean company, court reversed judgment for defendant where defense expert was permitted to testify about Korean companies' propensity to engage in fraudulent business practices).

C. The Bocchio Testimony.

Soon after Dr. Naughton's testimony, the government played the Bocchio deposition. The thrust of his testimony was that Dr. You had tried unsuccessfully to convince Metlac to enter the Chinese market and to partner with the new Chinese company she and Weihai Jinhong Group were forming. That was all the government needed to establish through Bocchio, but it went further. The government pressed Bocchio to explain why he would not do business in China. He responded: "Why not? Because as I said it before, because first of all, I didn't trust the Chinese. Especially they are very well-known to steal the technology. It's possible." RE241-1, Bocchio Deposition, 3271 (page 26).

[5] The district court had rejected the government's contention that General Spalding's proposed testimony was relevant to Dr. You's mens rea on the ground that Rule 704(b) "squarely excludes such testimony." RE248, Order, 3365. The same principle should have led to the exclusion of Dr. Naughton's quoted testimony. *See, e.g., United States v. Warshak*, 631 F.3d 266, 324 (6th Cir. 2010).

The defense sought to exclude the Bocchio deposition in its entirety but asked, if it was admitted, that this blatantly anti-Chinese statement be excluded. RE241, Defendant's Reply, 3262.[6] The district court acknowledged that "[a]nti-Chinese sentiment pervades the entirety of the deposition," but the court nonetheless permitted the government to play it. RE251, Order, 3415, 3416. The court agreed with the defense, however, that the quoted statement "is not more probative than prejudicial and should be edited from the deposition testimony." RE251, Order, 3415; *see id*. at 3416.

Through an error, the Bocchio deposition the government played for the jury included the statement the district court had ordered stricken. RE385:TT7467. The government sought immediately to interrupt the playing of the deposition, but, as the district court observed, "the jury has heard the statement." RE385:TT7468. The defense moved for a mistrial. RE385:TT7470; RE382:TT7248-55. The district court denied the motion. RE385:TT7470-71; RE382:TT7279-81. It declared that it had ordered the statement stricken out of concern "that the race of the defendant was

[6] The government opposed this request in part on the ground that Bocchio's racist statement would reflect badly on him but would not prejudice Dr. You. RE242, Government Reply, 3337-38. This view, if adopted, would open the door to racist testimony by any government witness; such testimony, according to the government, would discredit the witness but would not prejudice the defendant. The government's argument ignores decades of caselaw condemning racist testimony. It also ignores the context of Dr. You's trial, held during a pandemic that, fueled by the former President's anti-China rhetoric, had unleashed a wave of anti-Chinese hatred and violence.

going to become an issue in the case," but it "no longer ha[s] that concern in light of what I've heard." The court added that "the harm is very, very slight, and so the mistrial is denied." RE385:TT7471-72; *see* RE382:TT7279-81. The court offered to instruct the jury to disregard Bocchio's statement, but the defense declined, to avoid calling more attention to it. RE385:TT7470-71.

D. The Naughton and Bocchio Testimony Denied Dr. You a Fair Trial.

In accordance with the principles of *Rose, McCleskey*, and *Grey*, courts have repeatedly condemned the kind of racist testimony that occurred here. In *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000), for example, the Ninth Circuit reversed a conviction where a prosecution witness injected evidence concerning the defendants' Cuban origin into the case. *See id.* at 592-97. The court found that the references to "Cubans" warranted reversal even though the defendants had not objected to the evidence and had elicited some of the most damaging testimony themselves on cross-examination.

Similarly, in *United States v. Vue*, 13 F.3d 1206 (8th Cir. 1994), the court reversed drug convictions because a prosecution witness discussed the involvement in drug smuggling of persons of Hmong descent. *See id*. at 1211-13. And in *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990), the court reversed drug convictions where a prosecution expert testified about the "Jamaican" influence on the District of Columbia drug trade and the prosecution emphasized that testimony in closing.

See id. at 18-29; *see also, e.g., United States v. Cruz*, 981 F.2d 659, 663-64 (2d Cir. 1992) (reversing conviction in part because prosecution witness referred to neighborhood where crime occurred as having "a very high Hispanic population," including "Dominicans"); *United States v. Rodriguez Cortes*, 949 F.2d 532, 540-42 (1st Cir. 1991) (reversing conviction because introduction of Colombian identification card prejudiced defendant); *Boyle v. Mannesmann Demag Corp.*, 1993 U.S. App. LEXIS 8682, *8-*9 (6th Cir. Apr. 13, 1993) (unpublished) (court notes that "repeated references to a party's citizenship or nationality can be unduly prejudicial to that party"; new trial ordered in part because of repeated, irrelevant references to defendant's "Germanic origins").

The *Doe* court declared: "It is much too late in the day to treat lightly the risk that racial bias may influence a jury's verdict in a criminal case." 903 F.2d at 21. And the court refused to "quibble" with the government over whether the references to "Jamaicans" involved appeals to race; it found that "distinctions based upon ancestry are as odious and suspect as those predicated on race; in practical terms, appeals to either threaten the fairness of a trial." *Id*. at 21-22 (quotations and footnotes omitted). These principles apply equally here. If the evidence of ethnicity and national origin required reversal in *Doe* and the other cases cited above, the anti-Chinese Naughton and Bocchio testimony, during a trial that occurred at the height

of what the former President insisted on calling "kung flu" and the "China virus," even more clearly requires a new trial.

It is no answer to say that the anti-Chinese testimony was permissible because Dr. You was alleged to have committed economic espionage to benefit China. In *Jinro*, the court vacated a judgment against a Korean company because the opposing party elicited expert testimony portraying Korean companies and businesspeople as pervasively corrupt. The court declared that "[a]llowing an expert witness . . . to generalize that most Korean businesses are corrupt, are not to be trusted and will engage in complicated business transactions to evade Korean currency laws is tantamount to ethnic or cultural stereotyping, inviting the jury to assume the Korean litigant fits the stereotype." 266 F.3d at 1007. It concluded that the expert testimony was inadmissible because "[i]t invited the jury to distrust [the Korean company] by invoking an ethnic, national stereotype." *Id*. at 1008. The Naughton and Bocchio testimony similarly invited the jury to find that Dr. You had stolen trade secrets by invoking racist stereotypes about China and Chinese people.

In *Vue*, the court reversed the Hmong defendants' drug convictions because the prosecution elicited evidence about Hmong involvement in drug dealing--the same kind of "guilt by ethnicity" testimony that the prosecution elicited here. 13 F.3d at 1211-13. In *Doe*, the court reversed the defendants' convictions because of prosecution testimony and argument about the "Jamaican" influence on the local

drug trade--a theory that corresponds closely to the apparent premise of the Naughton and Bocchio testimony. And in *Rodriguez Cortes*, the First Circuit found particularly disturbing "the assumption underlying the [district] court's second asserted ground for relevance," that is, that "since the other members of the conspiracy were Colombians, it was more likely than not that the defendant, as a Colombian, would know about the conspiracy and be entrusted as a courier." 949 F.2d at 541. The court of appeals concluded--in terms that bear directly on the anti-Chinese evidence here--that "[a] card identifying the defendant as a native Colombian could have been and was, in fact, used as the basis for making generalizations about all Colombians. The admission of the card as an exhibit made it more likely that whatever preconceived notions the jury might have had about Colombians and drug trafficking would infect the deliberative process." *Id*. at 542.

These cases make clear that the prosecution cannot inject race or national origin into a case as a basis for inferring guilt. *See also United States v. Love*, 534 F.2d 87, 88-89 (6th Cir. 1976) (reversing conviction where prosecutor asked defendant whether his employer was in Mafia); *United States v. Perry*, 512 F.2d 805, 806-07 (6th Cir. 1975) (reversing conviction in part because prosecutor asked defendant whether he was member of the "Dixie Mafia"). Because that is what happened here through the testimony of Bocchio and Dr. Naughton, reversal is required.

II. THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY THAT THE GOVERNMENT DID NOT NEED TO PROVE THAT DR. YOU KNEW THE INFORMATION WAS TRADE SECRET.

The counts charging violations of 18 U.S.C. §§ 1831 and 1832--Counts 1 through 8, 10, and 11--required proof that Dr. You knew the information at issue was a trade secret. But the district court did not instruct the jury on this element. Instead, the court instructed the jury that the government must prove

> that the defendant knew the information was proprietary, meaning belonging to someone else who has exclusive rights to it. *The government is not required to prove the defendant . . . knew that all of the information met all of the legal requirements of a trade secret as I have defined that term*. What the government must prove beyond a reasonable doubt is that the defendant knew that the owner treated the information as a secret and the defendant was taking the information without authorization from the owner.

RE436:TT8278 (instruction on Counts 2-8) (emphasis added); *see id*. at 8294 (same instruction on Count 11). Because this instruction misstated a vital element of the trade secret offenses, those counts must be reversed.

A. Standard of Review.

"When a party claims a jury instruction improperly or inaccurately stated the law, we review that claim de novo." *United States v. Roth*, 628 F.3d 827, 833 (6th Cir. 2011). Dr. You's trial counsel made such a claim here with respect to the "knowingly" element. At a pretrial hearing, the court noted that the government's proposed instruction on the trade secret offenses required "that the defendant knew or believed that the information was a trade secret." The court continued: "I simply

believe after reading the case laws that that's incorrect. She didn't have to believe it was a trade secret, but she did have to believe that it was proprietary, and the Sixth Circuit defines what proprietary is." RE431:T7970. The court asked defense counsel: "So you want us to charge that she either knew, that the jury had to find that she either knew or believed it was a trade secret?" RE431:T7970. Counsel responded, "As opposed to proprietary." *Id*. Later in the colloquy, defense counsel again objected to the term "proprietary" and argued that the instruction should require that Dr. You either knew or believed that the information was trade secret. RE431:T7972-73. This colloquy "inform[ed] the court of the specific objection and the grounds for the objection." Fed. R. Crim. P. 30(d); *see, e.g., United States v. Hamm*, 952 F.3d 728, 741-42 (6th Cir.), *cert. denied*, 141 S. Ct. 312 (2020).

De novo review is appropriate as well because the argument Dr. You makes here "presents a question of pure law," involving the interpretation of §§ 1831 and 1832. *Hamm*, 952 F.3d at 743 (quotation omitted). Because Dr. You's challenge to the jury instruction raises a purely legal issue, "neither party has been denied the opportunity to offer relevant evidence in making its case, and both sides have . . . a full opportunity to present whatever legal arguments they may have on this particular issue." *Id*. (quotation omitted).

B. The Knowledge Instruction Was Error.

The plain language of §§ 1831 and 1832, recent Supreme Court cases, and cases interpreting those statutes leave no doubt that the government must prove the defendant knew the information she obtained was a trade secret.

As relevant here, § 1831(a)(3)--the statute at issue in Count 11, RE217, First Superseding Indictment, 3029--punishes a person who "*knowingly* . . . receives, buys, or possesses *a trade secret*, knowing the same to have been stolen or appropriated, obtained, or converted without authorization." 18 U.S.C. § 1831(a)(3) (emphasis added). Sections 1831(a)(1) and (a)(2)--the other objects of the conspiracy charged in Count 10--similarly punish persons who "knowingly" engage in certain conduct with respect to a "trade secret." The plain language of these provisions requires proof that the mental state--"knowingly"--extends to the object of the prohibited conduct--a "trade secret."

Section 1832 has a similar structure. Section 1832(a)(3)--the statute at issue in Counts 2 through 8--punishes a person who "*with intent to convert a trade secret* . . . *knowingly* . . . receives, buys, or possesses *such information* . . . ." 18 U.S.C. § 1832(a)(3) (emphasis added). Sections 1832(a)(1) and (a)(2)--the other objects of the conspiracy charged in Count 1--similarly punish persons who, "with intent to convert a trade secret . . . knowingly" engage in certain conduct with respect to "such information." This language requires both an "intent to convert a trade secret" and

that the defendant act "knowingly" with respect to "such information"--a clear reference back to "trade secret." Both phrases require proof that the defendant knew the information at issue was a trade secret.

If there were doubt about the scope of the word "knowingly" in §§ 1831 and 1832, a long line of Supreme Court cases removes it. In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Court recognized that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id*. at 652; *see id*. at 650 ("In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."). Applying this principle, the Court read the phrase "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" in 18 U.S.C. § 1028A(a)(1) to require proof that the defendant knew not only that he transferred, possessed, or used the means of identification "without authority," but also that the means of identification was "of another person." *See* 556 U.S. at 657; *see also United States v. X-Citement Video*, 513 U.S. 64, 78 (1994) (word "knowingly" in 18 U.S.C. § 2252, prohibiting knowing interstate transportation, shipping, receipt, distribution, or reproduction of visual depictions of minors engaged in sexually explicit conduct, requires proof that the defendant knew

both the sexually explicit nature of the material and the age of the performers); *Liparota v. United States*, 471 U.S. 419, 433 (1985) (phrase "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [law]" requires proof the defendant knew his conduct with respect to coupons or authorization cards was "not authorized by [law]").

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Court adhered to the *Flores-Figueroa* principle that the statutory term "knowingly" is normally construed to apply "'to all the subsequently listed elements of the crime.'" *Id*. at 2196 (quoting *Flores-Figueroa*, 556 U.S. at 650). The statute in *Rehaif*--18 U.S.C. § 924(a)(2)--made it a crime to "knowingly violate[]" certain subsections of 18 U.S.C. § 922. The subsection at issue--§ 922(g)--did not have its own mens rea element. The Court held that the phrase "knowingly violates" in § 924(a)(2) required proof that the defendant had knowledge of each element in § 922(g) that made his conduct unlawful: that he was an alien illegally or unlawfully in the United States and that he possessed a firearm or ammunition. *See* 139 S. Ct. at 2200.

Most recently, the Supreme Court applied the *Flores-Figueroa* principle to a prosecution of physicians for distribution of controlled substances--prescription drugs--under 21 U.S.C. § 841. *See Ruan v. United States*, 142 S. Ct. 2370 (2022). That statute prohibits the knowing and intentional distribution of a controlled substance "[e]xcept as authorized." *Ruan* held that the mens rea--"knowingly or

intentionally"--applied to the "[e]xcept as authorized" provision. The Court concluded, therefore, that once the defendant produced evidence that his conduct was authorized, "the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Id*. at 2376.

These cases demonstrate that the "knowingly" element in §§ 1831 and 1832 and the "intent to convert a trade secret" element in § 1832 require proof that the defendant knew the information at issue was a trade secret. Cases interpreting these statutes confirm that the "knowingly" mens rea extends to the "trade secret" element. In *United States v. Jin*, 833 F. Supp. 2d 977 (N.D. Ill. 2012), for example, the court rejected the government's argument that under 18 U.S.C. § 1831 it was required only to prove that the defendant knew the information was "proprietary." *Id*. at 1012-14. Relying on *Flores-Figueroa*, the court held that "'knowingly' in Section 1831(a)(3) modifies 'trade secret,' and . . . Section 1831(a)(3) therefore requires the Government to prove that a defendant knew, as a factual matter, that the information she possessed had the general attributes of a trade secret." *Id*. at 1012.[7]

[7] As *Jin* and other cases show, the government can satisfy the "knowingly" element through proof that the defendant knew the information possessed the attributes necessary to qualify as a trade secret under § 1839(3), even if the defendant had no knowledge of the statute itself. *See, e.g., Jin*, 833 F. Supp. 2d at 1012 (relying on second method); *United States v. Chung*, 633 F. Supp. 2d 1134, 1145-46 (C.D. Cal. 2009) (same), *aff'd on other grounds*, 659 F.3d 815 (9th Cir. 2011); *see also, e.g., McFadden v. United States*, 576 U.S. 186, 196 (2015) (government can prove defendant's knowledge that drug analogue is "controlled substance" "either by knowledge that a substance is listed or treated as listed by operation of the Analogue

Similarly, in *United States v. Chung*, 633 F. Supp. 2d 1134 (C.D. Cal. 2009), *aff'd on other grounds*, 659 F.3d 815 (9th Cir. 2011), the district court conducted a detailed analysis of Supreme Court authority and held that under 18 U.S.C. § 1831(a)(3)--the provision at issue in Count 11--"the Government must prove that Mr. Chung knew that the information he possessed was trade secret information." *Id*. at 1145. In terms directly relevant here, the court declared:

> Whether the information was a trade secret is the crucial element that separates lawful from unlawful conduct. Possession of open-source or readily ascertainable information for the benefit of a foreign government is clearly not espionage. The essence of economic espionage is the misappropriation of trade secret information for the benefit of a foreign government. . . . It would be unjust and inconsistent with the purpose of the criminal law to hold Mr. Chung accountable for possession of what he honestly believed was publicly available information.

Id. The court thus held that to obtain a conviction under § 1831(a)(3), the government had to prove, among other elements, that "Mr. Chung knew the information was a trade secret." *Id*. at 1146.[8]

Act . . . or by knowledge of the physical characteristics that give rise to that treatment"); *Staples v. United States*, 511 U.S. 600, 605 (1994) (defendant must know "the features of his AR-15 that brought it within the scope of the Act").

[8] In *United States v. O'Rourke*, 417 F. Supp. 3d 996 (N.D. Ill. 2019), the district court recognized that § 1831 requires proof the defendant knew the information at issue was a trade secret but distinguished § 1832, because "knowingly" in that statute refers to "such information" rather than expressly to "trade secret." *Id*. at 1004-06. The *O'Rourke* court misread § 1832. As discussed above, the phrase "such information" in § 1832(a)(3) plainly refers back to the phrase "trade secret." Moreover, *O'Rourke* overlooks the requirement in § 1832(a) that the government prove the defendant's "intent to convert a trade secret." Similarly,

As this analysis demonstrates, the district court's instructions on §§ 1831 and 1832 were flawed. The court instructed the jury that "[t]he government is not required to prove the defendant . . . knew that all of the information met all of the legal requirements of a trade secret as I have defined that term." RE436:TT8278. This instruction conflicts with the plain language of the two statutes and with the caselaw discussed above.

Having told the jury erroneously that Dr. You did *not* have to know the information at issue was trade secret, the court turned to what she *did* have to know: The government must prove "that the defendant knew the information was proprietary, meaning belonging to someone else who has exclusive rights to it. . . . What the government must prove beyond a reasonable doubt is that the defendant knew that the owner treated the information as a secret and the defendant was taking the information without authorization from the owner." RE436:TT8278. This instruction omitted from what Dr. You had to know the two most salient features of a trade secret: that the owner did not merely "treat[] the information as secret," but "has taken reasonable measures to keep such information secret," 18 U.S.C. § 1839(3)(A), and that the information "derives independent economic value . . . from

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United States v. Roberts, 2010 U.S. Dist. LEXIS 516 (E.D. Tenn. Jan. 5, 2010), erred in holding that § 1832 "does not require that the defendants know that the allegedly stolen information qualified as a trade secret." *Id*. at *6. Although *Roberts* makes passing reference to *Flores-Figueroa*, it ignores both the Supreme Court's analysis in that case and the plain language of the statute.

not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information," *id*. § 1839(3)(B). These omitted requirements were the very grounds on which the defense challenged the trade secret status of the information at issue and the aspects of Dr. You's knowledge the government would have had the greatest difficulty proving. They went to the heart of the case.

The district court suggested that its knowledge instruction was required by *United States v. Krumrei*, 258 F.3d 535 (6th Cir. 2001), and *United States v. Yang*, 281 F.3d 534 (6th Cir. 2002). RE431:T7970-7350-53. But neither *Krumrei* nor *Yang* considered the reach of the "knowingly" mens rea in §§ 1831 and 1832, and neither addressed the proper jury instructions on that element.

In *Krumrei*, the defendant moved to dismiss a theft of trade secrets charge under § 1832(a)(2) on the basis that the phrase "reasonable measures" in the definition of "trade secret" is unconstitutionally vague. 258 F.3d at 538. The defendant entered a conditional guilty plea and appealed the denial of his motion to dismiss. This Court concluded that the statute was not vague as applied, because the defendant "knew the information was proprietary but . . . sought to sell the information anyway, in order to profit personally, at the expense of the true owner of the information." *Id*. at 539. The only issue before the Court in *Krumrei* was whether the defendant's admitted knowledge sufficed to satisfy the constitutional

requirement of fair notice. The Court did not construe the "knowingly" requirement in § 1832 (much less in § 1831, which was not charged), and it did not even mention the key Supreme Court cases discussed above.

Yang is distinguishable for much the same reason. The case involved a conspiracy to commit theft of trade secrets, in violation of 18 U.S.C. § 1832(a)(5). (Like *Krumrei*, *Yang* did not involve an economic espionage charge under § 1831.) The case focused largely on whether impossibility constitutes a defense to a conspiracy charge--an argument Dr. You did not make. *See Yang*, 281 F.3d at 541-44.[9] The Court rejected the argument that an impossibility instruction which requires that the defendant "believe" the information is a trade secret, rather than "know" the information is a trade secret, makes the statute void for vagueness. *See id*. at 544 n.2. This holding does not resolve the scope of the "knowingly" mens rea for conspiracy to commit theft of trade secrets (a point we address below), much less for a substantive § 1832(a)(3) offense.

The district court's reliance on *Krumrei* and *Yang* was mistaken. The court should have looked to the plain language of the statutes, the relevant Supreme Court

[9] At the government's request, the district court instructed the jury on Counts 1 and 10 that impossibility is not a defense to conspiracy. RE436:TT8272, 8292. Because the defense did not assert an impossibility defense to the conspiracy charges, the instruction on that defense has no bearing here. In the context of the impossibility defense, the court instructed the jury that Dr. You need only "believe[]" the information to be trade secret--not that she had to have knowledge of the trade secret status. *Id*.

precedent, and the cases--especially *Jin* and *Chung*--applying that precedent to §§ 1831 and 1832.

C. The Erroneous Instruction Requires Reversal on All Trade Secret Counts.

The district court's erroneous mens rea instructions require reversal on Counts 1 through 8, 10, and 11.

First, the court's instruction on the knowledge necessary for conviction on the substantive trade secret counts (Counts 2 through 8 and 11) was error, for the reasons discussed above. Instructional error on an element of the offense may be found harmless "only if 'it appears beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.'" *Hamm*, 952 F.3d at 748 (quoting *Neder v. United States*, 527 U.S. 1, 15 (1999) (internal quotation omitted)). An instructional error is harmful "as long as 'there is a reasonable possibility' that it 'might have contributed to the' result." *Id*. (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). "[W]hen jury instructions misstate the law, the error is harmful 'where the defendant contested' the issue that was the subject of the misstatement 'and raised evidence sufficient to support a contrary finding' on that issue." *Id*. (quoting *Neder*, 527 U.S. at 19). Here, Dr. You contested the trade secret status of the information at issue--and, necessarily, her knowledge that the information was trade secret--and presented ample evidence to raise a reasonable doubt on the element, both through

cross-examination of government witnesses and through the testimony of expert witness J.D. Harriman.

Second, the erroneous mens rea instruction on the substantive counts requires reversal of the trade secret conspiracy counts (Counts 1 and 10). It is black letter law that a conspiracy to commit a substantive offense requires the government to prove "at least the degree of criminal intent for the [underlying] substantive offense itself." *United States v. Feola*, 420 U.S. 671, 686 (1975); *see, e.g., Ingram v. United States*, 360 U.S. 672, 678 (1959) (same); *United States v. Trevino*, 7 F.4th 414, 425 (6th Cir. 2021) (citing *Feola* principle), *cert. denied,* 142 S. Ct. 1161 (2022). The failure to instruct the jury properly on the mens rea element of the substantive trade secret counts necessarily means that the instructions on the conspiracy counts were erroneous. *See, e.g., United States v. Wyatt*, 964 F.3d 947, 950-51 (10th Cir. 2020) (failure to instruct on conspiracy counts that government had to prove defendant had same mens rea as for underlying substantive offenses required reversal of the conspiracy convictions); *United States v. Kim*, 65 F.3d 123, 126 (9th Cir. 1995) ("While the court's instructions regarding the elements of the conspiracy offense were generally unobjectionable, they necessarily refer to the erroneous definition of the substantive offense embodied in the substantive offense instructions . . . . This failure to properly instruct the jury of the knowledge requirement in the underlying offense resulted in error in the conspiracy instruction.").

Finally, if the Court determines that Dr. You's counsel failed to preserve the error, reversal is nonetheless required under the plain error standard. *See United States v. Houston*, 792 F.3d 663, 666 (6th Cir. 2015). Under plain error review, this Court has discretion to reverse a conviction "if there is (1) an error (2) that is plain, (3) that 'affected the [party's] substantial rights,' and (4) that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 667 (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); *see, e.g., United States v. Henry*, 797 F.3d 371, 374 (6th Cir. 2015). The district court's error in failing to instruct in accordance with the language of §§ 1831 and 1832 and governing Supreme Court precedent was "plain." The error "affected [Dr. You's] substantial rights." *Henry*, 797 F.3d at 375. The trade secret status of the information at issue was hotly contested, and that dispute "creates a 'reasonable probability' that the flawed state-of-mind jury instruction led to a flawed conviction." *Id*. (quoting *United States v. Marcus*, 560 U.S. 258, 262 (2010)). Finally, the error "seriously affected the fairness, integrity, [and] public reputation of judicial proceedings," such that this Court should exercise its discretion to vacate the conviction on all trade secret counts. *Id*. It would certainly reflect poorly on the "fairness" of "judicial proceedings" if Dr. You had to spend years in prison "for a crime that a reasonable jury could find [she] did not commit." *Id*.

For these reasons, the Court should vacate Dr. You's conviction on Counts 1 through 8, 10, and 11.

III. THE DISTRICT COURT ERRED IN REFUSING TO GIVE APPELLANT'S PROPOSED "BENEFIT" INSTRUCTION ON THE ECONOMIC ESPIONAGE COUNTS.

The economic espionage counts (Counts 10 and 11) required proof that the defendant "intend[s] or know[s] that the offense will benefit any foreign government, foreign instrumentality, or foreign agent." 18 U.S.C. § 1831(a). The district court refused a proposed defense instruction, drawn from *United States v. Lee*, 2010 U.S. Dist. LEXIS 144642 (N.D. Cal. May 21, 2010), that "[a] benefit to a foreign government or its instrumentality is more than a benefit that might flow simply from doing business in that country." The defense instruction was a correct statement of the law; it was not covered by other instructions; and it went to the heart of Dr. You's defense on Counts 10 and 11. The court's failure to give the instruction requires reversal of the conviction on those counts.

A. Standard of Review.

The defense requested the "benefit" instruction quoted above, RE431:T7975-77; RE435:TT8239-40, and the district court declined to give it, RE383:TT7344-46. "A district court's refusal to give requested instructions is reviewed for abuse of discretion." *Roth*, 628 F.3d at 833 (quotation omitted). "A refusal to give requested instructions is reversible error only if (1) the instructions are correct statements of

the law; (2) the instructions are not substantially covered by other delivered charges; and (3) the failure to give the instruction impairs the defendant's theory of the case." *United States v. Newcomb*, 6 F.3d 1129, 1132 (6th Cir. 1993).

B. The Failure to Give the "Benefit" Instruction Was an Abuse of Discretion.

In *Lee*, the court carefully analyzed the phrase "benefit any foreign government, foreign instrumentality, or foreign agent." The court concluded that "[t]he 'benefit' that a foreign government enjoys as a consequence of espionage is gaining access to the stolen information." 2010 U.S. Dist. LEXIS 144642 at *16. It added:

> An inherent feature of espionage is that the information is turned over to the foreign government or to an agent of the foreign government. Espionage is not committed if a defendant takes the information to a foreign country with no intent to give it or use it for the foreign government. Section 1831 does not penalize a defendant's intent to personally benefit or an intent to bestow benefits on the economy of a country that might be realized from operating a company in a foreign country. The defendant must intend to benefit a foreign government, instrumentality or agent.

Id. at *17-*18. The court concluded that, to meet its burden of proof on the "benefit" element of § 1831, the government had to show that the defendants "acted intending to turn over possession of the trade secret to or use the trade secret on the behalf or for the benefit of an agent or instrumentality of the PRC. Evidence that Defendants solely intended to benefit themselves in the PRC, or benefit a private corporation in the PRC is insufficient for the charge of Economic Espionage." *Id*. at *20. In

accordance with these principles, the *Lee* court instructed the jury that "[a] 'benefit' to a foreign government, instrumentality or agent is more than a benefit to a foreign country, generally that might flow from doing business there." *Id*. at *20 n.16.

As the *Lee* analysis demonstrates, Dr. You's proposed "benefit" instruction was a correct statement of law. It was not "substantially covered by other delivered charges." *Newcomb*, 6 F.3d at 1132. The district court's "benefit" instruction merely stated: "The benefit to the foreign government need not be economic in nature, although that would be sufficient. Other benefits would also satisfy this element, such as furthering the national security interests of the foreign government." RE436:TT8295. And the court's "failure to give the instruction impair[ed] the defendant's theory of the case" on the economic espionage counts, because Dr. You maintained that she never intended to benefit China or its agents and instrumentalities. *Newcomb*, 6 F.3d at 1132.

The government cannot establish that the failure to give the "benefit" instruction was harmless. After highlighting the portion of a Thousand Talents Plan PowerPoint that projected 250 million yuan in annual tax revenues from the new company Dr. You allegedly hoped to form, the government asked its case agent: "Q. Agent Leckrone, in your experience when taxes are levied, who gets that money? A. The government." RE363:TT6456. In closing, the government referred to this potential tax revenue and argued that Dr. You intended to benefit China, "because

who gets taxes? We all know the answer to that, it doesn't take an expert, governments get taxes. This project is intended to generate tax revenue to the Chinese government, direct economic benefit." RE377:TT7104.

The instruction Dr. You requested would have foreclosed the government argument, because tax revenue is nothing more than "a benefit that might flow simply from doing business in [China]." Absent the instruction, the jury may well have concluded that Dr. You intended to benefit the government of China through the new business merely by virtue of the tax revenue the business would produce.

IV. THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES A NEW TRIAL.

This Court recognizes that "errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *United States v. Blackwell*, 459 F.3d 739, 770 (6th Cir. 2006) (quotations omitted). Thus, errors that "[t]aken in isolation . . . may be considered harmless" may, when examined collectively, leave the Court with "the distinct impression that . . . due process was not satisfied." *United States v. Parker*, 997 F.2d 219, 221 (6th Cir. 1993). The errors outlined above--the erroneous admission of blatantly anti-Chinese testimony from Dr. Naughton and Pier Bocchio, the elimination of the requirement that Dr. You know the information at issue was trade secret, and the refusal to give the "benefit" instruction on the economic

espionage counts--require reversal when viewed cumulatively, even if the Court concludes, contrary to our position, that they are individually harmless.

V. THE DISTRICT COURT'S SENTENCE RESTED ON IMPROPER USE AND DETERMINATION OF INTENDED LOSS.

At sentencing, the parties agreed there was no actual loss. RE426:ST7746, 7800. The district court turned to intended loss, concluded that the appropriate amount was $121,800,000, and increased Dr. You's Guidelines offense level by 24 levels.

The court's loss determination was erroneous in two respects. First, the relevant Guideline--U.S.S.G. § 2B1.1--refers only to "loss"; it makes no mention of "intended" loss. Intended loss as an alternative to actual loss is solely a creation of the commentary to § 2B1.1. U.S.S.G. § 2B1.1, app. note 3(A). But this Court has recently made clear that the commentary to the Guidelines cannot expand the scope of the Guidelines themselves. *See United States v. Riccardi*, 989 F.3d 476, 483-89 (6th Cir. 2021). The commentary's use of intended loss as an alternative to actual loss does just that. As one court recently concluded, the word "loss" in § 2B1.1 means harm that has actually occurred; it does not encompass harm that has not yet materialized. *United States v. Alford*, 2022 U.S. Dist. LEXIS 149494, at *7-*9 (N.D. Fla. Aug. 20, 2022). The district court thus erred in relying on app. note 3(A) to construe "loss" in § 2B1.1 to include harm that was intended but never occurred.

Second, to the extent intended loss is a permissible basis for calculating the offense level under § 2B1.1, the district court clearly erred in determining that loss. The court's calculation confused *sales* with *profits* and rested on impermissible speculation about Dr. You's intent and about the market for BPA-free coating products in China.

A. Standard of Review.

Dr. You noted in her sentencing memorandum that the use of "intended loss" in the commentary to § 2B1.1 may "'sweep[] more broadly than the plain text of the Guideline.'" RE400, Defendant's Sentencing Memorandum, 7557 (quoting *United States v. Kirschner*, 995 F.3d 327, 333 (3d Cir. 2021)). The district court acknowledged the issue but implicitly rejected it. RE420, Memorandum Opinion and Order, 7698 n.1. Review of this pure question of law is de novo. *See, e.g., Riccardi*, 989 F.3d at 481.

The Court reviews the intended loss calculation itself for clear error. *See, e.g., United States v. Howley*, 707 F.3d 575, 582 (6th Cir. 2013).

B. The District Court Erred in Relying on Intended Loss.

Section 2B1.1--the Guideline for all offenses in this case--includes "the loss" as a specific offense characteristic. The Guideline itself says nothing about "intended loss." That concept appears only in the commentary to § 2B1.1. U.S.S.G. § 2B1.1, app. note 3(A), which provides (with exclusions not relevant here) that "loss

is the greater of actual loss or intended loss." Because there was no actual loss here, the Guidelines calculation turns on the weight (if any) to be assigned to the commentary and its invocation of "intended loss."

As this Court recounted in *Riccardi*, *see* 989 F.3d at 484, the Supreme Court first addressed the Guidelines commentary in *Stinson v. United States*, 508 U.S. 36 (1993). Likening the commentary to an agency's interpretation of its regulations, *Stinson* concluded that commentary "must be given controlling weight unless it is plainly erroneous or inconsistent with [the guideline]." *Id*. at 38 (quotation omitted). In the wake of *Stinson*, courts (including this Court) were "quick to give 'controlling weight' to the commentary without asking whether a guideline could bear the construction that the commentary gave it." *Riccardi*, 989 F.3d at 484.

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court sharply limited the scope of the so-called "*Auer* deference" that the Court had invoked in *Stinson*. The question in *Kisor* was whether to overrule *Auer* and thus abandon any judicial deference to agencies' interpretation of their regulations. Four Justices would have taken that step. *See id*. at 2425 (Gorsuch, J., concurring in the judgment); *id*. at 2448 (Kavanaugh, J., concurring in the judgment). A bare majority of five Justices declined to jettison *Auer* entirely, but narrowly circumscribed its application. According to the *Kisor* majority, a court should not defer to an agency's interpretation of its own regulation unless the court finds that the regulation is

"genuinely ambiguous." *Id*. at 2415. "[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction." *Id*. (quotation omitted). Even if ambiguity remains, a court should defer to an agency's interpretation only if it is "reasonable," meaning that "it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id*. at 2415-16 (quotation omitted). And even then a court need not defer "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity." *Id*. at 2417.

The restrictions *Kisor* placed on *Auer* deference require a fresh look at the role of Guidelines commentary. As this Court observed, quoting Judge Bibas from the Third Circuit, *Kisor*'s interpretation of *Auer* deference "must awake us 'from our slumber of reflexive deference' to the [Guidelines] commentary." *Riccardi*, 989 F.3d at 485 (quoting *United States v. Nasir*, 982 F.3d 144, 158 (3d Cir. 2020) (en banc) (Bibas, J., concurring)). Other courts have agreed. *See, e.g., United States v. Campbell*, 22 F.4th 438, 444-47 (4th Cir. 2022); *United States v. Nasir*, 17 F.4th 459, 469-71 (3d Cir. 2021) (en banc); *cf. United States v. Kirilyuk*, 29 F.4th 1128, 1138-39 (9th Cir. 2022) (leaving effect of *Kisor* open; court declines to follow commentary under *Stinson* analysis, citing Judge Nalbandian's concurrence in *Riccardi*).

The *Kisor* analysis shows that courts must reject the commentary's interpretation of "loss" in § 2B1.1 to include "intended loss." To begin, there is no "genuine ambiguity" in the word "loss." As Judge Rodgers of the Northern District of Florida recently concluded, the varying definitions of "loss" have in common the element of "concrete materialization of harm"--that is, "harm that actually occurred." *Alford*, 2022 U.S. Dist. LEXIS 149494, at *8. The word plainly does not include "harm that never materialized." *Id*. By including "intended loss" in the definition of "loss" in § 2B1.1, "the commentary does not 'illuminate the meaning of loss, but modifies it.' And the modification is so far afield from any contextual zones of ambiguity inherent in the ordinary meaning of the word 'loss' that the commentary is rendered plainly inconsistent with the text of § 2B1.1(b)(1)." *Id*. at *9 (quoting *Kirilyuk*, 29 F.4th at 1138).

Because the word "loss" does not have any "genuine ambiguity" that would include harm that has not occurred, the commentary--in particular, the "General Rule" in app. note 3(a) and the definition of "intended loss" in app. note 3(A)(ii)--should receive no deference. The Court should read § 2B1.1 in accord with its plain meaning to include only loss that has occurred.

Even if consideration of the plain meaning of "loss" left doubt about its scope, the Court would need to "exhaust all the traditional tools of construction" before concluding that the term was "genuinely ambiguous" and deferring to the

commentary. *Kisor*, 139 S. Ct. at 2415 (quotation omitted). For purely criminal provisions such as the Guidelines, one such "traditional tool" is the rule of lenity, "the most venerable and venerated of interpretive principles." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring); *see Nasir*, 17 F.4th at 472-74 (Bibas, J., concurring); *see United States v. Canelas-Amador*, 837 F.3d 668, 674 (6th Cir. 2016) ("[W]e may apply the rule of lenity to matters relating to the Sentencing Guidelines." (quotation omitted)); *United States v. Galaviz*, 645 F.3d 347, 361-62 (6th Cir. 2011) (same).

Under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987). Here, neither Congress nor the Sentencing Commission "clear[ly] and definite[ly]" included "intended loss" in § 2B1.1. To the contrary, as *Alford* explains, the Guideline term--"loss"--plainly does *not* include harm that has not occurred. Thus, the rule of lenity requires the Court to choose the less harsh interpretation and limit "loss" to harm that actually occurred. Because the parties agree that there is no actual loss in this case--no harm that actually occurred--the district court erred in adding 24 levels to Dr. You's offense level under § 2B1.1(b)(1).

C. The District Court's Intended Loss Calculation Rests on Impermissible Speculation.

Even if the Court determines that "loss" under § 2B1.1(b)(1) includes "intended loss," it should find the district court's loss calculation clearly erroneous. The district court noted that it had only to make a "reasonable estimate" of intended loss. RE420, Order, 7698. But the court's determination went far beyond a reasonable estimate; contrary to this Court's directive, it "attribute[d] a loss to [Dr. You] based on mere speculation." *United States v. Comer*, 93 F.3d 1271, 1285 (6th Cir. 1996).

In its loss opinion, the district court "agreed with the parties that probation's estimation of intended loss, based on the cost of development of the trade secrets, is inappropriate." RE420, Order, 7701; *see, e.g., United States v. Pu*, 814 F.3d 818, 826-27 (7th Cir. 2016). The court similarly rejected Dr. You's contention that the government had not proven she intended any loss to the alleged victim companies; as the court put it, "one thing is clear [from Sixth Circuit cases]: the Court must reach a non-zero determination on the amount." RE420, Order, 7700. *But see United States v. Xue*, 42 F.4th 355, 361 (3d Cir. 2022) (affirming district court's

finding of no intended loss in trade secret case; court declares that "the Guidelines do not mandate that a district court find a loss amount of greater than $0").[10]

The district court agreed with the government that Dr. You's "anticipated profits" formed the proper measure of intended loss. The court reasoned that the alleged victim companies monopolize the can coating market in China; that, as a result, any profit Dr. You's company made in China would necessarily constitute a loss to those companies; and that Dr. You had expressed the intention, in her Thousand Talents Plan materials, to "break" the foreign monopoly on can coating in China. RE420, Order, 7702. But the court rejected the government's effort to calculate Dr. You's anticipated profits based on projections in her Thousand Talents Plan application and related materials; it found that "the profit and tax estimates put forth in materials such as presentations or grant applications are likely inflated as a result of puffery and based on speculation." *Id*.; *see id*. at 7703.

The court then devised its own calculation of anticipated profits. Based on trial evidence, the court concluded that the Chinese can coating market is estimated at $2.9 billion annually; that 60% of can makers in the Chinese market are Chinese; that Chinese can makers would prefer to buy coatings from a locally-owned supplier such as the company Dr. You contemplated forming with Weihai Jinhong Group;

[10] The *Xue* court noted that because neither party had raised the *Kisor* issue concerning intended loss that Dr. You raises here, "we will similarly not address the issue." *Xue*, 42 F.4th at 361 n.4.

that the market for a Chinese coating company is therefore $1.74 billion (60% of $2.9 billion); that just 1% of the Chinese market is BPA-free coatings--the only kind that Dr. You planned to sell; and that the annual BPA-free market for Dr. You's anticipated new company is therefore $17.4 million (1% of $1.74 billion). The court multiplied $17.4 million times "an estimated seven years of profit, from 2021 to 2027," producing "a sales total of $121.8 million." RE420, Order, 7702-04. The court concluded that $121.8 million "is a conservative and reasonable estimate" of intended loss. *Id*. at 7705. It thus increased the offense level by 24 levels. *Id*.

The district court acknowledged that its calculation contained a series of "assumptions." *Id*. at 7704-05. One such assumption "is that the demand for BPA-free coatings in the Chinese market will neither grow nor shrink." *Id*. at 7704. Another assumption "is that, as a local can-coating manufacturer, Defendant would in fact absorb all sales from Chinese-owned can makers." *Id*. at 7704-05. The court further acknowledged that "[t]here is also no way to guarantee that any Chinese can manufacturer currently accounts for purchases of BPA-free coating in China, or that to the extent it exists, such demand will continue in the future." *Id*. at 7705.

These "assumptions" alone move the district court's intended loss figure into the realm of pure speculation. But there are at least two additional problems with the court's "estimate." First, its starting point--an estimated $2.9 billion annual Chinese can coating market, RE420, Order, 7704--rests entirely on a single sentence

in Dr. You's Thousand Talents Plan application.[11] That is the very source whose "profit and tax estimates" the district court found "likely inflated as a result of puffery and based on speculation." *Id*. at 7702. The application cites no basis for its "approximate[]" "estimate." GX8-B at 14 (App.125). This single, unsourced sentence, in a document the district court found unreliable and speculative, provides the foundation on which the court's entire loss calculation rests.

Second, it appears that Dr. You's application referred to an estimated market of $2.9 billion in annual *sales*, not $2.9 billion in annual *profit*. GX8-B at 14 (3-5% of market represents "annual sales of CNY 700-900 million") (App.125); *see* RE392, Objections of the United States to the PSR, 7498-7500 (referring to "sales"); RE420, Order, 7704 (referring to seven-year "sales total" of $121.8 million). The difference between annual *sales* and annual *profits* is potentially huge; $2.9 billion in annual sales might produce very little profit if the profit margin is small.

If Dr. You's "anticipated profits" are to serve as a proxy for the loss she intended to inflict on the alleged victim companies, RE420, Order, 7701, the starting point must be her anticipated *profits*--not her anticipated *sales*. *See United States v. Shi*, 2019 U.S. Dist. LEXIS 218106, at *10-*11 (D.D.C. Dec. 17, 2019) (in

[11] The district court's opinion does not cite a source for this estimate. RE420, Order, 7704. But the government's PSR objections show that it came directly--and solely--from a single sentence in Dr. You's application. RE392, Objections of the United States to the PSR, 7498. There is no evidence who prepared the relevant portion of the application.

performing intended loss analysis in trade secret case, court looks to anticipated "profits" defendant's company would make and corresponding "lost profits" for the victim company). This is so because (for example) if Dr. You's new company (and, by proxy, the alleged victim companies) merely broke even in the Chinese BPA-free coatings market, then her company would have no profit (regardless of the size of its sales) and the alleged victim companies (again, by proxy) would have no lost profit--and thus no loss. The district court's choice of a fundamentally wrong starting point renders its subsequent calculations unreliable.

The specificity of the district court's "anticipated profit" numbers creates the appearance of precision. But the first such number--$2.9 billion--rests on sales rather than profits, rendering the following numbers meaningless. And even apart from this basic error, the numbers on which the court relied represent at best very rough estimates. In combination, they are nothing more than a guess. No person should spend years in prison based on a guess.

D. If the Court Affirms Dr. You's Conviction, It Should Remand for Resentencing Under a Correct Loss Calculation.

Although not binding, the Sentencing Guidelines remain "the starting point and the initial benchmark" for federal sentences. *Gall v. United States*, 552 U.S. 38, 49 (2007). An error in calculating the Guidelines range is harmless only if the government can "demonstrate 'to the Court *with certainty* that the error at sentencing did not cause the defendant to receive a more severe sentence.'" *United States v.*

Gillis, 592 F.3d 696, 699 (6th Cir. 2009) (quoting *United States v. Lanesky*, 494 F.3d 558, 561 (6th Cir. 2007) (emphasis in original)).

The government cannot make such a showing here. The district court repeatedly remarked on the significance of the loss calculation to its sentencing decision. *E.g.*, RE426:ST7792-93 (court notes that intended loss is a "huge, huge issue"--the difference between a time-served sentence and the government's recommendation of a 240-month sentence); *id*. at 7819 (court comments that intended loss is "a very significant issue in the case. It's the difference between a Guideline range that would certainly fall within the range of the time already served by Dr. You and a Guideline range that approximates 20 years or more. So it's a very, very significant question. It would result, could result in a Guideline range driven almost entirely by the amount of the intended loss."); RE427:ST7887-88 (in pronouncing sentence, court states that the "[b]eginning point" is the advisory Guideline range; the Guideline range is "important"). These statements foreclose any contention that the district court's errors in using and calculating intended loss under § 2B1.1 were harmless.

CONCLUSION

For the foregoing reasons, the Court should reverse Dr. You's conviction and remand for a new trial. If the Court declines to reverse Dr. You's conviction in its entirety, it should vacate her sentence and remand for resentencing.

DATED: November 17, 2022

Respectfully submitted,

/s/ John D. Cline

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND SIXTH CIRCUIT RULE 32(a)

Case No. 22-5442

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and 6 Cir. R. 32(a), the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 12,988 words.

/s/ John D. Cline
John D. Cline

CERTIFICATE OF SERVICE

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U.S. Court of Appeals Docket Number: 22-5442

I hereby certify that on the 17th of November, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ John D. Cline
John D. Cline

No. 22-5442

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

XIAORONG YOU,

Defendant-Appellant.

On Appeal From the United States District Court
For the Eastern District of Tennessee
Case No. 2:19-cr-00014-1
The Honorable J. Ronnie Greer

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I certify that the foregoing documents are included in the district court's electronic record.

Respectfully submitted,

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