No.-22-10256

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATE OF AMERICA
Plaintiff-Appellee,

vs.

PETER SOTIS,
Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Florida
Lower Case No. District: 113C-1 : 1:19-cr-20693-PAS-1
The Honorable Patricia A. Seitz

RESPONSE AND REPLY BRIEF OF APPELLANT PETER SOTIS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

Comes now Appellant PETER SOTIS, by and through undersigned counsel, in accordance with the United States Court of Appeals for the Eleventh Circuit Rules (Rev. 4/01/20), 11th Cir. R. 28-1(b) and 11th Cir. R. 26.1-1, discloses the following interested persons and Corporate Disclosure Statement:

Alicia Otazo-Reyes	Magistrate
Andy Camacho	Assistant United States Attorney
Bruce Lee Udolf	Defense counsel, Trial level
Chris M. McAliley	Magistrate
Danielle S. Tarin	Counsel for Appellee

David Lim	US Dept of Justice
Edwin G. Torres	Magistrate
Hulda Odette Estama	Defense counsel, Trial level
John J. O'Sullivan	Magistrate
Juan Antonio Gonzalez	United States Attorney for the Southern District of Florida
Laura Thomas Rivero	Assistant United States Attorney
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Michael Thakur	Assistant United States Attorney
Nathan Michael Swinton	US Dept of Justice
Nicole Grosnoff	Assistant United States Attorney
Patricia A. Seitz, Senior U.S. District Court Judge	Trial Judge
Reginald Moss	Counsel for Emilie Voissem, codefendant
Ursula Ungaro	Trial Judge
Yvette Hernandez	Court reporter

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I
THE GOVERNMENT WAS REQUIRED TO PROVE THAT REVO III REBREATHERS IN PARTICULAR REQUIRED A LICENSE

The government argues that it proved that the rebreathers in question in this case were "the type of rebreathers" that required an export license. Basically, the government argues that because closed-circuit rebreathers and semi closed-circuit rebreathers are listed under the same section in the commercial control list (CCL) they are indistinguishable for purposes of a license and that by being listed there a license is required for both. (Appellee's brief, pp. 26-31).

The government's position is contrary to its own evidence presented at trial. Tu stated that he looks at ***what the item is,*** whether it is controlled by the CCL, the end use, and the end user. (Tr.Vol. I, p 195).). Tu failed to discuss the other components to the analysis, that is, who the end user was, the end use, and the specifications of this rebreather as to what made it suitable for military use. There is no evidence in the record that the government proved that these particular rEVO III rebreathers were destined to be shipped to a dangerous person to be used for a dangerous purpose. The Zaghabs were not prosecuted, and no one interviewed Osama Bensadik, or the ender user, CODI Group. (Tr. Vol. II, p. 193). These points were established on cross-examination challenging the government's position that the rEVO III's had a dual- use.

The government's position on appeal is not only contrary to its own evidence

presented at trial, but is contrary to the law. While it is true that Tu attributed an ECCN of 88002.q, which pertains to both closed and semi-closed-circuit rebreathers, (Tr.Vol. I, p. 199), having an EECN and being listed on the CCL is not the end-all.

At trial the government took the position that rEVO III's were "dual-use." (Tr.Vol. II, p. 123-124). As stated above, the defense challenged that position. The BIS within the U.S. Department of Commerce is responsible for "dual-use" items having both commercial and military or proliferation applications. (Appellant's App.Vol., II, p. 115). As stated on their website, relatively few exports of dual-use items require obtaining an export license from BIS prior to shipment. Dual- use export licenses are required in certain situations involving national security, foreign policy, short-supply, nuclear non-proliferation, missile technology, chemical and biological weapons, regional stability, crime control, or terrorist concerns. The license requirements are dependent upon an item's technical characteristics, the destination, the end-use, the end-user, and other activities of the end-user. The "dual-use" analysis requires a person to "screen the customer" to determine whether the customer is on the "Denied Persons List," the "Unverified List," the "Entity List," the "Specially Designated Nationals List, "or the "Debarred List." (Appellant's App. Vol. I, p. 115-116). There is no evidence in the record the government conducted this analysis.

An item's technical characteristics are paramount in the analysis. It was insufficient at trial for the government to present nothing about the item's true

characteristics. It is unpersuasive on appeal to argue that being of the "type" of items listed on the CCL is enough to sustain the convictions. Evidence on the end use and the end user are paramount to the analysis. It is insufficient at trial for the government to present nothing about these aspects of dual- use analysis, and to simply have someone say they made the determination a license was required. It is unpersuasive on appeal to fail to address any aspects of dual-use analysis in its brief, other than to say that dual- use items "generally" require a license, which is contrary to the BIS website.

The technical characteristics of scuba gear were particularly important to this case because underwater gear was addressed elsewhere in the CCL, and that section did not require a license for shipment to Libya. CCL section 8A992 addresses other underwater equipment. Items listed under 8A002 are controlled for NS (national security) and AT, (anti-terrorism). *See*, 15 CFR 738.2.(d)(2)(ii). According to the Country Chart (Appellant's App. Vol.I, p 96-104), as of November, 2016, Libya was controlled only with regard to the NS classification, not the AT classification. As to "other underwater equipment" listed under 8A992, it was only controlled for AT. Thus, no license would be required to ship to Libya.

The absence of any controls for Libya under the generalized list of underwater equipment (8A992) is significant because the rEVO III's were rejected for military use. The government argued at sentencing that even though these rebreathers were rejected for military use, they could nonetheless be used in training. (Sent. Tr. Jan 11, 2022, p.

33,39, 41, 42). Any type of thing can be used for training, including dime store plastic toy scuba gear. Thus, flushing out the characteristics of these particular rebreathers was indispensable to the question of whether a license was required.

The government cited *United States v. Singer*, 963 F.3d 1144, 1150 (11th Cir. 2020), stating that "EAR generally prohibit exporting dual- use items to a foreign country without a license from the Department of Commerce's Bureau of Industry and Security." (Appellee brief, p. 12). The case cited does not support that position, and in fact, it supports Appellant's position. Specifically, the *Singer* court stated that the CCL controls only the "most sensitive items":

> The Department of Commerce identifies the most sensitive items subject to EAR controls on the Commerce Control List (or the "List"), published at 15 C.F.R. Part 774, Supp. No. 1. It categorizes items on the List by Export Control Classification Number ("ECCN"), each of which is ***subject*** to export-control requirements, depending on the destination, end use, and end user of the item (emphasis supplied) .

Id. The *Singer* Court explained that items on the CCL are "subject to control," depending on the destination, end use, and end user of the item, but not that these controls "generally prohibit exporting dual- use items to a foreign country without a license from the Department of Commerce's Bureau of Industry and Security," as argued by the government. Having cited this case, the government only highlights how important completing the dual-use analysis is to the determination of whether a license is required.

Appellee cites in footnote 2 to Volume 1, pp. 194-180 for the statement that

because rebreathers are on the CCL and controlled for national security and anti-terrorism, a license is necessarily required. That is a mischaracterization of the testimony and the law. In fact, the reference in the record is to Tu's testimony, and he specifically stated:

> Q: (government) And, in general, what is the reason why a particular transaction would trigger a license requirement from Commerce?
> A. (Tu) Four primary reasons; what the item is, what the destination is for that item, who the end user is, meaning who is going to receive the item, and what they are going to do with it or the end use of the item.

(Tr. Vol. 1, p . 194). Tu went on to explain what "military application" meant, describing an item that actually had the capability to avoid detection and enhance the enemy's military capabilities:

> Q (government) Do you know anything more about what the national security concerns are with these devices?
> A. (Tu) Sure. In general, when we consider an item controlled for national security reasons, it is because it is a commercial item that could also be a key or major contributor to military and enhanced military capability. In this case, what the rebreathers might offer in order to enhance the military capabilities of an adversary is they would deprive us of a lot of the so-called surveillance techniques we use. I referenced the lack of bubbles being produced by a diver. Lack of surveillance in the port security, maritime world done via acoustics or visual surveillance, and it is much harder to detect a diver when they are not using bubbles. A second advantage that this would provide is enhanced military -- is to provide much longer range for a diver, that being the distance a diver can travel without surfacing.

(Tr. Vol. 1, p 199-200). The characteristics of these particular rEVO III rebreathers was critical to the determination of whether a license was required. Having

the capability to assist in training is not enough. Failing to distinguish the rEVO III's as either a closed- circuit or a semi- closed circuit was critical. Tu explained the difference between the two (Tr.Vol. I, p. 198) , but he failed to establish the rEVO III's as closed- circuit, as charged.

The government argues that the manual established that the rEVO III's were closed- circuit, arguing that "the rEvo manual placed into evidence shows that the manufacturer itself considered the rebreathers at issue to be closed- circuit rebreathers (or CCRs). See Gov't Ex. 3." (Appellee's brief, p. 38). The manual says no such thing. Exhibit 3 admitted into evidence is contained in Appellant's Appendix and consists of two pages. (Doc. 110-2, Exhibit 3) (Vol. II, p. 112-113). The exhibit does not address what type of rebreather the rEVO III is. [1]

The government argues on appeal that trial counsel invited the error as to whether a license was required, arguing that it did not cross examine Tu and "did not challenge Special Agent Wagner's testimony on any of these points." (Appellee's brief, p. 29). There was no stipulation between Sotis and the government that a license was required. Merely failing to object is not sufficient to trigger the invited-error

[1] Tu provided in testimony that he received information about "the commodity," and described it as both closed- circuit rebreathers and "micro" circuit rebreathers. (Tr. Viol. 1, p. 197.) He then modified his testimony after being prompted by the court reporter to clarify, and then said, "closed circuit rebreathers and semi-closed circuit rebreathers." (Tr. Vol. 1, p. 197-198). Tu's testimony appears to be an admission that a "micro" circuit rebreather was synonymous with "semi-closed circuit" rebreather.

doctrine. *United States v. Dortch*, 696 F.3d 1104, 1112 (11th Cir. 2012). Statements made by counsel in opening and closing statement are not evidence, and the jury was so instructed. (Doc. 101, p. 4). Most importantly, Wagner was cross examined extensively that he did not know himself whether a license was required. (Tr. 127). T Trial counsel challenged the notion that rEVO III's were dual-use, pointing out on cross that the Zaghabs were not prosecuted, and no one interviewed Osama Bensadik, or the ender user, CODI Group. (Tr. Vol. II, p. 193).

The government on appeal subtly shifts the burden to the defendant to establish that a license was ***not*** required. On the contrary, the government has the burden to prove its case and holding the government to its burden does not invite error. The government simply failed to prove its case.

The government states on appeal that Sotis asserted in his brief that the rEVO III's were open circuit. That is a mischaracterization of the argument. What Sotis did say in the brief is that "the government never established the rEVO III was indistinguishable from simpler, open-circuit, underwater equipment that was not restricted for export to Libya." (Appellant's Brief, p. 23). The dangerous quality of the rEVO III's, a dangerous purpose, and a dangerous user were all hurdles the government never cleared. The rEVO III's were rejected for military use. In that regard, the government did fail to distinguish them from ordinary open circuit rebreathers not restricted for shipment to Libya.

Convictions not supported by sufficient evidence violate the mandate that all criminal charges must be proven beyond a reasonable doubt. The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U. S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

II.
BECAUSE EXAMINING THE PARTICULARITIES OF ANY ITEM CONTROLLED BY THE CCL IS CRITICAL TO THE LICENSE DETERMINATION CHARGING SOTIS WITH EXPORT OF CLOSED-CIRCUIT REBREATHERS WAS FATAL

The government charged in the indictment that the rEVO III's were closed-circuit rebreathers, citing to ECCN 8A002.q.1. (ECF 3, Indictment, par. 5,9; Appellant's App. Vol. I, p. 44, 46-48). These paragraphs were incorporated by reference into every charge. Thus, it was incumbent upon the government to prove that rEVO III's were closed-circuit rebreathers for all counts. They failed to do so.

The government argues that the particularities of the rEVO III rebreathers is insignificant, which is a misstatement of the law. The government argues that closed-circuit and semi closed-circuit rebreathers are listed side by side in the CCL, and that any variance from the indictment and the proof at trial did not affect Sotis' substantive rights. Specifically, the government argues: "Any variance was immaterial because both "closed- circuit" and "semi-closed circuit" rebreathers were on the Commerce Control List and thus required a license for export to Libya." (Appellee's brief, p. 32).

As shown above, being listed on the CCL is not the end-all.

Wagner described the rebreathers but did not say if they are closed, semi or open. (Tr.Vol. I, p 96). Tu also failed to make the distinction. In any event, it was never established that the rEVO III's were closed- circuit, as alleged by the government.

Evidence on closed-circuit rebreathers was highly prejudicial. Wagner testified as follows:

> Q: And did you provide a specific example of what could happen if it ended up in the wrong hands?
> A. I did.
> Q. And what was that example?
> A. So the example I gave to them was for cruise ships, which is a perfect example. If someone wanted to, a terrorist organization, wanted to do something with a cruise ship, it would be very easy with this technology to utilize the scooters and the rebreathers to go underwater, weld something to the bottom, weld something to the bottom of the cruise ship, whether a bomb or anything, and then be able to escape very quickly with this technology, and pretty much be undetected.

(Tr. Vol. 1, p. 58). The government never proved at trial that the rEVO III's were capable of functioning in this capacity.

In fact, at sentencing, it was shown that the rEVO III's cannot function in this way. (Tr. Sent. January 11, 2022, p. 22-40). Chauncey Brewster Chapman III, who designed and built test systems for US Navy standards, explained that rEVO III's produce bubbles and make noise and, he believed, contained a lot of steel. He explained that ferrous metals will trigger a magnetic sensor. Although he could not specifically say whether the US military utilizes rEVO III's, he did say that the US Military invited

"a number of recreational rebreather manufacturers to come in, train a group of Navy divers, and leave some units for revaluation" and the rEVO III "was not accepted for use by the fleet." He stated that the rEVO III's were not useful in active military missions, although it could be used to train a diver. On cross, he stated that semi-closed-circuit rebreathers are not designed as stealth units. (Tr. Sent. January 11, 2022, p. 22-40). The government never called anybody to rebut Chapman's testimony, but did include an affidavit of James J. Marsh (ECF 148, Exhibit 1 thereto), which stated that the units had a military application because they could be used in training, and the government argued that basically that was good enough. (Tr. Sent. January 11, 2022, p. 42).

The evidence the government would have needed to prove its case did not exist. The government failed to prove its case, as charged, and the difference between what was charged and the evidence at trial is substantial. Sotis had no choice but to allow the government to attempt to prove that the rEVO III's were closed-circuit, because it was charged that way. The potential danger for closed-circuit rebreathers far exceeds the capabilities of the rEVO III's. Surely, had Sotis been properly charged, evidence of a more dangerous type of equipment would have been irrelevant and inadmissible. The variance was fatal and the evidence failed to meet the charges brought against Sotis. The charges must be vacated.

III.
TU AND WAGNER'S TESTIMONY INVADED THE PROVINCE OF THE JURY

a. **Tu's testimony that a license was required**. The only evidence in the record that a license was required is because Tu said so. The opinion of one person is not enough. Allowing opinion testimony to support such a crucial part of the state's case, without supporting facts from which the jury could make that determination, provides no safeguard against arbitrary and uneven application of the law.

Taking factual determinations away from the jury invades the province of the jury, whether it occurs with a testifying witness or with the court. *United States v. McClain*, 545 F.2d 988, 1003 (5th Cir. 1977) (Only the jury may properly decide a relevant factual question). *United States v. Goetz*, 746 F.2d 705, 708 (11 Cir. 1984) (No fact, not even an undisputed fact, may be determined by the Judge. If the plea of not guilty puts all in the issue, even the most patent truths. In our federal system, the trial court may never instruct a verdict either in whole or in part.); *Compare, United States v. Cardoen*, 898 F. Supp. 1563 (S.D.Fla. 1996) (The court's rulings on these issues do not invade the jury's province because they do not determine factual questions that are relevant to the determination of guilt or innocence).

The same would go for a witness who testifies. Tu stated that a license was required. That was a factual determination that was left up to the jury. There was no evidence presented by which the jury could determine for itself whether a license was

required. Tu's testimony was improper and the evidence is otherwise insufficient to render this improper opinion testimony harmless.

A witness' claim of authority to classify any item as a "defense article," without revealing the basis of the decision and without allowing any inquiry by the jury, would create or allow the sort of secret law that was condemned in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935). A regulation is published for all to see. As explained in the Seventh Circuit in *United States v. Pulungan*, 569 F.3d 326 (7 Cir. 2009):

> People can adjust their conduct to avoid liability. A designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use at a criminal trial, and immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian regimes. Government must operate through public laws and regulations.

citing, United States v. Farinella, 558 F.3d 695 (7th Cir. 2009). Tu simply declared that a license was required. There is no supporting evidence in the record, only his conclusion on this critical fact on whether a law had been broken. Wagner's "detention" order for the items at Add Helium was never put in writing. (Tr. Vol. I, p. 140). Wagner's actions were arbitrary and undocumented.

b. Wagner's testimony that Sotis' actions were willful. Wagner' testified on an ultimate issue for the jury, Sotis' intent:

> (Govt): There were questions on cross-examination about whether you had seen other cases involving rebreathers and other export violation cases. Compared to those other cases, have you ever seen a case where there was this much ***willfulness on the part of the***

> ***defendants***?
> MR. UDOLF: We object.
> MR. MOSS: Same grounds.
> THE COURT: You opened the door. Overruled.
> THE WITNESS: I have never seen this much knowledge in a case like this.
>
> (Tr.Vol. I, p 166).

This testimony is not harmless because the only thing that distinguishes civil and criminal penalties in a case like this is criminal intent. That was the ultimate issue for the jury.

The ultimate issues --- whether a license was in fact required for these particular rEVO III's and whether he willfully violated the law---were not left to the jury. The government elicited opinion testimony on those issues. The jury was told what to think. The government might as well have called an officer to the stand to point a finger at Sotis and say, "he's guilty." The constitutional right to a jury trial embodies "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Sotis was denied his Sixth Amendment right to trial by jury, Due Process of law, and a fair trial, requiring a reversal of all his convictions.

IV.
THE EVIDENCE WAS INSUFFICIENT ON A CONSPIRACY TO VIOLATE IEEPA

The evidence clearly established that Voissem and Sotis left the decision of

whether a license was required to Diana and Muhammad Zaghab, who each testified that they thought Voissem at Add Helium was "incompetent." (Tr. Vol. II, p. 81, 145). The only understanding Sotis and Voissem had was that they were in over their head on the decision of whether a license was needed, so they made the decision not to ship and let Diana and Muhammad Zaghab decide what to do.

The government painted a picture that in communications with Diana and Muhammad Zaghab Voissem failed to divulge critical informant. Yet, Add Helium knew the technical limitations of the rEVO III and knew it had been rejected for military application, a point which the government had to ultimately concede. Contrary to the government's position, they did not misrepresent anything. Ultimately Diana and Muhammad Zaghab made their own independent decision.

Once the items left Add Helium, they were owned by Osama Bensadik and Ramas (Tr.Vol. IV, p. 34-37). Robotka testified that "this particular model, the rEVO … was "sold to Osama [Bensadik]" (Tr.Vol. III, p. 125). Sotis and Voissem sold the items to Ramas, in a domestic sale. Ramas picked up the items from Add Helium. Sotis did not ship, and Voissem did not ship. They did not "transship" to another country to avoid a direct shipment to Libya (Tr.Vol. I, p. 49), and they did not "transfer" to another party to do their "dirty work," as Wagner described it. (Tr. Vol. I, p. 50). The government's characterization on appeal that Sotis "arranged for an intermediary to export the rebreathers" without a license is not supported by the record. (Appellee's

brief, page. 3). Sotis conducted a domestic sale for which no license was required.

This position—that Add Helium simply sold the items domestically to Ramas LLC – does not seem to be challenged by the government in subsequent proceedings. In a joint motion to extend the deadline for Ramas LLC to file its ancillary Petition in forfeiture proceedings, the parties stated that "Ramas LLC purchased from Add Helium and paid for the rebreathers that were the subject of this court's preliminary order of Forfeiture. Ramas LLC maintains it is the owner thereof." (Doc. 167, p. 1; See also Doc. 182, p. 1) The government does not seem to dispute that Ramas LLC purchased the rebreathers. That means that Sotis conducted a domestic sale, and never needed a license to do so. Ramas LLC shipped the items, and so they were the party that would have needed a license, if one was required at all. Diana and Muhammad Zaghab, who are Ramas LLC, were not charged with conspiracy. If anybody needed a license it was Ramas, exporting from the US to Libya. According to the BIS, a division of the US Department of Commerce, the primary responsibility to ensure the export complies with the Export Administration Regulations (EAR) is the exporter. (Appellant App. Vol. I, p.121-126).

V.
THE GOVERNMENT FAILED TO PROVE A WILLFUL VIOLATION

The rEVO III rebreathers were rejected for military use. (Tr. Vol. III, p. 125-127). The fact that the rEVO III's were rejected for military use was highly important to Sotis' opinion as to whether a license was required for their shipment because only

dual-use items subject to the controls under the CCL required a license. Sotis was charged with willfully violating a known legal requirement. The government failed to establish that the legal requirement existed. It was a precursor to the derivative finding that Sotis committed his actions willfully, and with intent to avoid or ignore a known legal requirement. A person cannot willfully violate the law, if the government fails to clearly establish that the law was in fact broken.

Appellee argues that Sotis failed to argue at trial as to whether a license was required, and has waived the issue for appeal. Quite the contrary, defense counsel cross examined on all points of dual-use: whether the rEVO's had been accepted for military use, what the use was, and who the end user was. The Zaghabs were not prosecuted, and no one interviewed Osama Bensadik, or the ender user, CODI Group. (Tr. Vol. II, p. 193). These were points established by defense counsel.

By the time Sotis was sentenced, the government did not challenge or present any contradictory evidence that the rEVO III's did not have a military application, except perhaps in training. (Sent. Tr. Jan 11, 2022, p. 33,39-42). Thus, the government never established the rEVO III was indistinguishable from simpler, open-circuit, underwater equipment that was not restricted for export to Libya.

At sentencing, it was established that rEVO III's produce bubbles, make noise, probably include magnetic components that could detonate explosive devices, and were rejected by the military. (Tr.Sent. January 11, 2022, p. 23-40). A closed-circuit

rebreather is a far more dangerous item than the rEVO III's. Of critical importance in this case was the actual knowledge possessed by Add Helium that the rEVO III's had been rejected for military application. Their belief that the rebreathers were for recreational use only was based on their actual knowledge of that fact. The government failed to prove otherwise.

VI.
THE TRIAL COURT'S MISAPPLICATION OF THE GUIDELINES ESTABLISHES A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME

The Court chose to apply 2M5.2 rather than 2M5.1, even though semi-closed rebreathers are not specifically listed under the United States Munitions List. 22 CFR. Part 121.1. The rEVO III's are not on the munitions list, as conceded by the government (Tr.Sent. January 12, 2022, 33-39). Section 2M5.2 pertains to "arms, munitions, or military equipment or services." A rebreather is none of those things. Expanding this section to include any thing that could be used to train someone to do something is inconsistent with the rule of lenity and construes it in a way that renders it meaningless. Courts avoid statutory interpretations that render portions of the statute meaningless. See *Huff v. DeKalb County*, 516 F.3d 1273, 1280 (11th Cir. 2008) (explaining that statutes should be read as a "consistent whole").

The government argues on appeal that rebreathers are "military equipment." (Appellee's brief, p. 48). Perhaps some of them are, but this particular rebreather, the

rEVO III was rejected for military use. There was not evidence at trial or sentencing that established otherwise. For that reason, the government argued at sentencing that even though these rebreathers were rejected for military use, they could nonetheless be used in training. (Sent. Tr. Jan 11, 2022, p. 33,39, 41, 42).

The trial court conceded that rebreathers are not an actual vessel, "It's not a vessel. but it's submersible and it allows the individual to be sort of an individual submarine without a shell around them." (Tr.Sent. January 11, 2022, p. 18). Contrary to the trial court's interpretation of the Guidelines, a person is not a vessel and such an interpretation is contrary to its ordinary meaning, clearly does not adhere to the rules of lenity, and gives that term an absurd or meaningless interpretation. *See, United States v. Fuentes-Rivera*, 323 F.3d 869, 872 (11th Cir. 2003) (*per curiam*) (explaining that we interpret statutory provisions "so that no words shall be discarded as being meaningless, redundant, or mere surplusage"); *United States v. Jeter*, 329 F.3d 1229, 1230 (11th Cir. 2003) (the "rule of lenity" applies if a statute - in this instance, a sentencing guideline - is ambiguous).

The court conceded that it "did not see anything that really applied." (Tr. Sent. January 11, 2022, p. 19). 2M5.1 provide for situations where the specific language, given its ordinary meaning, does not fit the conduct. That is why 2M5.1 provides in sub section two for base level 14 for conduct that is "otherwise. "

The government argues on appeal that 2M5.1 applies an offense level of 26

because "Sotis evaded national security controls by exporting rebreathers that had military applications to Libya. " (Appellee's brief, at p. 50). Again, this argument is contingent upon proof that the rEVO III's had a military application, that is, beyond training. As to "other underwater equipment" listed under 8A992, it was only controlled for anti-terrorism, not national security. Since the government settled for the fact that the rEVO III's were only useful for training, they were indistinguishable from open-circuit rebreathers not controlled for shipment to Libya at all.

The Supreme Court has recognized that "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345, 194 L. Ed. 2d 444 (2016).

At sentencing facts were established that undermined the verdicts, showed the deficiency in the government's case, and at the very least, demonstrated ultimately a misapplication of the Guidelines. Sotis is entitled to a remand and resentencing.

CONCLUSION

Peter Sotis respectfully requests that his convictions be vacated. In the alternative, Sotis respectfully requests that his sentence be vacated, that he be granted a new sentencing hearing, and for all other just and proper relief.

Respectfully submitted,

s/ Jane H. Ruemmele
Jane H. Ruemmele
Attorney for Defendant-Appellant

Dated: August 2, 2022

CERTIFICATE OF COMPLIANCE

This document complies with the type volume limited of Fed R. App. P. 32(a)(7)(B), the word limit of Fed. R. App. P. 5(c)(1) because, excluding the parts of the document exempted by Fed R. App. P. 32(f), this document contains no more than 6,500 words, specifically, 5,183 words.

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CERTIFICATE OF SERVICE

On the August 2, 2022, counsel uploaded this brief *via* e-filing, (ECF) which promptly served opposing counsel:

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On this same date, four paper copies this brief were mailed to the Clerk of the court:

Clerk of the Court- Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Respectfully Submitted,

s/ Jane H. Ruemmele
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