IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DOLI SYARIEF PULUNGAN,

OPINION AND ORDER

Plaintiff,

11-cv-470-bbc

v.

UNITED STATES OF AMERICA,

Defendant.

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In preparation for a hearing in this case on plaintiff Doli Syarief Pulungan's entitlement to a Certificate of Innocence under 28 U.S.C. § 2513, the parties have moved for pre-hearing clarification of two disputes. The first is the standard of willfulness that will be applied at the hearing. The second is whether an evidentiary hearing will be necessary on the propriety of the regulatory classification of the riflescopes Pulungan allegedly tried to export.

Pulungan was charged in this court with the willful violation of 22 U.S.C. § 2778, specifically, attempting to purchase riflescopes for export that were barred from export as "defense articles" on the United States Munitions List. He was found guilty by a jury, but the Court of Appeals for the Seventh Circuit overturned his conviction on the ground that the government had failed to prove that the particular riflescopes Pulungan tried to export were included on the list. The list included all "riflescopes manufactured to military

specifications"; it did not list the Leupold Mark 4 CQ/T riflescope by name.

The court of appeals acknowledged that the failure to list specific models of articles on the list was understandable, given the frequent changes in new models and model numbers, but it found the resulting lack of specificity problematic in a criminal prosecution. It concluded that a person such as Pulungan could not be found guilty of violating § 2778 unless the government revealed the basis of its decision to require export licenses for the Leupold Mark 4 CQ/T riflescope, in other words, unless it showed that the scope was properly included in the list because it was manufactured to military specifications. However, it found that Pulungan should have been acquitted even if the government had made the showing because the government did not prove that he knew both that the scopes were included on the list and that he needed an export license to ship them out of the country.

Following his acquittal, Pulungan moved for the issuance of a Certificate of Innocence under 28 U.S.C. § 2513. I granted the motion, but the court of appeals reversed the decision and remanded the case for further proceedings. Now that the proceedings are pending, both parties want to know (1) whether the government will be held to the standard of willfulness the court of appeals found it had agreed to at trial, United States v. Pulungan, 569 F.3d 326, 329 (7th Cir. 2009); and (2) whether an evidentiary hearing is necessary if the government can show that even if the riflescopes did not qualify for inclusion on the munitions list, they would have been prohibited from export without a license under other statutory provisions.

The government is convinced that it never conceded during the trial of this case that it had to prove that § 2778(c) required proof of Pulungan's knowledge that the riflescopes were manufactured to military specifications. It relies on United States v. Beck, 615 F.2d 441, 450 (7th Cir. 1980), in which the court of appeals held that the government could prove a violation of § 2278(c) by showing only that the defendant violated a known legal duty not to export proscribed articles and did so voluntarily and intentionally. The court did not require the government in that case to show that the defendant knew he was required to have an export license. Id. at 451. However, the court of appeals believed that the government had made such a concession in this case and reiterated its position during oral argument on Pulungan's appeal of this court's denial of his motion for a Certificate of Innocence. Trans. of Apr. 2, 2013 Oral Arg., Plt.'s Exh., Dkt. 35-1. The government points out that Pulangan's motion for a certificate is an entirely new proceeding, not a continuation of the initial criminal proceeding. This argument would be more persuasive if the court of appeals had not addressed it during oral argument in the appeal of Pulungan's certificate. Under the circumstances, I do not think that the question remains open for reconsideration.

As to the need for an evidentiary hearing on the propriety of the 2003 classification of the riflescopes, the government contends that none is necessary because the scopes would have been banned from export without a license as "dual-use articles" even if they were misclassified originally as "defense articles" on the munitions list. The government assumes that Pulungan will try to prove that the riflescopes were not "defense articles" in 2007. It is true that at this stage of the proceedings, it will be Pulungan's task to show that

> He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about this own prosecution.

28 U.S.C. § 2513(c). To make such a showing, he could try to show that the scopes are not defense articles, although he may decide to concede this issue and rely instead on his asserted lack of knowledge of the designation or of the need for an export license. Whatever showing he attempts, he must also prove that he did not bring about his prosecution by misconduct or neglect.

Assuming that Pulugan does try to attack the status of the riflescopes as "defense articles," the government seeks to forestall Pulungan from arguing that the 2013 redesignation of the Leupold Mark 4 CQ/T riflescope from a "defense article" to a "dual-use" item was a concession by the government that the scope had been misdesignated by the government in 2003. From what the parties have submitted, I am not persuaded that Pulungan can base such an argument on the mere fact of redesignation.

The parties seem to agree that the designation of the riflescope changed in 2013, but not on the reasons for the redesignation. Pulungan argues that the change reflects the government's recognition that the original designation was improper; the government does not agree. It takes the position that the redesignation was simply a reaction to the changes in "defense articles" in the intervening ten years. The difference is significant in terms of what Pulungan must prove. In my view, he cannot rely on the 2013 redesignation unless he can show that the original "defense article" designation was not proper in 2007, the year in which he is alleged to have made the attempt to obtain the riflescopes for export.

I do not agree with the government's position that no evidentiary hearing is necessary even if Pulungan succeeds in showing that the 2003 designation was improper when it was made. According to the government, Pulungan could still be denied a Certificate of Innocence because the scopes would have been reclassified automatically as "dual-use articles," prohibited from export without a license. In the absence of testimony to this effect from a qualified expert, it would be pure speculation to reach this conclusion. I would reach a different decision only if the government introduced testimony from a qualified witness that such a change in designation would have been inevitable and not discretionary and Pulungan offers no testimony on this subject in rebuttal.

Of course, Pulungan can concede the propriety of the 2003 designation and still establish his innocence provided that he can prove he did not know of the designation or of the need for a license. If anything is clear at this stage of the litigation, it is that no lay person can determine from reviewing the munitions list what specific products would be designated as "defense articles." However, Pulungan's furtive activities in pursuit of riflescopes would be relevant evidence on the question of his knowledge, as well as on the last showing he must make, which is that he did not by misconduct or neglect cause or bring about his own prosecution.

ORDER

IT IS ORDERED that at the hearing in this case on Doli Syarief Pulungan's motion for a Certificate of Innocence, the government will be held to the standard of willfulness the

court of appeals found it had conceded to at trial and on appeal. The government cannot rely on its assertion that even if the riflescopes in question were not classified as "defense articles" in 2007, they would have been classified as "dual-use articles" at that time, in which case they could not have been exported without a license. 50 U.S.C. §§ 1705-07, 50 U.S.C. §§ 2410-20, 15 C.F.R. § 764.3 and 18 U.S.C. § 371. However, I will reconsider this ruling if the government's assertion is supported by an expert witness.

Entered this 8th day of September, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge