UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:19-CR-20693-SEITZ

UNITED STATES OF AMERICA

v.

PETER SOTIS,

Defendant.
_____/

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT PETER SOTIS'S MOTION FOR BOND PENDING APPEAL

The United States of America, by and through the undersigned Assistant United States Attorneys, hereby files its Response in opposition to Defendant Peter Sotis's *Pro Se* Motion for Bond pending appeal ("Motion"). *See* D.E. 218.

Peter Sotis ("Sotis" or "the Defendant") raised three issues on appeal, currently pending before the U.S. Court of Appeals for the Eleventh Circuit: (1) sufficiency of the evidence, (2) eliciting evidence that he alleges invaded the province of the jury, and (3) miscalculation of the sentencing guidelines and rendering a disparate sentence. None of these issues presents a close question on appeal and accordingly Sotis's Motion should be denied.

BACKGROUND

Following a jury trial in October 2021, Sotis was convicted of all three counts with which he was charged: conspiracy to violate the International Emergency Economic Powers Act (IEEPA) and the Export Administration Regulations (EAR), in violation of 18 U.S.C. § 371 (Count 1); attempted export of a Commerce Control List item to Libya without a license, in violation of 50 U.S.C. §§ 1705, 2 and 15 C.F.R. 764.2 (Count 2); and smuggling, in violation of 18 U.S.C.

§§ 554(a), 2 (Count 3). Sotis's co-defendant Emilie Voissem was convicted of those same export charges but acquitted of an additional charge of making a false statement to a Government official in violation of 18 U.S.C. § 1001 (Count 4). In January 2022, this Court held a two-day sentencing hearing. The Court agreed with the Presentence Investigation Report that U.S.S.G. § 2M5.2(a)(1) applied, setting the base offense level at 26. Then the Court departed downward five levels to level 21 under Application Note 2, which permits the Court to depart from the Guidelines based on the "degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences."

The Court then applied a two-level enhancement for obstruction of justice based on the Defendant's "deliberate efforts to frustrate the investigation, ranging from instructing people to not comply with the subpoena, destroying documents, putting pressure [on co-defendant Voissem to stall discussions with federal investigators] and other intentional efforts." D.E.186:15. The Court also applied a two-level enhancement for Sotis's leadership role in the conspiracy. D.E. 186:43. Those enhancements brought the total base offense level to 25. *Id*. With a total base offense level of 25 and a criminal history category of I, the Court determined that the advisory Guidelines range was 57 to 71 months of imprisonment. D.E.186:44. The Court sentenced Sotis to 57 months' imprisonment, the low end of the calculated Guidelines range.

On or about May 13, 2022, Defendant Sotis reported to FCI Coleman to begin his sentence. D.E. 173. He filed his appellate brief in the Eleventh Circuit in *United States v. Sotis*, Case No. 22-10256 through appellate counsel on May 16, 2022. The Government filed its response brief on July 15, 2022, and the Defendant filed his reply brief on August 2, 2022. The case is currently pending on appeal and is tentatively scheduled for oral argument in February 2023.

LEGAL STANDARD

A defendant seeking release on bond during the pendency of his appeal must show that: (1) he is not likely to flee if released; (2) he is not likely to pose a danger to the community if released; and (3) his appeal raises a substantial question of law or fact likely to result in a reversal or an order for a new trial. 18 U.S.C. § 3143(b); *United States v. Giancola*, 754 F.2d 898, 899-901 (11th Cir. 1985).

The Eleventh Circuit has held that "a 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." *Giancola*, 754 F.2d at 901 (adopting *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985)).

ARGUMENT

Defendant's Motion should be denied because no issue raised in his appeal provides any basis in fact or law to support a reversal of his conviction or sentence. On two of the claims Sotis focuses on in appellate briefing—the sufficiency of evidence that an export licensed was required in this case and the propriety of testimony by Michael Tu, a senior engineer in the U.S. Department of Commerce —his trial counsel affirmatively conceded that the license requirement and the substance of Tu's testimony were not issues in contention at trial, and accordingly Sotis is barred from raising it now on appeal. On the claim that testimony by former Commerce Special Agent Brent Wagner invaded the province of the jury, Sotis invited the testimony by his cross examination on how other cases were handled civilly instead of criminally. Sotis also declined to object when given an opportunity to contest any reference to the Defendant's "knowledge" or "willfulness," and, in any event, the testimony was harmless because of its fleeting nature and the overwhelming collective evidence of willfulness presented at trial. And on the sufficiency of

evidence regarding willfulness and the conspiracy and the appropriateness of the sentence, the facts abundantly establish the propriety of the jury's verdict and the Court's sentence.

As to the first and second criteria for bond pending appeal, the Government does not assert that Defendant would be likely to flee if released; he was released on bond during trial and was permitted to self-surrender without incident. Although a closer question, the Government also does not contend that the Defendant would pose a danger to the community if released. The Defendant's conviction of a violent federal crime – robbing a jewelry store with others at gunpoint – happened more than 25 years ago. And although the Defendant threatened to kill a key Government witness, those threats appear to have been chiefly a form of intimidation and were not supplemented by any actions to suggest that the Defendant intended on following through with physical harm. Rather, Defendant's Motion should be denied on the basis of his failure to raise any issue that is a "substantial question of law or fact likely to result in a reversal or order for a new trial."

A. Ample Evidence Supports the Jury's Verdict.

1. Because Defendant at Trial Asserted That a License Was Required , He is Barred From Claiming the Opposite on Appeal.

The Defendant principally rests his sufficiency argument on a new claim, asserted for the first time on appeal, that the Government has not proven that a license was required to export the rebreathers at issue in this case to Libya. *See* Sotis Appellate Brief p. 14-28; Sotis Reply Brief, p.1-11. Not only did the Defendant not argue this at trial, his defense counsel specifically and repeatedly told the jury and the Court that the defense was not contesting that a license was required in this case. Because of that, the Defendant is affirmatively barred from raising this claim on appeal under the doctrine of invited error. *See United States v. Brannan*, 562 F.3d 1300, 1307 (11th Cir. 2009) (holding that when the defendant invites the error, this Court is barred from reviewing the claimed error on appeal). Even if that were not so, there is no doubt, as explained

further below, that the Government proved that a license was required.

In his opening statement, Sotis's counsel made clear that he agreed with the Government that the rebreathers in this case were dual use, were on the Commerce Control List, and required a license to ship to Libya:

> [T]here is no dispute about, that this is a different type of rebreather—of scuba equipment because it allows the person using it to stay down twice as long as he would under normal scuba equipment, because you have this recirculation of carbon dioxide in the system. You also are allowed or permitted to stay not only twice as long, but you can go to twice the depths that you can on regular scuba equipment, and one of the effects of this is that because you are recirculating the air, this particular type of scuba equipment does not produce—it produces little or no bubbles. And for that reason, it has a possible, what they call "dual application," and that dual application means that it can be used for military use because people could stay down without being detected from the surface. And because it has that dual application, it is listed on this Commerce Control List as the type of equipment that requires a license if sent to certain countries. One of those countries is Libya.

D.E. 175:19-20.

Later in his opening statement, Sotis's defense counsel reiterated to the jury that "we are not disputing that the license is required. We are not disputing that they didn't have a license." D.E.175:29.

And then at sentencing, after the Defendant heard all the evidence in the case and was convicted based on it, the Defendant still unambiguously asserted through his counsel that they were not contesting that the rebreathers in this case were closed circuit rebreathers that were on the Commerce Control List:

> COURT: . . . All items categorized under ECCN 8A002.Q.1 were controlled for export for, among other reasons, national security reasons. 15 CFR Part 774 Sup No. 1, entry for ECCN 8A002.Q.1 (closed-circuit rebreathers). So that basically says these rebreathers were on the Commerce Control List.
>
> MR. UDOLF: That's not an issue. We don't object to that.

D.E. 174:14-15.

A few minutes later, defense counsel for Sotis repeated that the rEvo rebreathers in this case required a license:

> The principal argument that we made with respect to the rEvo rebreathers, clearly rebreathers are on the Commerce Control List that's issued by the Commerce Department, which means they require a license. That's not an issue in the case.

D.E.174:16

There is a reason that defense counsel did not contest that a license was required in this case: because it clearly was. Both Commerce senior engineer Michael Tu and former Special Agent Wagner testified that a licensed was needed and the military application of the rebreathers. D.E.175:69-71, 199-200. Shawn Robotka, Sotis's former business partner, testified that the rebreathers had a distinctive military application, were restricted for export, and produced little to no bubbles. D.E.177:121-22; *see also* D.E.175:200. And the documentary exhibits in evidence shows it: Add Helium's own invoices describe the Revo rebreather training as "CCR", meaning closed circuit rebreathers, which are restricted under the Commerce Control List. *See* Gov Ex. 7B. Revo III's manual indicates that these are "mCCR." *See* Gov. Ex. 3. And, though not mentioned at trial, it should give comfort to the Court that rEvo's website itself states in bold font that the rEvo III rebreathers at issue in this case are "closed circuit rebreathers." *See* rEvo website at http://www.revo-rebreathers.com/products/revo-iii-closed-circuit-rebreather/standard/

Sotis's attempt to deny now what he previously deemed undeniable is foreclosed on appeal.

2. The Government's Evidence Established Willfulness and a Conspiracy.

Trial evidence established that the Defendant was warned by his shipping company that a Commerce or State Department license may be required and that there were "red flags" with the shipment; he was informed by his co-defendant Emilie Voissem that there were terrorism concerns with the shipment; he was put on notice by his business partner Shawn Robotka that shipments to

Libya were banned, that the transshipment of the rebreathers would be illegal, and that a Commerce agent came to their business and declared that the rebreathers were detained and could not be shipped pending a licensing determination; the Defendant himself acknowledged in email that this was an "illegal shipment" to Libya; and the Defendant affirmatively lied to Mohammed Zaghab about what Special Agent Wagner had said about whether the rebreathers could be shipped. *See* Gov. Appellate Response Brief, p. 35-41. Sotis conspired with Voissem to illegally export the rebreathers by instructing her to have the shipment go through the Zaghab's shipper, instructing her not to tell the Zaghabs about the meeting with Special Agent Wagner, and by explicitly instructing employees to not communicate over email around the time of the export. *Id*. In short, Sotis does not come close to showing that the evidence, in the light most favorable to the jury verdict, was insufficient to sustain his convictions.

B. Witnesses' Testimony Did Not Invade the Province of the Jury.

1. Michael Tu's Testimony

Michael Tu, a senior engineer for export administration at the Commerce Department's Bureau of Industry and Security, testified at trial to explain to the jury the licensing requirements of IEEPA, why certain items are controlled for export, and the fact that a license was determined to be required and not obtained by the Defendant. At no point during this testimony did Defendant ever object, nor did he seek to cross examine Tu. In fact, as cited above, the Defendant had already conceded in his opening statement that he was not contesting any material part of Tu's testimony – that the rebreathers were dual use or dual application with a potential for military use, that a licensed was required, and that the defendants did not obtain a license. Defendant's new contention, raised for the first time on appeal, that Tu's testimony invaded the province of the jury should be barred as invited error and clearly fails even if analyzed under the plain error standard

or even under abuse of discretion.

The Eleventh Circuit has squarely allowed this kind of testimony before. Indeed, a case that the Defendant highlights in his own appellate brief establishes that the Defendant has no basis for arguing that Tu's testimony invaded the province of the jury. In *United States v. Fuentes-Coba*, 738 F.2d 1191, 1197 (11th Cir. 1984), the Eleventh Circuit concluded, in an export violation/sanctions case in which the former chief counsel and director of the Office of Foreign Assets Control testified about the licensing provisions and regulations pertaining to the Cuban embargo, that such testimony "did not invade the province of the court in its determination of the applicable law [] or of the jury in its evaluation of the facts in the light of that law." The same is true here.

2. Special Agent Wagner's Testimony

Sotis's defense counsel, through his cross examination of Special Agent Wagner, opened the door to the testimony he complains about on appeal:

> Q. In all your years working with the Commerce Department, have you ever brought criminal charges against anyone for a violation of this particular regulation?
>
> A. Yes.
>
> Q. Specifically, for rebreathers?
>
> A. No, not for rebreathers.
>
> Q. Have you ever charged someone civilly with violations?
>
> A. Not for rebreathers, no.
>
> Q. Have you charged them for a civil violation for any such offense?
>
> A. As far as rebreathers, or anything?
>
> Q. As far as anything.

A. Yes.

Q. So, both of those remedies are available to you, criminal and civil; is that right?
A. That's correct.

D.E. 175:130-31.

This line of cross examination opened the door to an explanation through witness testimony why this case was brought criminally, as opposed to civilly, lest the jury be left with the misimpression that this was a minor infraction compared to other cases and should properly be the subject of a federal criminal case. The Government proceeded to elicit precisely this type of testimony:

> Q. Now, there were some questions about the option of criminal versus civil penalties. The decision about bringing criminal violation as opposed to civil violation, does that depend on the magnitude of the violation?
>
> A. There are several factors; but the magnitude and the knowledge are the key factors of whether it would be a civil case or a criminal case.
>
> Q. And compared to other cases, there was a question about other cases. Have you seen other cases where it was this level of willfulness?

D.E.175:165.

Defense counsel at that point objected on the grounds of mentioning "other cases." The court overruled the objection and the Government reiterated the question, with Special Agent Wagner answering that he had never seen this much "knowledge in a case." The Court, outside the presence of the jury, gave defense counsel another opportunity to object on the grounds of mentioning "willfulness" and they declined to take it: "I expected the objection to be to the word willfulness, but there was no objection to that. It was simply the same grounds as to other cases. . . So then, if it was just simply an objection to other cases, then that was the only thing that was asked, I guess I will leave it at that." The Government also explained that it mentioned the word

"willfulness" as equivalent to the word "knowledge," which the witness had used. D.E. 175:204. Accordingly, the Defendant's claim should be reviewed for plain error only. *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983) (concluding that "a defendant can not [sic] complain on appeal of alleged error invited or induced by himself, particularly where it is not clear that the defendant was prejudiced thereby").

Even if it were error, the harmless error standard would apply and it is not a close question. This small part of Special Agent Wagner's testimony was not mentioned again in the entirety of the rest of the trial. And the evidence as to willfulness, as explained above, was more than sufficient. *See United States v. Hawkins*, 905 F.2d 1489, 1493 (11th Cir.1990)("[W]here an error had no substantial influence on the outcome, and sufficient evidence uninfected by error supports the verdict, reversal is not warranted.").

C. The Defendant's Sentence was Appropriate.

The Court properly sentenced the Defendant under Section 2M5.2(a)(1). The Guidelines statutory index indicates that this Guideline section applies to precisely the statute for which Sotis was convicted, a violation of 50 U.S.C. § 1705(a).

Moreover, the Defendant's sentence was well within the range of other cases and, if anything, was lower than comparable cases. The Court explained thoroughly the basis for its sentencing under the factors of 18 U.S.C. §3553. None of the cases cited by Defendant presents a comparable fact pattern: a defendant who was convicted of violating export laws after a jury trial, who was enhanced for obstructing justice, and who played a leadership role in carrying out the export violation conspiracy. The Defendant falls well short of showing that the Court abused its discretion in sentencing him to 57 months' imprisonment.

CONCLUSION

For all the reasons states above, the Court should deny the Defendant's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned electronically filed the foregoing document with the Clerk of the Court using CM/ECF on November 28, 2022 and will mail a copy to Pro Se defendant Peter Sotis at his Bureau of Prison address at FCI Coleman.

s/ Michael Thakur
MICHAEL THAKUR
ASSISTANT UNITED STATES ATTORNEY