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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No. CR 06-320
)	Milwaukee, Wisconsin
vs.)	January 7, 2008
)	12:45 p.m.
DAVID R. OLOFSON,)	
)	VOLUME 2
Defendant.)	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE CHARLES N. CLEVERT
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Plaintiff	
UNITED STATES OF AMERICA:	Office of the US Attorney
	By: GREGORY J. HAANSTAD
	517 E Wisconsin Ave - Rm 530
	Milwaukee, WI 53202
	Ph: 414-297-4581
	Fax: 414-297-1738
	gregory.haanstad@usdoj.gov

For the Defendant	
DAVID OLOFSON (Present):	Federal Defender Services of
	Eastern Wisconsin, Inc.
	By: BRIAN P. MULLINS and
	BRIAN T. FAHL
	517 E Wisconsin Ave - Rm 182
	Milwaukee, Wisconsin 53202
	Ph: 414-221-9900
	Fax: 414-221-9901
	brian_mullins@fd.org
	brian_fahl@fd.org

U.S. Official Reporter:	JOHN T. SCHINDHELM, RMR, CRR,
	johnschindhelm2@sbcglobal.net

Proceedings recorded by mechanical stenography, transcript produced by computer aided transcription.



1 PROCEEDINGS RESUMED (12:53 p.m.)

2 (Jury in at 12:54 p.m.)

3 THE COURT: You may proceed.

12:54 4 MR. HAANSTAD: Your Honor, the government calls Robert
5 Kiernicki.

6 THE REPORTER: Raise your right hand, please.

7 ROBERT KIERNICKI, GOVERNMENT WITNESS, DULY SWORN

8 THE REPORTER: State your name and spell your name for
9 the record.

12:55 10 THE WITNESS: Robert Kiernicki, R O B E R T,
11 K I E R N I C K I.

12 DIRECT EXAMINATION

13 BY MR. HAANSTAD:

14 Q. Mr. Kiernicki, where are you from?

12:55 15 A. Berlin, Wisconsin.

16 Q. Okay. And were you born there?

17 A. Yeah.

18 Q. When were you born?

19 A. November 6, 1987.

12:56 20 Q. And how far did you go in school?

21 A. Ninth grade.

22 Q. Did you finish ninth grade?

23 A. No, I didn't.

24 Q. What do you do for a living?

12:56 25 A. I work for Hyler's Septic Service and Berlin Area School

1 District.

2 Q. What do you do with the Berlin School District?

3 A. I am a part-time sub janitor.

4 Q. Okay. And do you know David Olofson?

12:56 5 A. Yes, I do.

6 Q. Do you remember when you first met Mr. Olofson?

7 A. March-April.

8 Q. Of what year?

9 A. 2006.

12:56 10 Q. Okay. And how did you meet him?

11 A. There was an ad on the bulletin down in Subway at the gas
12 station in Berlin, and it said, for sale, AR-15 Colt. And I
13 called him to ask him about it, and he said it was gone but he
14 had, um, he could get me another one.

12:57 15 Q. Another gun?

16 A. Yeah.

17 Q. Do you know what kind?

18 A. It was a Colt AR-15.

19 Q. And where was he gonna get that for you?

12:57 20 A. He was gonna order it, all the parts and all that, the kit.

21 Q. Okay.

22 A. And then he was gonna --

23 Q. Was he gonna put it together for you?

24 A. Yeah.

12:57 25 Q. Did you ever get that gun?

1 A. No, I did not.

2 Q. Did you and Mr. Olofson have a plan as to where this gun was
3 going to be assembled?

4 A. Down in his basement.

12:57 5 Q. Had you been there before?

6 A. Yes.

7 Q. And based on your having been there in his basement, could
8 you tell whether he did that sort of thing before, that is, were
9 there guns down there?

12:58 10 A. There were some guns, yeah.

11 Q. How about gun parts?

12 A. Yeah, there was.

13 Q. And what about ammunition?

14 A. There was.

12:58 15 Q. Now, you said that you never received that AR-15 that was
16 gonna be built from a kit, right?

17 A. Yes.

18 Q. But you did receive a firearm from Mr. Olofson, right?

19 A. Yes, I did.

12:58 20 Q. Okay. How did that come about?

21 A. While waiting for the kit and then you'd put it together, he
22 let me borrow the AR-15.

23 Q. Okay. He didn't sell it to you?

24 A. No.

12:58 25 Q. He loaned it to you?

1 A. Yes.

2 Q. More than once?

3 A. Yes.

4 Q. Do you remember approximately how many times?

12:59 5 A. Four times.

6 Q. Okay. And how long did you have it typically each of those
7 four times?

8 A. About two weeks.

9 Q. Okay. I'm gonna show you what's been marked as Exhibit 1.

12:59 10 Do you recognize Exhibit 1?

11 A. Yes, I do.

12 Q. And why is it that you recognize it?

13 A. The safety.

14 THE COURT: Would you stand to the side so the jury
12:59 15 can see?

16 MR. HAANSTAD: Yes, Your Honor.

17 THE COURT: The opposite side.

18 MR. HAANSTAD: Over here?

19 THE COURT: Yes.

12:59 20 MR. HAANSTAD: Thank you.

21 THE WITNESS: The safety and fire, and the third one
22 that's not marked.

23 BY MR. HAANSTAD:

24 Q. Okay. And is this the gun you had for a couple weeks at a

01:00 25 time four times or so?

1 A. Yes.

2 MR. HAANSTAD: Now the government would offer
3 Exhibit 1.

4 MR. MULLINS: No objection.

01:00 5 THE COURT: It's received.

6 (Exhibit 1 offered and received.)

7 BY MR. HAANSTAD:

8 Q. Now, when Mr. Olofson would loan that gun to you would he
9 also provide you with ammunition for that gun?

01:00 10 A. Yes, he did.

11 Q. Every time you borrowed the gun from him?

12 A. Yes.

13 Q. Do you remember about how much ammunition he would give you?

14 A. The first three times I borrowed it was a hundred rounds
01:00 15 each.

16 Q. Okay.

17 A. And the fourth time was 500 rounds.

18 Q. And that fourth time when you got the 500 rounds, was that
19 around July 13th of 2006?

01:01 20 A. Yes, it was.

21 Q. Okay. Now, did Mr. Olofson ever charge you anything at all
22 for letting you use his gun?

23 A. No, he did not.

24 Q. Did he ever charge you for any of the ammunition he was
01:01 25 giving you?

1 A. No, he did not.

2 Q. Did he ever say why he was loaning you the gun and giving
3 you these hundreds of rounds of ammunition?

4 A. To keep my training up and to keep the skill of shooting.

01:01 5 Q. Now, you mentioned something about the selector switch on
6 Exhibit 1, right?

7 A. Yes.

8 Q. When you were borrowing that gun from Mr. Olofson, did you
9 notice that the selector switch had moved to three different
01:01 10 positions?

11 A. I didn't know at first.

12 Q. When did you find that out?

13 A. When I was out at the Conservation Club and Dave mentioned
14 that it doesn't work and that it would jam up.

01:02 15 Q. I'm sorry, now when you say Dave, you mean Mr. Olofson?

16 A. Yeah, Mr. Olofson.

17 Q. Okay. And I'm sorry, now what did he tell you about the
18 selector switch? First of all, did he indicate to you whether
19 he knew that that was an automatic function?

01:02 20 A. Yeah, he told me that the three-round burst wouldn't work
21 and that it would jam up.

22 Q. Did you know what he meant by "three-round burst"?

23 A. Yeah.

24 Q. What did you take him to mean?

01:02 25 A. Three rounds come out of it when you would pull the trigger.

1 Q. When you pull the trigger once?

2 A. Yeah.

3 Q. And when he was telling you this, did he tell you that he
4 had fired it automatically in that three-round burst position
01:02 5 and that the gun had jammed on him?

6 A. Yes.

7 Q. Okay. Now, did you ever end up putting the selector in that
8 unmarked third position?

9 A. Yes, I did.

01:03 10 Q. And when was that?

11 A. Out at the Conservation Club.

12 Q. Was that the same day that you got the 500 rounds of
13 ammunition from Mr. Olofson?

14 A. Yes.

01:03 15 Q. And what happened when you pulled the trigger, when the gun
16 was in the unmarked third position?

17 A. It shot three rounds or maybe four when I pulled the trigger
18 and then it jammed.

19 Q. Okay. Did you do it more than once?

01:03 20 A. Yeah.

21 Q. Okay. Now, you testified that you fired Exhibit 1 in
22 three-round bursts as you called it, or automatic, on July 13th
23 of 2006.

24 A. Yes.

01:03 25 Q. Did anything happen at the Conservation Club when you were

1 firing Mr. Olofson's firearm in that way?

2 A. It would just jam.

3 Q. Did the police end up coming?

4 A. Yes.

01:03 5 Q. And what did they do when they got there?

6 A. They wrote down the serial numbers on three guns we had.

7 Q. You were there with someone else?

8 A. Yeah. There were a couple of my friends.

9 Q. Okay. And the police took down the serial numbers for all
01:04 10 three of your guns?

11 A. All three of the weapons, yeah.

12 Q. Okay. And did they tell you why they were doing that?

13 A. Just to make sure that they weren't stolen or anything like
14 that.

01:04 15 Q. Okay.

16 Did you know why they were there?

17 A. Somebody called in and said that there was automatic machine
18 gun fire.

19 Q. Okay. Did they ask you if you were the one doing that?

01:04 20 A. Yeah.

21 Q. Did you tell them that you were?

22 A. Yes.

23 Q. Okay. And the police then left the Conservation Club?

24 A. Yes.

01:04 25 Q. After they left did you talk to Mr. Olofson?

1 A. Yes, I did.

2 Q. Did you let him know that the police had come there to talk
3 to you about firing his gun automatically?

4 A. Yes, I did.

01:05 5 Q. And what did he say?

6 A. That he was -- he's never had trouble with the police
7 shooting an automatic gun at the Conservation Club in Berlin.

8 Q. And then later on that same day, later on on the 13th, other
9 officers from the Berlin Police Department came to your house
01:05 10 and took Olofson's gun from you, right?

11 A. Yes.

12 MR. HAANSTAD: Okay. Those are all the questions I
13 have, Your Honor.

14 THE COURT: Cross?

01:05 15 CROSS-EXAMINATION

16 BY MR. MULLINS:

17 Q. Mr. Kiernicki, you said that you first became aware of
18 Mr. Olofson through an advertisement, correct?

19 A. Yes.

01:05 20 Q. And that advertisement was at a Subway sandwich shop?

21 A. Yeah.

22 Q. And that's in Berlin?

23 A. Yeah.

24 Q. Is that downtown Berlin?

01:06 25 A. No, it's just as you come into town.

1 Q. And this was in the window of the sandwich shop.

2 A. No, it was actually tacked above the pay phone.

3 Q. But it was visible for anyone passing by.

4 A. Yes. Yes.

01:06 5 Q. And it advertised an AR-15 gun, right?

6 A. Yes.

7 Q. It never advertised an automatic gun, a machine gun.

8 Correct?

9 A. Yes.

01:06 10 Q. Because an AR-15 is actually a semi-automatic gun.

11 A. Yeah.

12 Q. And you weren't looking for a machine gun to buy.

13 A. No.

14 Q. You only wanted to buy a semi-automatic.

01:06 15 A. Yes.

16 Q. And what were you -- what was your purpose? Are you a
17 hunter --

18 A. Yes, I'm a hunter.

19 Q. A hunter?

01:06 20 A. Yeah.

21 Q. And you also do a little target shooting?

22 A. Yes.

23 Q. Okay. So you then approached Mr. Olofson and said, hey, I
24 would like to buy this gun and your understanding was that it
01:07 25 was a semi-automatic gun, correct?

1 A. That's what I requested to him.

2 Q. Okay. And then he explained --

3 Now, there was a problem that you didn't have enough
4 money, correct?

01:07 5 A. Yeah.

6 Q. And he offered to get a lower priced model, correct?

7 A. Can you repeat that again?

8 Q. Well, he offered, because you didn't have enough money for
9 the gun that he was advertising, he offered to get a lower
01:07 10 priced model that you could afford, correct?

11 A. Yeah.

12 Q. And that was the model that was going to be received through
13 the mail, correct?

14 A. Yes.

01:07 15 Q. Okay. And then in the meantime he lent to you the AR-15
16 that he had advertised, correct?

17 A. Yes.

18 Q. And that was -- now, there were four different times that he
19 lent it?

01:07 20 A. Yeah.

21 Q. And you would -- how long would you have it each time?
22 Approximately.

23 A. Two weeks.

24 Q. Okay. And he never -- the first time that you came there he
01:07 25 never said, hey, this thing fires automatically if you put it in

1 this third position.

2 The first time he said -- you went to see him, he
3 never said that.

4 A. Yeah, he never said that.

01:08 5 Q. Okay. And then you fired it, it was a semi-automatic gun,
6 it didn't fire automatically the first time that you had it,
7 correct?

8 A. Yeah.

9 Q. And you had fired it at the Conservation Club?

01:08 10 A. Yeah.

11 Q. And do you remember when this was?

12 A. I don't remember. I don't know.

13 Q. Okay. So the second time you borrowed it, you returned it
14 to Mr. Olofson after a couple weeks, correct?

15 A. (Nods head.)

16 Q. And then a couple weeks later you came back and borrowed it
17 again, correct?

18 A. Yeah.

19 Q. And again he never said, hey, this is going to fire
01:08 20 automatic if you put it in this third position, correct?

21 A. (No response.)

22 Q. That second time that you went over there. When you went to
23 his house.

24 A. He never mentioned anything about it until the fourth time.

01:08 25 Q. Well, I didn't ask you that. The second time. The second

1 time he never said it fires automatically.

2 A. True.

3 Q. Okay. And you fired it and again it did not fire
4 automatically.

01:09 5 A. Yeah.

6 Q. And then you came back a third time. And again, Mr. Olofson
7 never said, hey, this thing fires as a machine gun or
8 automatically.

9 A. (Nods head.)

01:09 10 Q. And you used it again and again and it didn't fire
11 automatically, correct?

12 A. Yeah.

13 Q. Okay. And you weren't looking for an automatic gun.

14 A. No.

01:09 15 Q. That wasn't why you went to Mr. Olofson to get a gun.

16 A. (Nods head.)

17 Q. Okay. Now, the forth time -- you testified that Mr. Olofson
18 said you noticed it had this third selector switch, correct?

19 A. Yeah.

01:09 20 Q. And you brought it up to Mr. Olofson, hey, what happens when
21 you put it in this position, correct?

22 A. I don't know.

23 Q. You don't remember what you asked him?

24 A. Yeah, I don't remember.

01:09 25 Q. Okay. So -- now, you testified that Mr. Olofson told you

1 that it fired in three-round bursts. That's how you testified.

2 A. Yeah.

3 Q. However, do you recall speaking to the police back on July
4 13th of 2006? You spoke to a Berlin police officer named

01:10 5 Officer Zache; do you remember that?

6 A. Yes.

7 Q. And you told him that Mr. Olofson said the three-round burst
8 does not work because it was missing some type of thing. That's
9 what you told Officer Zache?

01:10 10 A. Yes.

11 Q. So Mr. Olofson essentially just told you -- you asked
12 Mr. Olofson what happens if I put it into this third position;
13 he said, well, it doesn't work because it will malfunction if
14 you do that, correct?

01:10 15 A. It would malfunction and jam.

16 Q. Okay. But you decided to do it anyways. You decided to put
17 it in that third position anyways, even though Mr. Olofson told
18 you not to because it would malfunction.

19 A. Yeah.

01:11 20 Q. Correct?

21 A. (Nods head.)

22 Q. Okay. And it fired three rounds and you did that about two,
23 three times?

24 A. At least twice and then it jammed.

01:11 25 Q. And there was more ammunition in the gun, but it wasn't

1 firing because the gun was jamming, correct?

2 A. Yeah.

3 Q. And it wasn't that you were taking your finger off the
4 trigger; it just jammed while your finger was on the trigger?

01:11 5 A. Uh-huh.

6 Q. Okay.

7 THE COURT: Is that a yes or a no?

8 THE WITNESS: Yes.

9 BY MR. MULLINS:

01:11 10 Q. Okay. And then it actually got hot, correct?

11 A. Yeah.

12 Q. The gun got hot?

13 A. Yes.

14 Q. What is your experience, what does that signify to you?

01:11 15 A. The barrel gets hot it means that too many rounds are being
16 shot out of it.

17 Q. So essentially it's not working the way it's intended to be
18 used.

19 A. Yes.

01:12 20 Q. And then you put it down?

21 A. Yeah.

22 Q. And then you I think retrieved it and then shot it maybe
23 once more?

24 A. Yeah.

01:12 25 Q. Okay. Now, the police arrived. You didn't think you were

1 doing anything wrong?

2 A. Yeah.

3 Q. And the police arrived and are you surprised that they
4 arrive at the gun club?

01:14 5 A. At the time they always do a routine check -- when they hear
6 shots at the Conservation Club they make a routine check there.

7 Q. Now, you know it's illegal to possess an automatic gun.

8 A. I did not know at the time.

9 Q. Okay. But the police were concerned about the gun that you
01:14 10 had, correct?

11 A. Yes.

12 Q. And you're probably pretty nervous, correct?

13 A. Yes.

14 Q. You had a lot of contact with police before?

01:14 15 A. No.

16 Q. So are you concerned that maybe I'm going to get arrested
17 for something?

18 A. Yes.

19 Q. So you probably told them -- might you have told them things
01:14 20 to maybe shift some of the blame for having that gun?

21 A. I just said I was borrowing it from Mr. Olofson and that's
22 all, and then --

23 Q. Okay. Now, you then called Mr. Olofson, correct?

24 A. Yeah.

01:14 25 Q. After the police came. And the police took the gun, right?

1 A. Yes.

2 Q. And you called Mr. Olofson, and told him what happened.

3 Correct?

4 A. Yes.

01:14 5 Q. And now you testified that Mr. Olofson said to you, gee, I'm

6 surprised that the police would come because I fired

7 automatically at the gun club before. Correct?

8 A. Yes.

9 Q. Now, you testified to that today.

01:14 10 A. Yes.

11 Q. Now, as you said previously, you remember talking to the

12 police back on July 13th of 2006?

13 A. Out at the Conservation Club that's when I, they came out
14 for the shooting.

01:14 15 Q. Okay. And you actually signed a statement. Now, when did

16 you sign a statement? Was this -- you went to the police

17 station I assume?

18 A. Yes.

19 Q. Okay. Did you make this statement before or after speaking

01:14 20 with Mr. Olofson?

21 A. After.

22 Q. Okay. And in that statement you basically told the police

23 everything you thought they wanted to know about the gun and

24 Mr. Olofson, correct?

01:14 25 A. Yes.

1 Q. But you did not tell them that Mr. Olofson had told you that
2 he was surprised that you were in trouble because he had fired
3 it automatically there before. You didn't tell him that on July
4 13th, correct?

01:15 5 A. Yes.

6 Q. Yes, that is correct, that you didn't tell them?

7 A. Can you repeat that?

8 Q. I'm sorry. Back on July 13th, when you talked to the
9 police, after you talked to Mr. Olofson you did not tell the
01:15 10 police that a Mr. Olofson said to you that he was surprised you
11 were in trouble because he had fired that gun automatically at
12 the Conservation Club before? You did not tell the police that
13 on July 13th of 2006, correct?

14 A. Yes.

01:15 15 Q. You did not -- you're saying yes, you did not tell them
16 that.

17 A. Yeah.

18 Q. Okay. And then you gave another statement. Do you remember
19 giving another statement to, I believe it was Agent Keeku from
01:15 20 the Bureau of Alcohol Tobacco and Firearms; do you remember
21 that?

22 A. Yes.

23 Q. And that was on July 17th of 2006. Correct?

24 THE COURT: One second, please. Please approach.

01:16 25 (At side bar on the record.)

1 THE COURT: Someone just walked in. I want to make
2 sure it's not a witness that should be sequestered.

3 MR. FAHL: We agreed that there's no need to sequester
4 them.

01:16 5 THE COURT: Okay.

6 (End of discussion at side bar.)

7 THE COURT: Proceed.

8 MR. MULLINS: Thank you.

9 BY MR. MULLINS:

01:17 10 Q. So returning to July 17th of 2006, you gave a statement to
11 Agent Keeku, and that was actually in an affidavit.

12 THE COURT: One second, please.

13 (Pause.)

14 THE COURT: Proceed.

01:18 15 BY MR. MULLINS:

16 Q. On July 17, 2006, you gave a statement to Agent Keeku,
17 correct?

18 A. Yes.

19 Q. Do you remember that?

01:18 20 A. No.

21 Q. Would it refresh your recollection if I gave you an
22 affidavit that you signed and read? And if you want to take
23 some time to read this, Mr. Kiernicki.

24 (Witness peruses document.)

01:20 25 BY MR. MULLINS:

1 Q. You had a chance to review that, Mr. Kiernicki?

2 A. Yes.

3 Q. And did that refresh your memory as to the statement you
4 made on July 17th of 2006?

01:20 5 A. Yes.

6 Q. And that you signed on that day, correct?

7 A. Yes.

8 Q. And that was -- you signed that indicating that everything
9 you said in there was true, correct?

01:21 10 A. Yes.

11 Q. And this is an affidavit; are you familiar with the term
12 "affidavit"?

13 A. No.

14 Q. Did Agent Keeku explain to you that when you sign an
01:21 15 affidavit it's just like you're testifying today, that you could
16 be subject to prosecution for perjury if you're not telling the
17 truth?

18 A. Yeah.

19 Q. Okay. So you understood that you better tell the truth or
01:21 20 else they could actually prosecute you for lying.

21 A. Yes.

22 Q. Okay. And --

23 MR. HAANSTAD: I'm going to object. There's no
24 foundation for suggesting he wasn't telling the truth.

01:21 25 THE COURT: Overruled. Proceed.

1 MR. MULLINS: Thank you.

2 BY MR. MULLINS:

3 Q. And you did not state in that statement that Mr. Olofson
4 expressed surprise to you that you got in trouble because he had
01:21 5 fired that gun automatically at the Conservation Club before,
6 correct?

7 A. Correct.

8 Q. That's not in the statement. And if you need to go through
9 the statement again that's fine.

01:23 10 (Pause.)

11 Q. It's not in there, correct?

12 A. It's not in there.

13 Q. Okay. And is it possible that you didn't say that because
14 Mr. Olofson didn't tell you that?

01:23 15 A. Can you repeat that again?

16 Q. Is it possible that you didn't tell Agent Keeku that
17 Mr. Olofson told you that he had fired the gun automatically at
18 the gun club before because actually Mr. Olofson didn't tell you
19 that?

01:23 20 A. He told me on the phone.

21 Q. Is it possible that Mr. Olofson just said to you, gee, I
22 fired that gun at the range before and never had any problems?
23 Is it possible that he just said that?

24 A. No.

01:24 25 Q. It's not possible?

1 A. (No response.)

2 Q. And did Mr. Olofson offer, when you told him about the
3 problems you had with the police department, did he offer to try
4 to straighten things out? Do you remember that?

01:24 5 A. He said he was gonna go down to the police station and talk
6 to the chief of police and to try getting the gun back.

7 Q. So he was trying to help you basically. Because he didn't
8 think there was anything wrong with having that gun. Otherwise
9 he wouldn't go to the police station admitting a gun was his
01:24 10 when he knew it was illegal; he wouldn't have done that, would
11 he?

12 MR. HAANSTAD: Objection, Judge, argumentative.

13 THE COURT: Rephrase the question. The objection is
14 sustained.

01:25 15 BY MR. MULLINS:

16 Q. Mr. Olofson offered to go down to the police station.

17 A. Yeah.

18 THE COURT: What is the response?

19 THE WITNESS: Yes.

20 THE COURT: All right, go ahead.

21 BY MR. MULLINS:

22 Q. And he offered to go down to the police station to try to
23 straighten things out with the chief of police.

24 A. Yes.

01:25 25 Q. Because he didn't think there was anything wrong with having

1 that gun.

2 A. Yes.

3 Q. Okay. And actually having an automatic gun, if you're a
4 target shooter, is not really -- doesn't help you shoot a target
01:25 5 accurately, does it?

6 A. No.

7 Q. Because it's not -- you can't control it as well, right?

8 A. Yeah.

9 Q. Okay.

01:26 10 MR. MULLINS: I have nothing further.

11 REDIRECT EXAMINATION

12 BY MR. HAANSTAD:

13 Q. Mr. Kiernicki, now, you've testified that on one prior
14 occasion you told law enforcement officers that you had that
01:26 15 conversation with Mr. Olofson, that is, the conversation where
16 he said I don't know what the big deal is, I fired automatically
17 at the Conservation Club and not gotten in trouble. Right?

18 A. Yes.

19 Q. So you gave a statement to law enforcement where you told
01:26 20 them that after --

21 A. Say that again?

22 Q. Sure. After the police officers approached you on July 13th
23 at the Conservation Club, after that you told them that you had
24 a conversation with Mr. Olofson, right?

01:27 25 A. Yeah.

1 Q. Okay. And you told the officers back then that during that
2 conversation Mr. Olofson made the comment, something to the
3 effect of I don't know what the big deal is, I fired
4 automatically at the Conservation Club before and not had any
01:27 5 problems, right?

6 A. (Nods head.)

7 THE COURT: One second, is that a yes or a no?

8 THE WITNESS: Yes.

9 THE COURT: Would you pull the mic a little closer?

01:27 10 All right, go head.

11 BY MR. HAANSTAD:

12 Q. But then you gave another interview to law enforcement, and
13 we've just established that according to the affidavit that you
14 signed it doesn't appear that you told them that again, right?

01:27 15 A. Yeah. Yes.

16 Q. Do you remember if they asked you about it?

17 A. When I -- yeah, I let 'em know that I talked to 'em --

18 Q. Okay.

19 A. And they just asked me what he all said and I told 'em what
01:29 20 he said. Yeah.

21 Q. Okay. Well, as you sit here today, regardless of what you
22 said in the past, as you sit here today is it still your
23 testimony that you had that conversation with Mr. Olofson?

24 A. Yes.

01:29 25 Q. And that during the conversation he made the comment about

1 having fired automatically at the Conservation Club in the past?

2 A. Yes.

3 Q. But you admit that it's possible that in some of the later
4 interviews that you gave with law enforcement you didn't tell
01:29 5 them that again. Right?

6 A. Yes.

7 Q. And do you remember in those later interviews they even
8 asked you about it, that is, they asked you what conversations
9 you had with Mr. Olofson? Do you remember?

01:29 10 A. Not right offhand.

11 Q. Okay. And at the time did you think his statement was very
12 significant? That is, his statement that he had fired
13 automatically at that Conversation Club before?

14 A. Like it's true or --

01:29 15 Q. I'm sorry, did you think it was important?

16 A. No.

17 Q. Okay. Now, you testified on cross-examination that you
18 didn't fire Mr. Olofson's AR-15 automatically the first time
19 that you borrowed it, right?

01:29 20 A. Yeah.

21 Q. Did you try to fire it automatically the first time that you
22 borrowed it from him?

23 A. No.

24 Q. So do you know whether the gun fired automatically or not
01:29 25 when you borrowed it from him the first time?

1 A. No.

2 Q. And again, your testimony was that you didn't actually fire
3 it automatically until approximately the fourth time or so that
4 you borrowed it from him, right?

01:29 5 A. Yeah, the last time.

6 Q. Okay. And that was on July 13th of 2006.

7 A. Yes.

8 Q. And when you fired Mr. Olofson's AR-15 automatically on July
9 13th of 2006, you said that the barrel got hot and you think at
01:30 10 least that that's what caused the gun to jam, right?

11 A. It could have been.

12 Q. Before you fired it automatically had you been firing it in
13 a non-automatic manner, that is, in semi-automatic mode?

14 A. Yes.

01:30 15 Q. For how long?

16 A. Maybe --

17 Q. And if you don't know how long, maybe how many rounds would
18 be a better way to put it.

19 A. Maybe 100, 120 rounds maybe.

01:30 20 Q. And just so we're clear, so are you testifying that you
21 fired Mr. Olofson's AR-15 in regular semi-automatic mode
22 approximately 100 to 120 rounds and then tried to fire it
23 automatically?

24 A. Yes.

01:30 25 Q. And then the gun jammed?

1 A. Yeah.

2 Q. And that's when you noticed that the barrel was hot?

3 A. Yeah.

4 Q. Okay. At any time during the four times or so that you
01:31 5 borrowed Mr. Olofson's gun from him, did you ever loan it to
6 anyone else?

7 A. No.

8 Q. Did you ever allow anyone else to shoot it?

9 A. No.

01:31 10 Q. Whether you considered it loaning it or not, did you ever
11 allow anyone else to have it and take it out of your sight?

12 A. To hold onto it?

13 Q. Right.

14 A. Yeah.

01:31 15 Q. When they were holding onto it did they leave and go
16 somewhere, did they go home with it?

17 A. Nope.

18 Q. They were always in your presence?

19 A. Yes.

01:31 20 Q. Did you ever see any -- anyone that you might have let hold
21 on to Mr. Olofson's gun ever in any way modify the gun?

22 A. No.

23 Q. Did you ever do that?

24 A. No.

01:31 25 MR. HAANSTAD: Those are all the questions I have,

1 Your Honor.

2 RE-CROSS-EXAMINATION

3 BY MR. MULLINS:

4 Q. Mr. Kiernicki, getting back to that conversation that you
01:32 5 had with Mr. Olofson after police came to the gun club, you said
6 you didn't think it was very important at the time, correct?

7 A. Yes.

8 Q. Now, has it been -- is it your experience that when you are
9 listening to something that you don't consider very important,
01:32 10 you may not listen all that closely?

11 A. Yeah.

12 Q. You may not remember things all that accurately?

13 A. (Nods head.)

14 Q. So it's possible that Mr. Olofson told you, yeah, I fired
01:32 15 that gun before and never had a problem. It's possible that he
16 said that, and that he never said anything about firing the gun
17 automatically.

18 A. I don't remember.

19 Q. Okay.

01:32 20 MR. MULLINS: Nothing further.

21 THE COURT: You may step down.

22 (Witness excused at 1:32 p.m.)

23 MR. HAANSTAD: Your Honor, the government calls Jody
24 Keeku.

01:33 25 THE REPORTER: Raise your right hand, please.

1 JODY KEEKU, GOVERNMENT WITNESS, DULY SWORN

2 THE REPORTER: State your name and spell your name for
3 the record.

4 THE WITNESS: Jody Keeku, K E E K U. J O D Y.

01:33 5 DIRECT EXAMINATION

6 BY MR. HAANSTAD:

7 Q. Ms. Keeku, how are you employed?

8 A. I'm a special agent with the Bureau of Alcohol, Tobacco,
9 Firearms and Explosives.

01:33 10 Q. ATF?

11 A. Yes.

12 Q. How long have you been with ATF?

13 A. Since July of 2001.

14 Q. AND what's your position with ATF right now?

01:34 15 A. I am a special agent.

16 Q. And as a special agent with ATF what are your duties?

17 A. I investigate violations of federal firearms laws,
18 violations of arson and violations of explosives.

19 Q. Okay. And in the course of performing your duties as an ATF
01:34 20 agent, did you become involved in an investigation that centered
21 on David Olofson?

22 A. Yes.

23 Q. And how did that come about?

24 A. I received a phone call from Officer Bob Zache of the Berlin
01:34 25 Police Department. And he told me that he had been out --

1 actually an Officer Spittleberger had been out at the
2 Conservation Club and had spoken with some gentleman that was
3 firing firearms.

01:34 4 Q. Okay. And eventually in the course of your involvement in
5 that investigation a federal search warrant was executed at
6 Mr. Olofson's residence, right?

7 A. Yes.

8 Q. Was that July 16th of 2006?

9 A. Yes.

01:34 10 Q. Now, while that search warrant was being executed, you
11 interviewed Mr. Olofson, correct?

12 A. Yes.

13 Q. And you talked to him about this automatic rifle that you
14 heard about?

01:35 15 A. Yes.

16 Q. And more specifically, did you talk to him about the rifle
17 that's entered in Government's Exhibit 1, that is, an Olympic
18 Arms .223 caliber SGW Rifle, model CAR-AR, with a serial number
19 F7079?

01:35 20 A. Yes.

21 Q. And when you were interviewing him did Mr. Olofson indicate
22 whether he had loaned that gun to Robert Kiernicki?

23 A. Yes. He had said that he had loaned that firearm to
24 Mr. Kiernicki.

01:35 25 Q. Okay. Did he tell you why he loaned the gun to

1 Mr. Kiernicki?

2 A. That he was loaning that to Mr. Kiernicki so Mr. Kiernicki
3 could maintain his firearm skills.

4 Q. Did he say what he meant by that?

01:35 5 A. Mr. Olofson I guess was interested in military training and
6 firearms expertise and was kind of helping Mr. Kiernicki become
7 more involved with firearms.

8 Q. Did Mr. Olofson tell you if he had loaned anything else to
9 Mr. Kiernicki to help him in that endeavor?

01:36 10 A. He had also given Mr. Kiernicki ammunition.

11 Q. On more than one occasion?

12 A. Yes.

13 Q. And did Mr. Olofson explain to you why it was that -- or for
14 what length of time he was loaning the gun to Mr. Kiernicki?

01:36 15 A. Um --

16 Q. It was a loan, it wasn't permanent, right?

17 A. Right. It was a loan until Mr. Kiernicki had purchased the
18 firearm that he and Mr. Olofson had talked about previously.

01:36 19 Q. Okay. And did Mr. Olofson indicate to you whether that was
20 a full gun or whether it was a kit?

21 A. It was going to be a parts kit and they were going to
22 assemble it.

23 Q. Do you know who was going to assemble it?

24 A. Mr. Olofson.

01:36 25 Q. And did Mr. Olofson tell you during the course of his

1 interview whether Mr. Kiernicki was the only person to whom he
2 had lent firearms?

3 A. No, he had loaned firearms out to numerous people.

4 Q. Did he tell you how many?

01:37 5 A. He said he didn't recall. He had loaned out so many
6 firearms that he could not keep track.

7 Q. Did he know to whom he had lent those firearms?

8 A. No. He said he did not keep a record of who he loaned out
9 firearms to.

01:37 10 Q. Did he say why he didn't keep a record?

11 A. Because it would be dangerous.

12 Q. Did he say what he meant by that?

13 A. I believe he would not want law enforcement to know who he
14 had loaned firearms out to.

01:37 15 Q. Now, Mr. Olofson knew that the federal search warrant was
16 being executed at his residence at the same time you were
17 interviewing him, right?

18 A. Yes.

19 Q. And did he indicate to you whether there were any firearms
01:37 20 at his house --

21 A. Yeah.

22 Q. What did he say?

23 A. I believe -- well, it was officer safety issue. We had
24 asked him actually before the interview that if there were
01:37 25 firearms in the house, and he had said yes.

1 Q. Did he indicate to you whether he had firearms in places
2 other than at that residence that was being searched?

3 A. Yes, he had said that there were numerous firearm caches,
4 but he would not disclose the exact location of those places.

01:38 5 Q. And did Mr. Olofson tell you during the course of your
6 interview with him whether he knew what a machine gun was?

7 A. Yes, he did.

8 Q. And what did he say a machine gun was?

9 A. It was a firearm that would expel more than one round with a
01:38 10 single pull of the trigger.

11 Q. And when you were interviewing him did Mr. Olofson tell you
12 whether he knew how to convert a nonautomatic rifle into a
13 machine gun?

14 A. Yes, he said he had knowledge of how to do so.

01:38 15 Q. And when you were interviewing him did he ever express to
16 you any opinion that he had as to whether or not Robert
17 Kiernicki would have the knowledge that was required to make
18 that sort of conversion?

19 A. He did not believe that Mr. Kiernicki would have the
01:38 20 knowledge to be able to convert the firearm into a fully
21 automatic.

22 MR. HAANSTAD: Those are all the questions I have,
23 Your Honor.

24 THE COURT: Thank you.

01:39 25 CROSS-EXAMINATION

1 BY MR. MULLINS:

2 Q. Agent Keeku, when you interviewed Mr. Olofson back on, this
3 was in July of 2006?

4 A. Yes.

01:39 5 Q. He never tried to say that that gun wasn't his.

6 A. Correct.

7 Q. He fully acknowledged that that was his gun.

8 A. Yes.

9 Q. You said that he also told you that he had the knowledge to
01:39 10 transform a gun, a semi-automatic into an automatic, correct?

11 A. Correct.

12 Q. But that he didn't have the parts, tools, or machining
13 skills, correct?

14 A. Correct.

01:39 15 Q. So actually he might have had knowledge of some, in some
16 vague way, but he didn't have the skills to do it.

17 A. That is a statement that he made, yes.

18 Q. Okay. And Mr. Olofson also -- he said that he had bought
19 that gun in 1989, correct?

01:40 20 A. Correct.

21 Q. And that he had bought it from a federal firearms licensee,
22 correct?

23 A. I'd have to review my notes.

24 Q. Would it refresh your recollection if I showed you the
01:40 25 summary of the interview of Mr. Olofson?

1 A. Yes.

2 Q. And actually let me rephrase my question. He said that he
3 buys guns from federal firearms licensees, correct?

4 A. Yes.

01:40 5 Q. And to be a federal firearms licensee, you must be complying
6 with federal laws as they relate to selling guns, correct?

7 A. Correct.

8 Q. Okay. Now, Mr. Olofson also said to you -- you asked
9 Mr. Olofson whether he had said anything to Mr. Kiernicki about
01:41 10 the gun, correct?

11 A. I'd have to review my notes.

12 Q. Sure, go ahead.

13 A. Yes, Mr. Olofson did speak with Mr. Kiernicki.

14 Q. And he told him to behave himself with the gun.

01:42 15 MR. HAANSTAD: Objection, Your Honor.

16 THE COURT: Excuse me. Overruled. Overruled.

17 THE WITNESS: That is correct.

18 BY MR. MULLINS:

19 Q. And he told Mr. Kiernicki that he didn't expect him to do
01:42 20 anything stupid.

21 A. Correct.

22 Q. So Mr. Olofson was expecting Mr. Kiernicki to behave
23 responsibly with the gun when he gave it to him.

24 A. I do not know. I just know the statement that he told
01:42 25 Mr. Kiernicki to behave.

1 Q. Okay. And Mr. Olofson -- you advised Mr. Olofson that it
2 had fired automatically, correct?

3 A. Yes.

4 Q. And he said, well, if that happened then it was a
01:42 5 malfunction, correct?

6 MR. HAANSTAD: Objection, hearsay.

7 THE COURT: Overruled.

8 THE WITNESS: I'd have to refer back to my notes.

9 BY MR. MULLINS:

01:42 10 Q. Go ahead.

11 (Witness peruses document.)

12 A. Can you repeat the question, please?

13 Q. You told Mr. Olofson that the gun had fired automatically?

14 A. Yes.

01:43 15 Q. And he said that if that happened then it was a malfunction.

16 A. Yes.

17 Q. And when the search warrant was executed there were other
18 guns that were found in Mr. Olofson's house, correct?

19 A. Yes.

01:43 20 Q. And none of those guns are automatic.

21 A. No.

22 MR. MULLINS: Okay. Nothing further.

23 MR. HAANSTAD: I have no other questions, Your Honor.

24 THE COURT: You may step down. Thank you very much.

01:44 25 (Witness excused at 1:44 p.m.).

1 MR. HAANSTAD: Your Honor, the government calls Agent
2 Paul Harding.

3 THE REPORTER: Raise your right hand, please.

4 PAUL HARDING, GOVERNMENT WITNESS, DULY SWORN

5 THE REPORTER: State your name and spell your name for
6 the record.

7 THE WITNESS: My name is Paul John Harding,
8 H A R D I N G.

9 DIRECT EXAMINATION

01:45 10 BY MR. HAANSTAD:

11 Q. Mr. Harding, could you tell the ladies and gentlemen of the
12 jury how you're employed?

13 A. I'm a special agent with the Bureau of Alcohol, Tobacco,
14 Firearms and Explosives employed at the Milwaukee, Wisconsin
01:45 15 field office.

16 Q. And how long have you been with ATF?

17 A. Since August of 1987.

18 Q. And what are your responsibilities currently with ATF?

19 A. I routinely investigate alleged violations of the federal
01:45 20 firearms, arson and explosive laws, drug laws as they relate to
21 the firearms laws, and I'm also a computer forensics examiner
22 with ATF.

23 Q. How long have you been a computer forensics examiner with
24 ATF?

01:46 25 A. Approximately I'd say right around 19 months now.

1 Q. Okay. And in the course of performing your duties as an ATF
2 agent, did you become involved in an investigation involving
3 Mr. David Olofson?

4 A. Yes, I did.

01:46 5 Q. And how did you come to be involved in that investigation?

6 A. I was involved in a search warrant that was executed at his
7 residence, and later I did analysis on some computer hard drives
8 that we recovered from the residence.

9 Q. Was the search of his residence on July -- or on 16th of
01:46 10 2006?

11 A. My recollection it was July 19th.

12 Q. Okay. And generally speaking, the object of that search was
13 to locate guns and gun related items in Mr. Olofson's residence,
14 right?

01:46 15 A. That's correct, as well as computer related evidence.

16 Q. And did you find those types of things when you executed the
17 search warrant?

18 A. Yes, we did.

19 Q. First of all, did you find guns in the residence?

01:47 20 A. Yes.

21 Q. Do you recall roughly how many?

22 A. There was, from 10 to 13 long guns my recollection is were
23 recovered, and I believe three handguns.

24 Q. And what about gun components?

01:47 25 A. There were gun components, there were various gun parts,

1 tools for working on firearms, manuals, ammunition, a large
2 number of firearms related items.

3 Q. When you say tools for working on firearms, what sorts of
4 work were those, were those useful for on firearms?

01:47 5 A. Various things. There were common hand tools, a number of
6 them were, there were what appeared to be certain types of dyes
7 and things used in reloading and various other assorted items.

8 Q. And you testified that one of the objects of the search was
9 to look for computer related evidence as well, right?

01:47 10 A. That's correct.

11 Q. And did you find computers in his residence?

12 A. Yes, we did.

13 Q. Okay. And have you had an opportunity to perform a search
14 of the hard drives of those computers?

01:48 15 A. Yes, I have.

16 Q. I'm going to show you a series of documents that have been
17 marked Exhibits 9 through 13.

18 MR. MULLINS: Your Honor, may we have a side bar?

19 THE COURT: Surely.

01:48 20 (At side bar on the record.)

21 MR. MULLINS: I just want to give some heads up that
22 we're going to object on relevancy grounds to Exhibit 10 because
23 that refers to a different model of gun, not an M-16. Or an
24 AR-15.

01:50 25 THE COURT: All right. What else are you objecting

1 to?

2 MR. MULLINS: Exhibit 11 also based on relevancy
3 because the e-mails are from 2003. Also I don't see any
4 reference to M-16s in Exhibit 11 or AR-15s.

01:50 5 THE COURT: Go ahead. What else?

6 MR. MULLINS: Exhibit 12, there we're objecting on
7 relevancy because of the date, it's from 2005. This happened a
8 year later. No objection to Exhibit 13. Or Exhibit 9.

9 THE COURT: Mr. Haanstad?

01:51 10 MR. HAANSTAD: It's true Exhibit 10 does not refer to
11 M-16s at all, but it discusses the conversion of non-automatics
12 into automatic firing weapons. So it's relevant in that it
13 shows that Mr. Olofson is a person who not only is not going to
14 have knowledge but also is not going to have the interest in
01:51 15 performing properly speaking conversions of non-automatics into
16 fully automatics.

17 THE COURT: And what about 11?

18 MR. HAANSTAD: In 11 someone is asking Mr. Olofson
19 about registering a machine gun. Mr. Olofson indicates that as
01:52 20 a sovereign they're not hindered by regulations that federal
21 citizens have to allow.

22 There's been testimony just recently that's gone into
23 whether or not Mr. Olofson knew that it was illegal for him to
24 have this gun, whether he had reason to be worried about having
01:52 25 this gun. One possible reason --

1 THE COURT: What about 12?

2 MR. HAANSTAD: In 12, I mean, he specifically is
3 asking about ordering M-16 parts which are exactly what was put
4 into this AR-15 at issue in this case. It's true it's from --

01:52 5 THE COURT: All of the objections are overruled.

6 (End of discussion at side bar.)

7 BY MR. HAANSTAD:

8 Q. I think these are in order, Mr. Harding.

9 THE COURT: Mr. Haanstad, would you please turn your
01:53 10 screen.

11 BY MR. HAANSTAD:

12 Q. I'm showing you now what's been marked Exhibits 9 through
13 13. If you could just look at those and tell me whether you
14 recognize them.

01:53 15 THE COURT: One second, please.

16 THE WITNESS: Yes, I do.

17 BY MR. HAANSTAD:

18 Q. And how do you recognize Exhibits 9 through 13?

19 A. They were items that I recovered from three of the hard
01:54 20 drives, recovered from some of the hard drives that were taken
21 from Mr. Olofson's residence on that day during the course of my
22 analysis.

23 MR. HAANSTAD: Your Honor, I'd move Exhibits 9 through
24 13 into evidence.

01:54 25 THE COURT: Objections? Above what we discussed at

1 side bar?

2 MR. MULLINS: No.

3 THE COURT: The objection is overruled. Proceed.

4 (Exhibit 9-13 offered and received.)

01:54 5 BY MR. HAANSTAD:

6 Q. Agent Harding, looking first at Exhibit 9. What is

7 Exhibit 9?

8 A. It's -- it is a printed out PDF document that was recovered
9 from drive Q1.

01:54 10 THE COURT: One second, please.

11 (Pause.)

12 THE COURT: Go ahead.

13 THE WITNESS: This is a printed out copy of a PDF
14 document that was recovered by myself from a drive that was
01:55 15 designated as Q1. It was the main drive containing the Windows
16 operating system from one of the computers in the basement.

17 BY MR. HAANSTAD:

18 Q. And it's a PDF document entitled, AR-15 to M-16 Conversion
19 Book, right?

01:55 20 A. Yes, it is.

21 Q. And if you turn to the first page, there is a notice at the
22 bottom, right?

23 A. That's correct.

24 Q. And that notice says that this book contains information
01:55 25 that gives explicit details on the construction and/or

1 conversion of fully automatic firearms, right?

2 A. Correct.

3 Q. And if you turn to page 10 of that document. It lists some
4 AR-15 parts?

01:56 5 A. That is correct, it depicts the parts with the description
6 under them.

7 Q. And at the very bottom of that page it indicates AR-15 parts
8 to be discarded, right?

9 A. Correct.

01:56 10 Q. And among the parts that are listed in the AR-15 parts to be
11 discarded are the hammer, the trigger, the selector and a
12 disconnecter, right?

13 A. Correct.

14 Q. And if you turn to page 11 of that document, it's entitled,
01:56 15 M-16 Parts?

16 A. Correct.

17 Q. And the same parts, the same AR-15 parts that were just
18 discarded are for the most part listed here under the M-16
19 parts, right?

01:56 20 A. The descriptions are the same, that's correct.

21 Q. So again it includes the hammer, the selector, the trigger,
22 and the disconnecter. Right?

23 A. Correct.

24 Q. And if you could look at Exhibit 10.

01:57 25 A. Yes.

1 Q. And Exhibit --

2 THE COURT: Can you magnify that?

3 MR. HAANSTAD: Judge, I'm sorry, this is Exhibit 11
4 that popped up on the screen. I'm afraid I don't have the
01:57 5 ability to go back.

6 THE COURT: All right.

7 BY MR. HAANSTAD:

8 Q. And Exhibit 10 first lists the person's name, address, phone
9 number, some information like that.

01:58 10 THE COURT: One second. Let me see if I can do
11 something here. Would you put your paper down?

12 (Pause.)

13 THE COURT: Go ahead.

14 BY MR. HAANSTAD:

01:58 15 Q. After the identifying information at the very top there's a
16 line that reads, the down and dirty full auto SKS, right?

17 A. That is correct.

18 Q. Have you looked through this document?

19 A. Yes, I have.

01:58 20 THE COURT: Would you pull the document down some?
21 Pull it toward you.

22 BY MR. HAANSTAD:

23 Q. I'm sorry, have you looked through this document before?

24 A. Yes, I have.

01:59 25 Q. And generally speaking what process does it describe?

1 A. It describes how to turn a semi -- how to convert a
2 semi-automatic SKS rifle into a SKS rifle that will fire in a
3 full automatic configuration.

4 Q. And when you say an SKS rifle that will fire in a full
01:59 5 automatic configuration, do you mean an SKS rifle that will fire
6 as a machine gun?

7 A. That is correct.

8 Q. Continuing on to Exhibit 11. What is Exhibit 11?

9 A. Exhibit 11 -- get it centered here --

01:59 10 THE COURT: I'll see if I can go back to the other
11 one. Unless you would prefer using that.

12 MR. HAANSTAD: Is that larger?

13 THE COURT: It's larger.

14 MR. HAANSTAD: I think that would be a good idea.

01:59 15 (Pause.)

16 THE COURT: Can the jury see that? Go ahead.

17 BY MR. HAANSTAD:

18 Q. So Exhibit 11 is an e-mail exchange between David Olofson
19 and another individual, right?

02:00 20 A. That is correct.

21 Q. And we need to start at the bottom to go chronologically as
22 the earliest e-mail on this page; is that right?

23 A. That's correct.

24 Q. Okay. So at the bottom it's somebody e-mailing to David R.
02:00 25 Olofson asking him about the untaxed registering of a machine

1 gun, right?

2 A. That's correct.

3 Q. And how does Mr. Olofson respond in the e-mail above?

4 A. He responds that -- do you want me to paraphrase it?

02:00 5 Q. No, if you could just read right from the --

6 THE COURT: No, the jury can read.

7 MR. HAANSTAD: I'm sorry?

8 THE COURT: The jury can read.

9 BY MR. HAANSTAD:

02:01 10 Q. Okay. If you could summarize what it is that he, how
11 Mr. Olofson's responds.

12 A. The response essentially is that individuals that are
13 sovereigns, as it is called, as they are called in the e-mail,
14 are not bound by the United States regulations regarding
02:01 15 firearms, and that possession of machine guns by sovereigns,
16 unlike those by average citizens, is not restricted, and there's
17 no requirement for registration or adherence to the federal law.

18 Q. And if you could go to Exhibit 12. What is Exhibit 12?

19 A. Exhibit 12 is again an e-mail exchange between
02:01 20 Mr. Olofson -- between an individual utilizing -- referred to by
21 the name of David and utilizing an e-mail address of
22 clover762@charter.net and another individual essentially appear
23 to be bartering back and forth over M-16 associated items such
24 as magazines and military pouches, that type of thing.

02:02 25 Q. And it also refers generally to M-16 parts, right?

1 A. That's correct.

2 Q. Now, you said an individual who is referred to as David, but
3 also has an e-mail address of cloverleaf762@charter.net. Based
4 on your forensic examination of Mr. Olofson's hard drives, that
02:02 5 is the hard drives of the computers that were taken from his
6 residence in July of 2006, do you know who
7 cloverleaf762@charter.net refers to?

8 A. Yes, I saw numerous e-mails using that e-mail address, and
9 also referencing the name of -- Mr. Olofson's full name David
02:02 10 Olofson, and I also know that that's the user profile for the
11 main computer that we recovered designated as Q1. And that
12 computer also, when it was installed, was installed with the
13 registered user name of David Olofson.

14 Q. Okay. And if you could take a look at Exhibit 13. Have you
02:03 15 reviewed Exhibit 13 before?

16 A. Yes, I have.

17 Q. And it's a document entitled, Requirements For Purchasing
18 Machine Guns and then goes on from there, right, in the title?

19 A. That's correct.

02:03 20 Q. And generally speaking what is Exhibit 13?

21 A. It describes the requirements of the National Firearms Act
22 in regards to private citizens purchasing and registering in
23 their own names legally National Firearms Arms Act weapons which
24 includes machine guns, silencers, short-barreled rifles,
02:04 25 short-barreled shotguns and other types of firearms. It

1 basically describes the procedure at how one goes about it and
2 what the requirements are.

02:04

3 Q. And it actually begins by indicating that the notion that
4 machine guns are illegal is, as they refer to it here, a
5 misconception, right?

6 A. That's correct.

7 MR. HAANSTAD: Those are all the questions I have,
8 Your Honor.

9 CROSS-EXAMINATION

02:04

10 BY MR. MULLINS:

11 Q. Agent Harding, the M-16 and the AR-15 are similar types of
12 guns, correct?

02:04

13 A. It's tough to -- what you're using generally is generic
14 terms right now, AR-15 and M-16, there's various different
15 manufacturers and models of the AR-15. I believe initially they
16 were both -- and again I'm not one of our firearms technology
17 people, I'm a special agent, but generally they were derived
18 from very similar type of firearms. It may have branched off
19 over the years. One is generally regarded as fully automatic or
20 a machine gun or select fire, the other is generally regarded as
21 a semi-automatic firearm.

02:05

22 Q. So the AR-15 was essentially designed as the civilian
23 version of the M-16, the civilian semi-automatic version as
24 opposed to the M-16 which is primarily used by the military,
02:05 25 correct?

1 A. In general I think, again, using the generic terms I believe
2 that's an accurate statement.

3 Q. Okay. And so the AR-15 can function using parts from the
4 M-16. Correct?

02:05 5 A. M-16 parts -- some M-16 parts will fit in an AR-15 rifle and
6 you can fire, you can certainly fire rounds from it.

7 Q. But that doesn't necessarily transform the gun, the AR-15
8 into an automatic gun just because it has some M-16 parts,
9 correct?

02:06 10 A. That is again a question that would be beyond my level of
11 expertise.

12 Q. Okay.

13 A. My understanding is if it fires as a machine gun that it may
14 not be designated as an M-16 but it's still designated as a
02:06 15 machine gun.

16 Q. If it fires. But just the fact that it has parts of an M-16
17 does not by that fact make it a machine gun, unless it fires
18 more than one round.

19 A. Actually I believe it can be more complicated than that.
02:06 20 And again, I think that would be outside of my area of expertise
21 to answer that, to try to answer that question.

22 Q. Okay. Now, these documents that were retrieved from
23 Mr. Olofson's computer, these were on his hard drive, correct?

24 A. I'm sorry?

02:07 25 Q. These were on his hard drive?

1 A. There were more than one hard drive, but, yes, they were on
2 hard drives, that's correct.

3 Q. Okay. And they were not printed in hard copy form?

4 A. Not that I observed. These here were printed from files
02:07 5 that were recovered from the hard drives.

6 Q. In other words, you printed them --

7 A. Yes.

8 Q. -- or somebody with the ATF printed them. They weren't just
9 lying around --

02:07 10 A. These are not the copies --

11 Q. Okay.

12 A. -- we did not recover these copies from --

13 Q. Right.

14 A. Yes.

02:07 15 Q. And they weren't just lying around Mr. Olofson's house.

16 A. These particular documents?

17 Q. Correct.

18 A. Not that I'm aware of, no.

19 Q. Okay. Now, is it possible you are a computer forensics
02:07 20 expert, correct?

21 A. That's correct.

22 Q. Is it possible to determine how often someone has viewed a
23 specific document by examining the hard drive?

24 A. In certain circumstances it's possible. It depends on the
02:08 25 type -- it depends on the type of document, it depends on where

1 it was stored, it depends on the operating system. I mean, in
2 certain circumstances it is possible.

3 Q. Okay. Did you try to determine that in this case?

4 A. What I did determine -- I attempted to determine along those
02:08 5 lines in this case. What I was able to determine is what are
6 referred to generally as creation, modification, and last access
7 dates for these documents.

8 Q. Okay. Do you know when Exhibit 9 was last accessed?

9 A. I would have to look. Exhibit 9 has a last access date of
02:08 10 July 16th, I believe it is, of 2006. Roughly, give or take a
11 day but I believe it was July 16th of 2006 is reflected as the
12 last access date.

13 Q. Okay. Now, Exhibit 9 describes a particular process for
14 converting an AR-15 to an M-16, correct?

02:09 15 A. Whether -- it describes a process whether the process
16 involves all steps or whether the process involves pieces,
17 again, we're -- not to put anybody off, but we're again getting
18 outside my personal area of expertise regarding this.

19 Q. Okay. So you don't know whether this process was done on
02:09 20 that gun.

21 A. I'm, again, not my area of expertise.

22 Q. Okay. And this came -- it was on the hard drive, was it
23 downloaded with other documents?

24 A. It can be difficult to tell at times how a file actually got
02:09 25 on the hard drive itself. This particular file was in a folder

1 with quite a few other PDF documents and it -- based upon my
2 analysis of that hard drive and based upon the items that were
3 recovered from it, it would be my opinion that this was copied
4 from a CD along with other PDF files that were part of that CD
5 and put into a folder under the cloverleaf's -- under several
6 sub-folders under the cloverleaf762 user profile for the main
7 hard drive on that computer, if that answers your question.

8 Q. It does. Do you know what other documents would have been
9 downloaded with it?

10 A. Again, I don't like to use the term downloaded because that
11 often would reflect that it came from the Internet. I believe
12 this was more likely a copied CD in which a CD was placed in a
13 drive and then the contents of that CD were copied over to a
14 folder.

15 Q. Okay.

16 A. I'm sorry.

17 Q. Do you know what other documents were on that CD?

18 A. There were documents related to all types of, everything
19 from the federal firearms rules and regulations was one of the
20 documents, an ATF manual regarding essentially the entire
21 federal firearms regulations and laws, there was a manual on
22 there, an ATF publication regarding ATF's -- a compilation of
23 state firearm laws, there were manuals for various other types
24 of firearms. Again, these were PDF documents. I believe there
25 was a DEA drug enforcement training guide PDF that was on there.

1 There was a whole --

2 Q. So is it fair to describe the CD as kind of intended for gun
3 enthusiasts to allow them to pursue their hobby and not run
4 afoul of the law?

02:11 5 A. There were manuals. I don't know what it was intended for.
6 I can simply tell you what was on it.

7 Q. Okay. But there were laws and regulations dealing with
8 firearms.

9 A. Among various other manuals for armory manuals, for various
02:12 10 military type firearms. There were military training manuals.
11 There were -- there was a whole smattering of that type of
12 material and there were several -- there were additional
13 sub-folders on there that contained what appeared to be other
14 disks that were part of this series.

02:12 15 Q. Okay.

16 A. What the intention of the seller, the company I believe is a
17 company called Stipco, S T I P C O.

18 Q. And you know Mr. Olofson is in the Army Reserves?

19 A. I have been told that.

02:12 20 Q. Now, the -- some of the parts that you found in
21 Mr. Olofson's basement it was?

22 A. That's correct.

23 Q. They're used to assemble firearms. Correct?

24 A. They certainly could be. They could be used for assembly,
02:12 25 they could be used for repair. Some of them were -- we found,

1 for example, FNFAAL rifle in which the main section of the
2 receiver is cut out to essentially stop it from being viewed by
3 ATF regulations as a firearm in itself, it's no longer
4 functioning. So we have the upper barrel assembly --

5 Q. But --

6 A. -- we found a whole smattering of things.

7 Q. And those parts by themselves are not illegal to possess.

8 A. I'm sorry, illegal?

9 Q. Those parts are not illegal to possess.

02:13 10 A. No, they are not.

11 Q. And it's not illegal to assemble a gun, correct?

12 A. It depends on the gun that you assemble.

13 Q. Right, you can't assemble an automatic. But it's not
14 illegal to assemble a nonautomatic gun.

02:13 15 A. You can certainly assemble firearms. But again, the
16 completed firearm must be in conformance with all existing
17 federal regulations and laws. I don't know how to put it any
18 other way.

19 Q. But the actual assembly is not by itself illegal.

02:13 20 A. Not if you're assembling a fully legal in-conformance
21 firearm, no.

22 Q. Okay.

23 A. You can't engage in the business of assembly --

24 Q. Correct.

02:14 25 A. -- unless you're licensed, but to assemble one for yourself

1 would be legal, that's correct.

2 Q. Correct, or to loan to people, friends.

3 A. Again, as long as the friend is not prohibited --

4 Q. Right.

02:14 5 A. -- and the firearm is in conformance --

6 Q. Yes.

7 A. -- with all laws, that's correct.

8 Q. Okay. I want to refer to Exhibit 10. Do you have that in
9 front of you, Agent?

02:14 10 A. Yes, I do.

11 Q. And that refers to the full auto SKS. And SKS is a model of
12 gun, correct?

13 A. Yes, it is.

14 Q. And that's not an M-16.

02:14 15 A. It is not, no.

16 Q. And this document does not refer to M-16s, correct?

17 A. It does not.

18 Q. And it does not refer to AR-15s.

19 A. It does not.

02:14 20 Q. Okay. And I want to ask you to look at Exhibit 11. And
21 these were e-mails from 2003, correct?

22 A. That's correct.

23 Q. And Exhibit 12, those were from 2005?

24 A. That's correct.

02:15 25 Q. And those only refer to parts, M-16 parts, correct?

1 A. That's correct.

2 Q. They don't refer to any process of converting an AR-15 to an
3 M-16.

4 A. They do not.

02:15 5 Q. And for that matter Exhibit 11 does not refer to any
6 conversion of an AR-15 into an M-16.

7 A. Does not refer to conversion, that is correct.

8 Q. And if you look at Exhibit 13. Do you know who published
9 this or who wrote this?

02:16 10 A. I can't tell you who wrote it, I can tell you who did not
11 write it.

12 Q. The ATF.

13 A. Yes. And that's because quite simply we're referred to as
14 BATF which is a terminology we don't use. We refer to our
02:16 15 agency, its official designation is ATF. And I don't say that
16 that to be wise, I'm simply saying that that's, the one thing I
17 can say is it's not one of our documents.

18 Q. Okay. But it essentially advises people how to legally own
19 or possess an automatic firearm, correct?

02:16 20 A. That's correct.

21 Q. Because there are certain legal procedures for owning an
22 automatic firearm, or possessing an automatic firearm.

23 A. Yes, there are.

24 Q. And this just describes the procedures that have to be
02:17 25 followed.

1 A. That's correct.

2 Q. And these are accurate? For the most part?

3 A. I would say for the most part, yes.

4 Q. And just getting back to Exhibit 9, and this might be beyond
02:17 5 your expertise, but I'll try anyways. If you could go to page
6 11. And --

7 THE COURT: Of which document?

8 MR. MULLINS: Of Exhibit 9.

9 THE COURT: Thank you.

02:17 10 BY MR. MULLINS:

11 Q. And that shows the M-16 parts. I assume these are the
12 essential parts of an M-16?

13 A. Again, that would be beyond my area of expertise.

14 Q. Okay. Fair enough.

02:18 15 MR. MULLINS: I have nothing further.

16 MR. HAANSTAD: Nothing further from the government,
17 Your Honor.

18 THE COURT: Very well. Let's take a break at this
19 time.

02:18 20 THE BAILIFF: All rise.

21 (Jury out at 2:18 p.m.)

22 (Witness excused at 2:18 p.m.)

23 THE COURT: Who do you have in the wings?

24 MR. HAANSTAD: I have one more witness, Your Honor.

02:18 25 THE COURT: All right. We'll take about 10 minutes or

1 so and give the jury sufficient time to refresh and we'll be
2 ready to roll.

3 MR. HAANSTAD: Thanks.

4 THE COURT: Thank you.

02:19 5 (Recess taken at 2:19 p.m., until 2:34 p.m.)

6 THE COURT: Do the parties wish to be heard?

7 MR. HAANSTAD: Your Honor, the government has one more
8 witness, and we'll likely rest after that witness.

9 THE COURT: Mr. Fahl?

02:34 10 MR. FAHL: Mr. Haanstad informed me that he would like
11 to sequester our expert during their expert's testimony and I
12 thought that was something we should discuss prior to the jury
13 coming out.

14 THE COURT: All right.

02:34 15 MR. HAANSTAD: My concern, Your Honor, is that if
16 their proposed expert witness sits in through our entire --
17 they've sat through our case so far, and if that witness now
18 sits through and hears our expert testimony, I think the obvious
19 concern is that he's going to sort of weave his testimony in
02:35 20 through what he heard our witness testify to. And it's
21 particularly the case where this witness hasn't prepared a
22 written report of any kind in connection with this case.

23 I know that within the last couple of months this
24 exact same proposed expert witness, Mr. Savage, encountered a
02:35 25 similar situation in I believe it was the District of South

1 Carolina and was excluded from testifying on that basis, and I
2 think the concern is the same here.

3 THE COURT: Mr. Fahl?

4 MR. FAHL: First of all, I had talked to Mr. Haanstad
02:35 5 earlier and we decided that we would allow our witnesses in
6 throughout the entire trial. And that's why when you stopped us
7 before and we came to side bar I mentioned that we had agreed
8 that witnesses would not be sequestered during the hearing.
9 Apparently now that's changed.

02:35 10 But under Rule 703 it's clear that an expert can
11 testify to factual data and it can be basis for an opinion that
12 are just made known to the expert that day or just before the
13 hearing.

14 So I think under Rule 703 Mr. Savage should be allowed
02:36 15 to be present to hear the government's expert's testimony
16 because some of those facts may be relevant to any opinion which
17 he would in fact give.

18 Mr. Savage has examined the firearm this afternoon.
19 His testimony will be -- mostly consist of what it is he saw in
02:36 20 the gun and what, including the internal parts of this gun, and
21 what they consist of. However, there are some malfunctions that
22 I think will be at issue in Mr. Kingery's testimony.

23 I would like to have Mr. Savage present so he can hear
24 what Mr. Kingery testifies to regarding those malfunctions so
02:36 25 that if the information concerning those malfunctions is in our

1 eyes not complete or incorrect, we have the ability to either
2 rebut or add information to that.

3 THE COURT: Mr. Haanstad, I'm curious about your
4 position with respect to the exclusion of the defense expert in
02:37 5 light of your prior statement that all witnesses could be in the
6 courtroom during the course of testimony.

7 MR. HAANSTAD: Our concern was not so much with the
8 fact witnesses that were testifying earlier as with the witness
9 who is going to be providing the same type of expert testimony
02:37 10 that this proposed expert --

11 THE COURT: Well, you could have certainly said that
12 at the beginning of the trial, but you didn't. So have you in
13 effect duped the defense by saying on the one hand everyone can
14 be in and suggesting to the defense that there will be no
02:37 15 problem with its expert and now changing course?

16 MR. HAANSTAD: No, Your Honor. And I want to make
17 something clear. And that's why -- there are two related issues
18 here, and I know I can't have it both ways and I wouldn't ask to
19 have it both ways.

02:38 20 We are not at this point satisfied that Mr. Savage is
21 qualified to present expert testimony. So I think maybe it
22 would make sense, and I know we talked at the final pretrial
23 about having a Daubert hearing of some sort. And I understand
24 that the government should have to choose one or the other.
02:38 25 That is, if its position is that this person is not qualified as

1 an expert then the harm in him sitting through the trial is
2 obviously much less.

3 On the other hand -- so I don't want to hold back and
4 suggest that I'm not opposing his expert testimony because the
02:38 5 government is still opposing that testimony.

6 THE COURT: Well, I certainly recall that was your
7 position earlier. Now, with respect to Mr. Savage remaining in
8 the courtroom, why has there been a change in heart?

9 MR. HAANSTAD: Your Honor, I didn't mean to commit to
02:38 10 his being here through the testimony of our proposed expert. In
11 fact, I wasn't sure that we were going to get this far today.
12 This is our last witness and I didn't anticipate that we would
13 finish, but obviously it moved a lot more quickly than I thought
14 it would.

02:39 15 THE COURT: That still wouldn't change the earlier
16 statement by the government in response to my question at side
17 bar regarding the exclusion of witnesses.

18 MR. HAANSTAD: Right. And, Your Honor, all I can say
19 is that I didn't mean to -- and I'm certainly not trying to
02:39 20 sandbag the defense in any way. I'm not sure I see how the two
21 things are related. I'm not sure I see how they're prejudiced
22 if he's not allowed to sit through this testimony whereas he was
23 allowed to sit through the prior nonexpert testimony.

24 THE COURT: Mr. Fahl?

02:39 25 MR. FAHL: Well, in this discussion we had part of the

1 concern was Mr. Haanstad's expert Mr. Kingery, and Mr. Vasquez
2 who could be in fact called on to rebut Mr. Savage, have been
3 allowed to sit through the entire trial. I had talked to him,
4 are we going to sequester witnesses or not. He said I don't see
02:40 5 a need to, so we didn't. And I -- so I called Mr. Savage and
6 told him to come up.

7 As far as a Daubert hearing, as I said, his testimony
8 is to be based on any expert opinion he bases, be based upon a
9 visual inspection of the firearm which is the same method that
02:40 10 Mr. Kingery will use for some of his testimony.

11 THE COURT: If that is so, if his testimony is going
12 to be based upon his examination of the document -- of the
13 firearm --

14 MR. FAHL: As one part. And in that sense I don't
02:40 15 think it's a Daubert issue. I mean, if he wants to talk about
16 the credibility of Mr. Savage, I mean, I think that goes to
17 admissibility and not to whether or not he can come in.

18 THE COURT: That's certainly not a Daubert question.

19 MR. FAHL: Okay. He may want to -- or I may ask him
02:40 20 to testify, one, about this soft primered ammunition versus hard
21 primered ammunition, or two malfunctions that may be occurring
22 in this particular rifle. Those are going to be based upon his
23 general knowledge as a gunsmith and owner of a gun shop and his
24 work designing and producing firearms for his own company and
02:41 25 other companies.

1 THE COURT: If he's offering opinion testimony
2 regardless of the source of his knowledge, if he's expressing
3 opinions, then he's testifying essentially as an expert. He's
4 not just giving objective testimony based upon facts that are
02:41 5 clearly observable and can be testified to by the average Joe.

6 In light of what has been said I'm going to do this.
7 I will exclude Mr. Savage from the trial during, at least during
8 that portion of the trial where the government is offering what
9 it believes to be expert testimony. When the government's
02:41 10 witness completes his testimony, that witness will also be
11 excluded from the courtroom.

12 The witness offered by the government as an expert and
13 Mr. Savage may not discuss their testimony with anyone until
14 they're advised this case has been completed. That is, tonight
02:42 15 or tomorrow they cannot talk about their testimony with the
16 government or with the defense.

17 So if the government's witness is called to rebut what
18 your witness has to say, he cannot confer with the government
19 prior to any rebuttal testimony that that witness wishes to
02:42 20 offer.

21 MR. FAHL: Can that go as well for Mr. Vasquez who at
22 this point I haven't heard that --

23 THE COURT: If there is any expert testimony to be
24 offered by the government, yes. Now, with respect to other
02:42 25 government witnesses, if there's another witness the government

1 anticipates calling either as part of its case in chief or as
2 rebuttal, that witness or witnesses cannot be in the courtroom.

3 MR. FAHL: Thank you, Your Honor.

4 THE COURT: All right. So if you need to give
02:43 5 instructions to any of your witnesses this is your opportunity
6 to do so.

7 (Pause.)

8 THE COURT: Are you ready to proceed?

9 MR. HAANSTAD: Yes, Your Honor.

02:46 10 THE COURT: Before we proceed I would like to ask both
11 sides whether or not you would anticipate calling any witnesses
12 who have been convicted of any crimes.

13 MR. HAANSTAD: The government does not, Your Honor.

14 MR. FAHL: No, Your Honor.

02:47 15 THE COURT: All right, I will have a set of
16 instructions given to you shortly so that you can review them
17 tonight or during some later break.

18 (Jury in at 2:48 p.m.)

19 THE COURT: Mr. Haanstad?

02:49 20 MR. HAANSTAD: The government calls Max Kingery.

21 THE REPORTER: Raise your right hand, please.

22 MAX KINGERY, GOVERNMENT WITNESS, DULY SWORN

23 THE REPORTER: State your name and spell your name for
24 the record.

02:49 25 THE WITNESS: Max Mason Kingery, K I N G E R Y.

DIRECT EXAMINATION

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BY MR. HAANSTAD:

Q. Mr. Kingery, can you tell the ladies and gentlemen of the jury how you're employed?

02:50 A. I'm a firearms enforcement officer with the Bureau of Alcohol, Tobacco & Firearms.

Q. Okay, and how long have you been with ATF?

A. About two and a half years.

02:50 Q. And have you been a -- I'm sorry, is it a firearms enforcement officer?

A. Yes, sir.

Q. An FEO? Have you been an FEO that whole time?

A. Yes, sir, I have.

Q. And what are your duties and responsibilities as an FEO?

02:50 A. As an FEO primarily we examine and classify items submitted to us as evidence. We also examine items submitted to technology branch by the firearms industry for classification. Items that are being imported into the United States are evaluated for their importability. And we answer general firearms related questions to the public and to members of the industry.

Q. And do your evaluation responsibilities include making determinations for ATF as to whether certain firearms are machine guns?

02:51 A. Yes, sir.

1 Q. How are you employed prior to working for ATF?

2 A. Prior to ATF I was a sergeant with the West Virginia State
3 Police.

02:51 4 Q. And what types of firearms training did you receive before
5 you came to ATF?

6 A. With the state police I was trained with the service side
7 arm, and with the shotgun and carbines. I was also a sniper, so
8 I'm a member of the sniper team.

9 Prior to the State Police I was a member of the United
02:51 10 States Marine Corps, and I served there about nine years. Had
11 an expensive amount of training with a wide variety of the use,
12 implementation and identification of firearms of a wide variety
13 in the Marine Corps, both U.S. and Soviet.

14 Q. Okay. And have you received firearms training since joining
02:52 15 ATF?

16 A. Yes, sir, I have.

17 Q. And what kind of training is that?

18 A. I received training on the classification of firearms
19 according to the Federal Firearms Guide. And I've attended
02:52 20 several armors courses on a number of different types of
21 firearms. Ammunition factory tours, ammunition training at
22 those tours. Training on firearms nexus.

23 Q. What do you mean by firearms nexus?

24 A. Where firearms originate from.

02:52 25 Q. Okay.

1 A. And I've written, I believe it's 15, possibly 16 what we
2 call white papers --

3 Q. What are those?

4 A. -- on a number of different firearms. It's basically like a
02:52 5 homework assignment of paper. The initial part of my position
6 with ATF I was being trained on the job. And part of that
7 training I had to write these papers on a number of different
8 types of firearms. One of those was the AR-15 series of
9 firearms.

02:53 10 Q. And when you write these papers on something like the AR-15,
11 what sorts of topics do you cover with respect to the gun?

12 A. Everything about it that we have available in our library at
13 ATF.

14 Q. Okay.

02:53 15 A. We have a 9,000, maybe 10,000 volume library on firearms.
16 We also have a number of periodicals, magazines, factory fliers
17 and pamphlets. We cover the design characteristics of the
18 various models of the firearm, both the civilian -- in this case
19 there are civilian and military variants, we cover both
02:53 20 variants, and how it -- its history, how it came about to be
21 designed, who designed it, who uses it and those type of things.

22 Q. Okay. Now, you testified that part of your responsibilities
23 include making determinations as to whether or not particular
24 firearms qualify as machine guns.

02:54 25 A. Yes, sir.

1 Q. And in order to determine whether a firearm qualifies as a
2 machine gun, where do you find the standard, that is, the
3 definition for machine gun?

4 A. The definition is under 26 U.S.C. 5845(B) I believe it is.

02:54 5 Q. Okay. And just generally speaking, what is a machine gun
6 according to that source?

7 A. A machine gun is any weapon which shoots automatically which
8 is or designed to, intended to, or may readily be converted to
9 fire automatically more than one shot without manual reloading
02:54 10 by a single function of the trigger.

11 It's also the frame of receiver of any such firearm.
12 And it can be a part solely intended -- solely designed and
13 intended to convert a firearm into a machine gun, or a
14 combination of parts that are designed to convert a firearm into
02:55 15 a machine gun, if those parts are under the control or
16 possession of a person.

17 Q. And how many firearms approximately have you examined in
18 your official capacity to make that determination, that is,
19 whether the firearm qualifies as a machine gun?

02:55 20 A. As evidence I've examined several hundred firearms, maybe
21 approaching a thousand firearms that would have fit into the
22 machine gun category.

23 Q. Okay. And if I show you what's been marked as Exhibit 1 in
24 this case, do you know whether you've had an opportunity to
02:55 25 examine this particular firearm?

1 A. Yes, sir, I have.

2 Q. And how do you know that?

02:56

3 A. From the serial number. I looked at it earlier also as it
4 was sitting on the table and verified that it's the same firearm
5 that I examined.

6 Q. Okay. And do you know how many times you've had an occasion
7 to examine that particular firearm?

8 A. Well, not counting today three occasions.

02:56

9 Q. And is it true that you examined that particular firearm
10 specifically in the course of performing your duties as an FEO?

11 A. Yes.

12 Q. And do you recall when the first test was?

13 A. It was in October of 2006.

02:56

14 Q. Okay. And how did that test come about? How did you first
15 come into contact with that gun?

16 A. The item was submitted to Firearms Technology Branch as
17 evidence, and it was assigned to me for examination.

18 Q. Okay. And once it was assigned to you, you took possession
19 of it, right?

02:57

20 A. Yes, sir.

21 Q. And what did you do that?

22 A. Well, I examined it to see if it had been modified in any
23 way, or if any parts had been installed into it to convert it
24 into a machine gun.

02:57

25 Q. And what did you find upon that examination?

1 A. When I examined this firearm I found that there were four of
2 the fire control components, it had been assembled with machine
3 gun components for four of the firearm components.

4 Q. And what four components were those?

02:57 5 A. The trigger, the hammer, the disconnecter, and the selector
6 switch.

7 Q. Okay. And based on your training and experience, what is
8 the effect of having those four components, those four specific
9 components be M-16 parts rather than AR-15 parts?

02:58 10 A. When installed to an AR?

11 Q. That's correct.

12 A. It would make the weapon fire automatically, or allow it to
13 fire automatically.

14 Q. And when you say allow it to fire automatically, you mean
02:58 15 allow it to fire more than one round with a single pull of the
16 trigger?

17 A. Yes, sir.

18 Q. And, therefore, constitute a machine gun?

19 A. Yes, sir.

02:58 20 Q. I show you what's been marked as Exhibit 9.

21 Now, Exhibit 9 is a document entitled, AR-15 to M-16
22 Conversion, right?

23 A. Yes, sir.

24 Q. And it indicates on page 2, if you turn to that, there's a
02:59 25 notice at the bottom I believe that indicates that the purpose

1 of the manual is to instruct individuals as to how to convert a
2 nonautomatic to an automatic firearm, right?

3 A. Yes, sir.

4 Q. And --

02:59 5 THE COURT: Counsel, please note that document is not
6 currently in front of the jury. Do you wish to have it
7 displayed?

8 MR. HAANSTAD: I'm sorry, yes, Your Honor, please.

9 THE COURT: Can the jury see that clearly?

02:59 10 Go ahead.

11 BY MR. HAANSTAD:

12 Q. And if you turn to page 10 of that manual. Now, at the top
13 of page 10, it's captioned, AR-15 Parts?

14 A. Yes.

03:00 15 Q. And it shows five different fire control components, right?

16 A. Yes, sir.

17 Q. And you had mentioned that four fire control components were
18 M-16 rather than AR-15 in this particular firearm, right?

19 A. Yes, sir.

03:00 20 Q. And which four are those?

21 A. The hammer, the selector, the trigger and the disconnecter.

22 Q. Okay. And again, based on your training and your
23 experience, is it necessary to replace all five of these AR-15
24 parts that are listed here in Exhibit 9 in order to make an
03:00 25 AR-15 fire automatically?

1 A. No, sir, it's not necessary to replace all five.

2 Q. Okay. And you testified that during your October 2006
3 examination of this particular firearm of Exhibit 1, that you
4 noted that four of these five were changed, right? Or I'm
03:01 5 sorry, four of these five were M-16 rather than AR-15
6 components, right?

7 A. Yes, sir.

8 Q. Okay. And based on the fact that those four components were
9 M-16 rather than AR-15, did you have an expectation as to
03:01 10 whether or not that firearm would qualify as a machine gun?

11 A. I expected that it would fire automatically, yes.

12 Q. Okay. But your examination consists of more than just
13 looking at the fire control components, right?

14 A. Right.

03:01 15 Q. After you noted the fire control components were M-16 rather
16 than AR-15, what did you do?

17 A. Well, the next step would be to check the barrel to make
18 sure that it's not obstructed so that I may fire it safely.

19 Q. Okay.

03:02 20 A. Then I would take it into the range and actually test fire
21 it.

22 Q. And did you do that in October of 2006 with this particular
23 gun, Exhibit 1?

24 A. Yes, sir, I did.

03:02 25 Q. And can you describe the test that you performed at the

1 range?

2 A. Yes. I fired a total of 10 rounds on this test, two
3 magazines of five rounds each. I inserted a magazine of five
4 rounds, charged the weapon, loaded a cartridge into the chamber,
03:02 5 placed the selector lever on the safe position, and squeezed the
6 trigger. The weapon did not fire, as I would have expected.

7 Q. Okay. So that was not consistent with -- I'm sorry, that
8 was consistent with what you expected.

9 A. Yes.

03:02 10 Q. The fact that when the selector switch was on safe the
11 firearm did not fire.

12 A. Correct. Yes, sir.

13 Q. Okay. What did you do next?

14 A. Next I moved the selector to the fire position, which is the
03:03 15 semi-automatic position, and squeezed the trigger, and the
16 weapon fired.

17 Q. Okay. Just one shot?

18 A. I repeated this test with five shots.

19 Q. And each time you pulled the trigger how many rounds were
03:03 20 fired?

21 A. I pulled the trigger five times and it fired one round with
22 each pull of the trigger.

23 Q. And was that consistent with what you expected?

24 A. Yes, sir.

03:03 25 Q. And what did you do next?

03:03 1 A. Next I inserted a magazine, a second magazine of five
2 rounds, and moved the selector lever to the automatic position.
3 It's an unmarked position on this firearm. It would be the
4 position at 3:00 o'clock if you were looking at the selector as
5 a clock face.

6 Then I squeezed the trigger and the weapon fired one
7 round, ejected that round, loaded another, and then the hammer
8 followed that round forward but failed to fire.

03:04 9 Q. So when it was in the unmarked third position and you pulled
10 the trigger it fired one round, right?

11 A. Yes, sir.

12 Q. And even though it fired that round, a second round was
13 cycled into the battery, right?

14 A. Yes, sir.

03:04 15 Q. That is, it was put in the same position that the first
16 round had just been in.

17 A. Right. But the hammer is caught in the semiauto position.
18 It is not allowed to continue forward.

19 Q. Whereas in the automatic position what happens?

03:04 20 A. The hammer would be allowed to fly forward and strike the
21 primer.

22 Q. Okay. And in this case could you see whether the -- when
23 the second round was chambered, whether the hammer hit that
24 second round?

03:04 25 A. Yes, there was a dimple in the primer where the -- actually

1 the hammer strikes the firing pin and the firing pin strikes the
2 primer. There was a dimple made in the primer by the firing
3 pin.

03:05 4 Q. Okay. Was that result, that is, the result of your pulling
5 the trigger while the selector switch was in the unmarked third
6 position, was that consistent with what you expected to happen?

7 A. No, sir, it was not.

8 Q. Because you expected it to fire automatically in that
9 position?

03:05 10 A. Yes, sir.

11 Q. Now, based on your training and your experience and your
12 examination of Exhibit 1, do you have an opinion as to why, even
13 with those M-16 machine gun parts, that AR-15 would not fire
14 automatically when you tried that on October -- or in October of
03:05 15 2006?

16 A. Yes, sir. It was due to the ammunition I was using. Even
17 though it was commercially available ammunition, it was a
18 military grade ammunition which has a much harder primer than
19 standard civilian ammunition.

03:05 20 Q. And why does military ammunition have a harder primer than
21 standard civilian ammunition?

22 A. Because military designed firearms have what's called a free
23 floating firing pin. And in the free floating firing pin the
24 firing pin is allowed to move back and forth freely where it can
03:06 25 often strike the primer.

1 And with a soldier handling a weapon of this type,
2 he's going to be handling it on a battlefield, jumping in and
3 out of vehicles, into ditches and things like this. The
4 firearm's going to be handled fairly roughly, and that's going
03:06 5 to cause this firing pin to move quite a bit back and forth,
6 often striking the primer. And the intent is with the harder
7 primer, is that it be necessary for a great deal of force to be
8 applied to it to allow it to go off so that it doesn't go off
9 accidentally.

03:06 10 Q. Well, with that explanation in mind, you performed a second
11 test using standard civilian grade ammunition, right?

12 A. Yes, sir.

13 Q. Okay. And can you explain that test?

14 A. Yes, sir. In that test I fired a total of 60 rounds with
03:06 15 three magazines, 20 rounds in each magazine, and also three
16 different types of ammunition. I used Winchester, Remington and
17 Federal ammunition.

18 The test was conducted similarly to the first test in
19 that I also checked the safety first, but I did not go into the
03:07 20 semi-automatic position, I went directly to the full auto
21 position and squeezed the trigger.

22 Q. Why didn't you test the semiauto position again?

23 A. Why did I not?

24 Q. Yes.

03:07 25 A. I knew that the weapon functioned already.

1 Q. Okay.

2 A. And that was the purpose for firing it in the semiauto
3 position.

4 Q. So you just checked the safe position, right?

03:07 5 A. Yes, sir.

6 Q. Found again that it worked?

7 A. Yes, sir.

8 Q. And then you put the selector switch in the unmarked third
9 position?

03:07 10 A. Yes, sir.

11 Q. And what happened when you did that? First of all, you said
12 that you used Federal, Winchester, and Remington brands?

13 A. Yes, sir.

14 Q. 20 rounds of each?

03:07 15 A. Yes, sir.

16 Q. Okay.

17 A. I don't recall in what order now, but the first magazine I
18 held the trigger down and it emptied all 20 rounds without any
19 stoppage.

03:08 20 Q. And then you loaded another magazine of 20 rounds?

21 A. Yes, sir.

22 Q. And what happened with that one?

23 A. In the next two magazines I fired in five to 10 round bursts
24 by myself functioning the trigger in five to 10 round bursts
03:08 25 and the weapon fired automatically each time.

1 Q. So in the end Exhibit 1, after that second test, fired all
2 60 rounds automatically, right?

3 A. Yes, sir.

4 Q. That is, more than one round with a single pull of the
03:08 5 trigger.

6 A. Yes, sir.

7 Q. And, therefore, it was a machine gun.

8 A. Yes, sir.

9 Q. And you also conducted a third test fire, right?

03:08 10 A. Yes, sir.

11 Q. I show you what's been marked as Exhibit 2. Do you
12 recognize Exhibit 2?

13 A. Yes, sir.

14 Q. How do you recognize it?

03:08 15 A. My initials appear on it.

16 Q. And what is Exhibit 2?

17 A. This is a DVD of the video of myself shooting the firearm on
18 the third test.

19 Q. How is it that your initials came to be on it? Did you
03:09 20 watch it?

21 A. Yes, sir. I was shown this and watched it and after I
22 watched it I took the disk out and initialed it.

23 Q. Okay. And when you watched this could you tell whether it
24 was a fair and accurate representation of the third test fire
03:09 25 that you did?

1 A. Yes, sir.

2 MR. HAANSTAD: Your Honor, the government would move
3 Exhibit 2 into evidence.

4 THE COURT: Is there any objection?

03:09 5 MR. FAHL: No objection.

6 THE COURT: 2 is received.

7 (Exhibit 2 offered and received.)

8 MR. HAANSTAD: Your Honor, it might take just a minute
9 to load this.

03:09 10 THE COURT: All right.

11 If you have a list, a complete list of the exhibits I
12 would like to get them at the end of the day.

13 MR. HAANSTAD: Okay.

14 (Pause.)

03:10 15 (Exhibit 2, video, played.)

16 BY MR. HAANSTAD:

17 Q. Now, that was the third test fire, right?

18 A. Yes, sir.

19 Q. And each time that you put a magazine in did you find that
03:12 20 the gun fired fully automatically?

21 A. Yes, sir, it did.

22 Q. With respect to each kind of ammunition that you tried?

23 A. Yes, sir, it did.

24 Q. And then you actually performed some further test fires on
03:12 25 that same day, right?

1 A. Yes, sir, we fired it a second time.

2 Q. Okay. And is that what this is?

3 A. Yes, sir.

4 (Video played.)

03:13 5 Q. That was 10 rounds?

6 A. Yes, sir.

7 (Video continued.)

8 Q. Again, based on your training and experience and your

9 examinations and test firings of Exhibit 1, that is the F7079

03:13 10 Olympic Arms AR-15, do you have an opinion as to whether or not
11 that firearm is a machine gun?

12 A. Yes, it is a machine gun.

13 Q. And again, why do you consider that firearm to be a machine
14 gun?

03:14 15 A. Because it fires automatically.

16 Q. And by "automatically" what do you mean?

17 A. It fires more than one round without manual reloading by a
18 single function of the trigger.

19 MR. HAANSTAD: I have no other questions, Your Honor.

03:14 20 THE COURT: Cross?

21 CROSS-EXAMINATION

22 BY MR. FAHL:

23 Q. Good afternoon, Officer Kingery.

24 A. Good afternoon.

03:14 25 Q. Through your training and experience have you become

1 familiar with the M-16 weapon including its design and function?

2 A. Yes, sir.

3 Q. Can you describe your experience with M-16s?

03:14 4 A. My experience with M-16s, I didn't get to finish my entire
5 experience, but my first experience was with the Army National
6 Guard, 19th Group Special Forces is when I was first introduced
7 to the M-16 family of weapons in 1983. I've used it in the
8 Army, the Marine Corps, and in the State Police, and then again
9 also here in the ATF.

03:15 10 Q. Is your experience with the M-16 purely on a firing level or
11 have you repaired or examined the gun through your training and
12 experience in these other past endeavors?

13 A. In the past it was mainly usage. With the ATF it's been, it
14 included repair, detailed examination, complete disassembly and
03:15 15 assembly.

16 Q. Okay. Using rough terms here, noting that no one thing is
17 going to be equivalent to another, the M-16 is a fully automatic
18 military style weapon which is similar to the AR-15, correct?

19 A. Yes.

03:15 20 Q. In essence, I mean, it's really the legal, the AR-15 is
21 really the legal semi-automatic rifle version of the M-16
22 machine gun for practical purposes.

23 A. Yes.

24 Q. The M-16 has what's called an auto sear, does it not?

03:16 25 A. Yes, it does.

1 Q. The AR-15 does not, correct?

2 A. As designed, no, it does not.

3 Q. Okay. To give the jury a little better understanding of how
4 a machine gun works, can you explain how the M-16 functions from
03:16 5 the point when the round is chambered and what happens
6 internally?

7 A. I'm sorry?

8 Q. Can you explain what happens internally in a machine gun
9 that makes it work as a machine gun and not as, let's say, a
03:16 10 semi-automatic?

11 A. Any machine gun?

12 Q. An M-16, which is the most similar to the AR-15 for these
13 purposes.

14 A. Okay. In an M-16 the -- starting with the round chambered,
03:16 15 the hammer is released when the trigger is pulled.

16 Q. Okay.

17 A. There's a portion on the front of the trigger called the
18 sear, comes out of the sear notch, which is what holds the
19 hammer to the rear. That allows the hammer to fly forward,
03:17 20 strike the firing pin, the firing pin in turn strikes the
21 cartridge, the primer of the cartridge, and that causes it to
22 detonate.

23 The gas pressure follows behind the bullet down the
24 barrel to a certain point at which it's tapped off and pushes
03:17 25 the bolt carrier to the rear.

1 This begins a cycle which cocks the hammer, ejects the
2 spent cartridge, reloads another cartridge, and then as the bolt
3 carrier completely closes forward, it trips the auto sear which
4 has at that point actually caught the hammer and held it to the
03:17 5 rear for a slight moment, and then allows the hammer to fly
6 forward. And this cycle continues to repeat until the trigger
7 is released.

8 Q. Okay. On the M-16 there are three settings, a safety, a
9 semi-automatic and a full automatic, correct?

03:18 10 A. Depending on the version, yes.

11 Q. And in the safety setting the weapon will not fire if the
12 trigger is pulled; is that correct?

13 A. That's correct.

14 Q. But in the semi-automatic mode the weapon will fire one
03:18 15 round for each pull of the trigger generally; is that correct?

16 A. Correct.

17 Q. Again talking about the M-16, in the automatic position the
18 weapon will fire, as you said, round after round of ammunition
19 as long as the trigger is engaged or until the ammunition runs
03:18 20 out, correct?

21 A. Yes, sir.

22 Q. Okay. Now, turning to the AR-15 rifles in general, can you
23 explain what the difference is -- you explained the M-16 very
24 thoroughly, can you explain what the difference is in the AR-15
03:18 25 for the jury? How does that operate differently?

1 A. Well, the cycle of operation is the same, but the
2 relationship of the parts is slightly different in their actual
3 design.

4 The -- for instance, the disconnecter, there's a tail
03:19 5 on the disconnecter on the M-16 version that's not present on
6 the semiauto version.

7 There is also a cross piece on the semiauto portion of
8 the trigger that's not present on the full auto version.

9 The hammer itself is shaped differently. It's heavier
03:19 10 in the M-16 version, machine gun version, and it has a second
11 hook on the back side of it. There's one hook that's caught by
12 the disconnecter, and another hook that's caught by the auto
13 sear, on the M-16, that's not present on the AR.

14 Q. So there's no auto sear on the AR-15.

03:19 15 A. Well, as designed, yes.

16 Q. As designed. Somebody could add one afterwards obviously,
17 but --

18 A. Yes.

19 Q. As you would buy one at a local gun store it would not come
03:19 20 with an auto sear.

21 A. Correct. And then there's also a difference in the bolt
22 carrier. The bolt carrier on the AR has a slot cut in the
23 forward portion of it, and the Colt variant that slot is opened
24 fairly far forward along the length of travel that the firing
03:20 25 pin travels. And it's made to a specific dimension which is

1 designed to catch the hammer as the hammer falls forward.

2 Also, again, the weight of the two, the carrier on the
3 AR is lighter than the AR on the M-16.

03:20 4 Q. Thank you. Now, turning to your report, the first test
5 which consists of the report dated October 20th, do you recall
6 the date on when you first examined this weapon?

7 A. Not off the top of my head, no, sir.

8 Q. Would it help if I refreshed your recollection with your
9 report from that day?

03:20 10 A. Yes, sir.

11 MR. FAHL: May I approach, Your Honor?

12 THE COURT: You may.

13 Would you identify the document by exhibit number?

03:21 14 MR. FAHL: I have presented Officer Kingery with a
15 report dated October 20th, 2006. His report of his inspection
16 of his --

17 THE COURT: Exhibit number what?

18 MR. FAHL: This is no exhibit. It's just used to
19 refresh his recollection.

03:21 20 THE COURT: It should be marked with an exhibit
21 number. Anything put in front of the witness should be
22 identified by an exhibit number for tracking purposes. We'll
23 start off with 100.

24 MR. FAHL: Thank you.

03:21 25 BY MR. FAHL:

1 Q. Officer Kingery, can you determine when you first inspected
2 this particular rifle?

3 A. Well, I received this weapon in July 24th of '06, and then I
4 examined it the same date of the test fire, October 11th.

03:22 5 Q. Okay. And in this examination you took the weapon apart to
6 look at its internal components, correct?

7 A. Yes, sir.

8 Q. And in your examination you noticed and you testified that
9 it had some M-16 parts, the trigger, the hammer, the
03:22 10 disconnecter and the safety selector, correct?

11 A. Yes, sir.

12 Q. In your training and experience as an expert on AR-15
13 weapons, you're aware, of course, that many AR-15 weapons,
14 especially those manufactured in the '80s, were manufactured
03:22 15 with some M-16 internal parts?

16 A. I'm aware that some were, yes.

17 Q. Do you know whether SGW/Olympic Arms manufactured its rifles
18 with internal M-16 parts?

19 A. They did use some M-16 machine gun parts, but they did not
03:22 20 use this combination of M-16 machine gun parts.

21 Q. Did you ever contact SGW/Olympic Arms about this particular
22 rifle?

23 A. No, sir, I did not.

24 Q. Are you aware that SGW has recalled this particular rifle?

03:23 25 A. No, sir.

1 Q. On your examination this weapon did not have an auto sear,
2 that's correct?

3 A. That's correct, yes.

4 Q. What does an auto sear do?

03:23 5 A. What an auto sear does is it causes a delay in the hammer
6 following forward to strike the firing pin.

7 Q. In your training you're required to be aware and follow ATF
8 regulations; is that correct?

9 A. Yes, sir.

03:23 10 Q. Are you familiar with ATF Rule 81-4?

11 A. 81-4?

12 Q. 81-4.

13 A. Yes, sir.

14 Q. So, could you summarize the contents of 81-4?

03:23 15 A. 81-4 refers to drop-in auto sears in conjunction with a
16 combination of M-16 machine gun fire control components.

17 Q. So it's correct to say that the addition of the auto sear to
18 an AR-15, and it can be an AR-15 auto sear, drop-in auto sear or
19 an auto sear 2, when you add that to a machine gun with M-16
03:24 20 internal parts that's what makes it a machine gun, correct?

21 A. No, sir, not as you just asked the question. If it's a
22 machine gun it's a machine gun. If you add them to an AR
23 semi-automatic rifle, they would make that semi-automatic rifle
24 a machine gun.

03:24 25 Q. Thank you.

1 A. And those parts together just by themselves would be a
2 machine gun.

3 Q. Okay.

4 A. Because they would be a combination of parts from which a
03:24 5 machine gun could be configured.

6 Q. Now, you testified that you noticed some modifications or
7 conversions of the firearm, but in your report you didn't note
8 any conversions but you did note these four M-16 parts; is that
9 what you were referring to when you testified?

03:25 10 A. There was no conversion that I noted, no mechanical
11 conversion.

12 Q. The modification -- this is the modification you were
13 referring to when you testified, these four M-16 parts?

14 A. It was assembled with those parts, yes, sir.

03:25 15 Q. But you can't be certain that this particular gun -- well,
16 you said that you didn't believe SGW manufactured guns with
17 these parts?

18 A. This combination of parts. They did use machine gun --

19 Q. (Interrupting) Which combination of parts do you think they
03:25 20 used or are you aware that they used?

21 A. They used hammers, on occasion triggers and disconnectors.
22 I think they've even used the bolt carrier but not -- again,
23 I've not seen them use the selector and I've not seen them use
24 it in this combination.

03:25 25 Q. So the selector is the thing that you, that kind of peaked

1 your interest?

2 A. In combination with these parts. The selector by itself
3 would not do anything.

03:26

4 Q. And your inspection revealed an AR-15 bolt carrier; is that
5 correct?

6 A. Yes, sir.

7 Q. And the purpose of the AR-15 bolt carrier is to prevent the
8 weapon from operating as a machine gun, correct? It's supposed
9 to stop the process from going forward.

03:26

10 A. Not by itself, no. It's -- replacing all of these parts is
11 intended to prevent the weapon from firing as a machine gun.

12 Q. Okay. But then let's back up. What does the AR-15 bolt
13 carrier do? What's its purpose?

03:26

14 A. It carries the bolt forward and it acts as a gas piston
15 device to convert the gas energy of the discharged firearm to
16 function the firearm.

17 Q. Okay. You noted there were three selections for the
18 selector switch, you noticed a safe fire, but the third one was
19 unmarked, correct?

03:27

20 A. That's correct.

21 Q. So there's no actual auto position on the firearm.

22 A. This one there is, yes, sir.

23 Q. Well, I mean, it's marked auto?

24 A. No, sir, it's not marked.

03:27

25 Q. It's not officially marked an automatic setting for this.

1 You flip it there and maybe it fires, but it does not say
2 automatic fire.

3 A. No, sir, there's no marking on it.

4 Q. So would it be your opinion that this particular rifle was
03:27 5 not designed in its inception to fire automatically?

6 A. In its inception I would say that's a true statement, yes,
7 sir.

8 Q. And you also test fired this weapon on October 11th, 2006;
9 is that correct?

03:27 10 A. Yes, sir.

11 Q. And when you placed the selector switch in the safe position
12 it didn't fire; that's correct?

13 A. That's correct.

14 Q. And when you placed the selector switch in the fire position
03:27 15 it fired five rounds one at a time. Correct?

16 A. Yes, sir.

17 Q. And that we referred to as a semi-automatic firing.

18 A. Yes, sir.

19 Q. But then when you placed in the third selector switch, the
03:28 20 third position, the weapon fired one round, it chambered the
21 next but then nothing happened.

22 A. Correct, sir.

23 Q. And this is a malfunction they call hammer follow or hammer
24 follow through; is that correct?

03:28 25 A. It did hammer follow, yes.

1 Q. And is hammer follow something that guns are designed to do?

2 A. No, sir.

3 Q. Now, you testified to having a military background?

4 A. Yes, sir.

03:28 5 Q. Did you ever experience a hammer follow in your military or
6 police career?

7 A. No, sir.

8 Q. Personally? No? Are you aware whether or not there's a
9 procedure if you experience a hammer follow, as either in the
03:28 10 military or in your duties as a police officer?

11 A. No, sir.

12 Q. If you experience a hammer follow is there something you're
13 supposed to do next?

14 A. No, sir. You're referring to a failure to fire.

03:28 15 Q. Pardon?

16 A. If it fails to fire when you pull the trigger --

17 Q. (Interrupting) -- yeah, hammer follow -- I was just
18 wondering if there was a procedure for something -- if you have
19 this malfunction while you're in the field, is there something
03:29 20 that you were supposed to do next?

21 A. (No response.)

22 Q. Something to alleviate your -- you experience hammer follow
23 and the gun jams, what should you do? I was just wondering if
24 you knew what you should do next to alleviate this problem.

03:29 25 A. I've been told what to do if it fails to fire when I pull

1 the trigger, yes, sir. I've not been taught what to do if
2 there's a hammer follow.

3 Q. So you're not aware of what to do if the failure to fire is
4 because of a hammer follow.

03:29 5 A. Well, the procedure would be the same. But it was never
6 addressed as hammer follow because we were taught never to
7 modify the firearm, so that that function would never happen.

8 Q. Now, can hammer follow occur when you have a properly
9 functioning auto sear present?

03:29 10 A. No, sir.

11 Q. Because actually the purpose of the auto sear is to hold the
12 hammer in place until the next piece of ammunition comes in and
13 then it releases it. It holds it temporarily as you've
14 testified.

03:30 15 A. Yes, sir.

16 Q. So you're not going to have hammer follow if you have a
17 functioning auto sear.

18 A. Correct.

19 Q. And again, there was no auto sear in this weapon, correct?

03:30 20 A. That's correct.

21 Q. In your testifying on October 11th, you used commercially
22 available .223 caliber ammunition?

23 A. Yes, sir.

24 Q. And then based on your examination and test, you determined
03:30 25 this gun was not a machine gun, correct?

1 A. The initial test, yes, sir.

2 Q. And you didn't immediately retest it then, did you? You
3 waited -- you submitted those results and then waited for a
4 request to retest, correct?

03:30 5 A. I just submitted those results.

6 Q. Okay. Is the decision to conduct a second test
7 discretionary?

8 A. (No response.)

9 Q. In other words, is it up to you to decide to conduct a
03:30 10 second test, is it up to somebody else?

11 A. In this case I asked my -- the acting branch chief at that
12 time was Rick Vasquez if it would be okay to go ahead and
13 perform a second test.

14 Q. Who requested the second test?

03:31 15 A. The submitting agent.

16 Q. And that was Agent Keeku?

17 A. Yes, sir.

18 Q. And when a request for a second test is submitted, does it
19 generally go to Mr. Vasquez or somebody, a supervisor?

03:31 20 A. Yes, we usually run it by him.

21 Q. And Mr. Vasquez had actually been a witness to the second
22 test, correct?

23 A. Yes, sir.

24 Q. Is that the common procedure when you're doing a second test
03:31 25 to have a supervisor present?

1 A. Not always. We thought it was good in this instance just to
2 have a second witness.

3 Q. Okay. And you did not conduct a second examination of the
4 weapon, correct? You just did a -- the second time around it
03:31 5 was just a test firing and not a thorough examination like
6 before?

7 A. No, sir, I satisfied myself that it was the same weapon and
8 was unmodified. But I didn't do a detailed examination, no.

9 Q. You were asked by Agent Keeku to retest the gun using soft
03:32 10 primered ammunition, correct?

11 A. No, sir.

12 Q. You were not? This decision to use soft primered ammunition
13 was your idea?

14 THE REPORTER: Question again, please.

15 MR. FAHL: Sure.

16 BY MR. FAHL:

17 Q. You were asked by Agent Keeku to retest the gun using soft
18 primered ammunition, correct?

19 A. Was that towards me also or just repeating --

20 Q. (Interrupting) No, I was just repeating for him.

21 A. Okay.

22 Q. The answer was no. And then the second question was, so you
23 decided to use the soft primered ammunition the second time?

24 A. No, sir.

03:32 25 Q. Whose decision was it to use soft --

1 A. (Interrupting) There was no soft primered ammunition used,
2 sir.

3 Q. In the second test?

4 A. Yes, sir. That's actually a misspeaking on my part as I
03:32 5 wrote the report. What we used was standard commercial civilian
6 ammunition. Those are not soft primers. They're softer than
7 military primers, so that's why I used that term, but they're
8 not soft primers. There are soft primers which are
9 substantially softer.

03:33 10 Q. Okay, so relatively these were softer primers than the first
11 testing.

12 A. These were standard primers, yes, sir.

13 Q. So, but the first testing was a harder primer, let's do it
14 that way. Would that be --

03:33 15 A. (Interrupting) Yes, sir.

16 Q. Okay. Is the purpose in using the standard primer instead
17 of the hard primer so that it's most likely to result in
18 multiple firings?

19 A. No, sir.

03:33 20 Q. Now, when you test this you said you used, first you tested
21 it in the safe position; is that correct?

22 A. Yes, sir.

23 Q. And then you skipped the semi-automatic position.

24 A. Yes, sir.

03:33 25 Q. Why did you skip the second position?

1 A. As I said before, because I already knew that it would
2 function.

3 Q. Is there a possibility if this gun was exhibiting hammer
4 follow through, that if you test fired it with this standard
03:34 5 primered ammunition that the hammer would ignite on the
6 re-chambering and conduct the same, have the same result?

7 A. I'm sorry.

8 Q. I'm sorry.

9 A. If you could restate that.

03:34 10 Q. Assuming that this gun was exhibiting the hammer follow,
11 condition that you noticed the first time around, and you have
12 this in semiauto, the fire setting, and you used the regular
13 primered ammunition, the .223, is it possible that the hammer
14 follow would ignite the regular follow ammo in the
03:34 15 semi-automatic position?

16 A. Yes, sir. The hammer following forward the bolt --

17 Q. Right.

18 A. -- would strike, and it did so.

19 Q. Right. But that could also continue to result in multiple
03:34 20 firing in the semi-automatic setting. I'm talking about the
21 semi-automatic setting, the one you didn't use.

22 A. Right.

23 Q. I'm saying if this particular gun exhibited hammer follow
24 using the ammunition you used, would it set multiple rounds with
03:35 25 a single pull of the trigger?

1 A. If it did?

2 Q. If it did.

3 A. If it did that's possible, but it did not.

03:35 4 Q. In the third position you fired 20 rounds of soft primered
5 ammunition in five- to 10-round bursts?

6 A. Yes, sir.

7 Q. What do you mean by a burst?

8 A. A continuous firing cycle, automatic firing cycle of five to
9 10 rounds with a single pull of the trigger.

03:35 10 Q. Now, is it patterned, in other words, five rounds, five
11 rounds, five rounds, or can it go from five rounds followed by
12 seven rounds followed by 10 rounds followed by three rounds? Is
13 it random or is there a pattern to it?

03:36 14 A. It wasn't random, no, sir. I simply squeezed the trigger
15 and the number of rounds that came out until I released it were
16 how many that came out.

17 Q. Right, but you said it came out in bursts.

18 A. Because I was firing as bursts. I was --

19 Q. (Interrupting) You were --

03:36 20 A. -- squeezing and releasing the trigger --

21 Q. Okay.

22 A. -- before the magazine was empty.

23 Q. Okay. Now, why did you use .223 ammunition when test firing
24 this particular gun?

03:36 25 A. It's chambered for the .223 caliber ammunition.

1 Q. The barrel is .556; is that correct.

2 A. .556 and .223 are the same.

3 Q. They're exactly the same?

03:36 4 A. Not exactly. The difference is so minute that there's no
5 difference. But the military designation for the ammunition is
6 .556 and the civilian designation for the same ammunition is
7 .223.

8 Q. But what is minute difference between .556 and .223?

03:37 9 A. Just in the diameter of the cartridge at the neck and the
10 length of that neck.

11 Q. And will a gunfire differently if you're using .223 versus
12 .556?

13 A. No, sir.

03:37 14 Q. No? No guns, no matter what you have in, if it takes .223
15 it will take .556 just as well?

16 A. Any weapon made in the United States that's chambered for
17 .223 will also fire .556.

03:37 18 Q. Now, the second time, the second test you got the gun to
19 fire in multiple rounds with a single pull of the trigger. Did
20 you attempt to discover why it was firing those rounds with a
21 single pull of the trigger?

22 A. In the second test?

23 Q. In the second test.

24 A. Yes, sir.

03:37 25 Q. And what was the reason that -- the mechanical reason why it

1 was firing multiple rounds a second time but not the first?

2 A. Because the hammer was not being held to the rear.

3 Q. So the hammer follow is what caused the multiple firings in
4 this third position.

03:37 5 A. The hammer following forward was a intended feature of these
6 combination of parts.

7 Q. So what you're saying is that you believe that these
8 combination of parts redesigned the gun to allow the hammer to
9 come forward.

03:38 10 A. It did not redesign the gun, no, sir. It allowed the weapon
11 to fire automatically.

12 Q. Officer Kingery, I believe you have Government's Exhibit 9
13 in front of you, which is the AR-15 to M-16 conversion book?

14 A. Yes, sir.

03:38 15 Q. If you could turn to page 10. And page 10 is the list of
16 the number of AR-15 parts that should be discarded if you want
17 to convert, and that's the AR-15 bolt carrier, hammer, selector,
18 trigger and disconnecter; is that correct?

19 A. Yes, sir.

03:38 20 Q. Okay. This particular gun you examined had the bolt
21 carrier; is that correct?

22 A. Had an AR-15 bolt carrier, yes, sir.

23 THE COURT: Would you pull the desk portion out.

24 BY MR. FAHL:

03:39 25 Q. But the hammer selector trigger and disconnecter were M-16

1 parts, correct?

2 A. Yes, they were M-16 machine gun parts.

3 Q. If you turn the page to page 11 we list those parts. And
4 there you see the M-16 hammer, selector, trigger and

03:39 5 disconnecter. But this particular rifle did not have the bolt
6 carrier or the auto sear, correct?

7 A. That's correct.

8 Q. Now, if you could turn to page 15 -- or 16, I'm sorry. 16.
9 And what you see on there is a schematic; is that correct?

03:40 10 A. Yes, sir.

11 Q. And that involves some cutting and some routing of the parts
12 of an AR-15 to convert it into an M-16, correct?

13 A. Yes, sir.

14 Q. Was that done in this particular weapon?

03:40 15 A. No, sir.

16 Q. On page -- can you turn to page 25. Page 25 describes
17 what's called a lightning link. Are you familiar with that
18 term?

19 A. Yes, sir.

03:41 20 Q. A lightning link allows an AR-15 gun to fire automatically;
21 is that correct?

22 A. Yes, sir.

23 Q. Did this particular weapon have a lightning link?

24 A. No, sir, it did not.

03:41 25 Q. What is the typical firing pattern of a semi-automatic? I

1 mean, I guess, what is the speed that a semi-automatic can be
2 fired?

3 A. It could be fired as fast as you could pull the trigger.

4 Q. And how about in a fully automatic weapon, what's the speed
03:42 5 of rounds per second or rounds per minute?

6 A. It depends upon the particular model, but somewhere between
7 700 and 900 rounds per minute.

8 Q. Okay. In your test, the video that we saw, can you estimate
9 how fast that gun was firing?

03:42 10 A. Not exactly.

11 Q. Would you say it's about 700 rounds, or is it more or less?

12 A. More.

13 Q. Would you say considerably more or just a little bit?

14 A. I would say considerably more.

03:42 15 Q. Would it be dangerous to continue to fire that gun for a
16 long period of time with the ammunition moving through it that
17 fast?

18 A. You'd wear it out pretty fast, but I don't know what you
19 mean by dangerous.

03:42 20 Q. I mean, could it cause it to malfunction or send some of the
21 parts back in some sort of a explosion, interior explosion or --

22 A. It's possible that it could experience a malfunction. It
23 wouldn't cause an explosion --

24 Q. Okay.

03:43 25 A. -- unless just from the heat of the barrel.

1 Q. And I noticed in that video that you were holding the gun I
2 would say not as we typically see somebody hold a gun up to
3 their shoulder and viewing through a sight, you were kind of
4 stooped over with the gun kind of away from your body; was there
03:43 5 a reason for that?

6 A. It actually wasn't away from my body. It may have appeared
7 that way. I was firing with the butt of the weapon in the right
8 center of my chest.

9 MR. FAHL: I have no further questions at this time.

03:43 10 REDIRECT EXAMINATION

11 BY MR. HAANSTAD:

12 Q. Mr. Kingery, you've got Exhibit 9 with you, right?

13 A. Yes, sir.

14 Q. And you've had an opportunity to go through Exhibit 9?

03:43 15 A. Yes, sir.

16 Q. And is it fair to say that Exhibit 9 describes a number of
17 different ways in which an AR-15 can be converted to an M-16?

18 A. Yes, sir, it does.

19 Q. And it describes a number of different ways in which an
03:44 20 AR-15 can be modified so that it fires automatically?

21 A. Yes, sir.

22 Q. And one of the ways that it describes is on pages 9 and 10,
23 right? Or I'm sorry, 10 and 11.

24 A. Yes, sir.

03:44 25 Q. To the extent that it identifies the AR-15 parts it

1 indicates those AR-15 parts are to be discarded.

2 A. Yes, sir.

3 Q. And then the following page identifies what appear to be the
4 replacement M-16 parts, right?

03:44 5 A. Yes, sir.

6 Q. But again, your testimony is that it's not necessary to
7 discard and replace all five of those identified AR-15 parts.

8 A. That's correct.

9 Q. And that the combination of hammer, trigger, selector and
03:45 10 disconnecter will be sufficient to convert -- I should say
11 changing the combination of those four, substituting M-16 parts
12 for AR-15 parts, would be sufficient to allow an AR-15 to fire
13 automatically, right?

14 A. Yes, sir, it would.

03:45 15 Q. And is it also the case that an auto sear, the installation
16 of an auto sear will allow an AR-15 to fire automatically?

17 A. Yes, sir.

18 Q. Now, in this particular case, that is with respect to
19 Exhibit 1, the Olympic Arms that you examined, there was no auto
03:45 20 sear, right?

21 A. No, sir.

22 Q. Now, is the insulation of an auto sear required before ATF
23 will determine that a firearm is a machine gun?

24 A. No, sir.

03:45 25 Q. Is the installation of an auto sear required before, in your

1 mind, a firearm would qualify as a machine gun?

2 A. No, sir.

3 Q. Now, you were asked some questions about hammer follow. And
4 based on your examination of the gun and based on the test
03:46 5 firing that you did, particularly the second and third test
6 firings, is it possible -- based on your training, your
7 experience and your examination of Exhibit 1, is it possible
8 that hammer follow was responsible for causing the firearm to
9 fire automatically on those occasions?

03:46 10 A. As a malfunction or in --

11 Q. (Interrupting) Yeah, I'm sorry, there was malfunctioning in
12 that way, and that's what was causing the firearm to fire fully
13 automatic?

14 A. No, there was no malfunction of this firearm at all.

03:46 15 Q. Okay. And how can you be sure of that?

16 A. Because I examined the parts --

17 Q. (Interrupting) What would you expect to see in an
18 examination of the parts if there were a malfunction?

19 A. That the surfaces that held the hammer would have been worn,
03:47 20 significantly rounded, or the spaces between them would have
21 been opened up such that the parts would not function as
22 capturing the hammer.

23 Q. Okay. And you saw no evidence of that when you did your
24 examination of Exhibit 1.

03:47 25 A. No, just the opposite. This appeared to be intentionally

1 assembled so that it would allow automatic fire.

2 Q. Okay. And why do you conclude that it looked like it was
3 intentionally designed to fire fully auto?

03:47 4 A. Because of these combination of parts with the M-16 machine
5 gun selector. The geometry of how these parts work is such that
6 with the selector in place it allows a person to selectively, as
7 the selector is called, selectively fire from semiauto to full
8 auto or back at will.

03:48 9 Q. And in your experience, even when AR-15s, in those cases
10 where they are assembled originally with M-16 parts, are they
11 ever assembled with that specific combination of those four M-16
12 components, that is the trigger, the hammer, the selector and
13 the disconnecter?

14 A. No, sir.

03:48 15 Q. And I believe that on cross-examination you agreed with
16 Mr. Fahl that a firearm is a machine gun as long as the trigger
17 is engaged -- as long -- if it fires, as long as the trigger is
18 engaged or until the ammo runs out?

19 A. That's one portion of the machine gun definition, yes, sir.

03:48 20 Q. Well, would it also qualify as a machine gun if you pulled
21 the trigger once and it started to fire multiple rounds but
22 before you released the trigger and before the ammo had run out,
23 for example, the gun jammed? Would you still consider that
24 firearm to be a machine gun?

03:49 25 A. It could be.

1 Q. If you pull the trigger, let's say, and three to four rounds
2 are fired and --

3 A. (Interrupting) Oh, three to four rounds?

4 Q. Yes.

03:49 5 A. As long as it's more than one round fired automatically,
6 it's a machine gun.

7 MR. HAANSTAD: I have no other questions, Your Honor.

8 THE COURT: Mr. Fahl?

9 MR. FAHL: Little redirect, Your Honor? Recross?

03:49 10 THE COURT: Surely.

11 RECCROSS-EXAMINATION

12 BY MR. FAHL:

13 Q. I guess to be clear, is hammer follow a malfunction or not?

14 A. It can be. It was intended in this instance.

03:49 15 Q. Now, going to Mr. Haanstad's questions about firing three
16 rounds and jamming. Why would somebody design a gun to fire
17 three rounds and then jam, have to eject the bolt, start all
18 over, fire three rounds, jam, and do that?

19 A. They would not do so, sir.

03:50 20 Q. Now, turning back to Exhibit, Government's Exhibit 9, and
21 pages 10 and 11, which are the AR-15 parts versus the M-16
22 parts?

23 A. Yes, sir.

24 Q. If you looked at page 11, there's some writing?

03:50 25 A. Yes, sir.

1 Q. That writing doesn't tell you that if you swap these parts
2 out you have a machine gun, does not? It just tells you just
3 look at, compare the two and see what the differences are?

03:50

4 A. It does not tell you on this page that these parts are a
5 machine gun.

6 Q. Have you reviewed this document prior to your testimony
7 today?

8 A. Yes, sir.

03:50

9 Q. Does it say anywhere in here that these are -- that just
10 swapping out these parts will make a AR-15 into an M-16 machine
11 gun?

12 A. In the beginning it says that these conversions create a
13 machine gun, and that an unregistered machine gun is unlawful.

03:51

14 Q. Correct. But as I'm looking again at pages 10 and 11, it
15 does not say that this is a conversion, convert from page 10 to
16 page 11, it just says note there are differences, correct?

17 A. Yes, sir, confined to those pages, that's correct.

03:51

18 Q. And if you flip through the rest of the manual there are
19 pages and pages of schematics with drillings and things, those
20 are the conversions that he's talking about in the first page,
21 correct?

22 A. No, sir.

23 Q. He's just only talking about swapping these parts out?

03:51

24 A. No, sir, he's not. He's saying that all of these are
25 conversions. There's multiple types of conversions listed in

1 this document.

2 Q. And you said you reviewed this document prior to your
3 testimony. Could you find where it says that just swapping out
4 these four parts as indicated here would change an AR-15 into an
03:51 5 M-16?

6 A. Within this document it does not say those specific words.

7 Q. Okay.

8 A. It says these conversions are --

9 Q. (Interrupting) Or maybe you can then -- I'm sorry -- that
03:52 10 you can explain where anywhere in this document it tells us that
11 going from page 10 to a page 11, in other words, swapping out
12 those parts is a conversion that they're talking about? Can you
13 tell me where that is in here?

14 A. It does not say that specifically, no, sir.

03:52 15 MR. FAHL: Nothing further.

16 MR. HAANSTAD: I have no other questions, Your Honor.

17 THE COURT: You may step down. Please do not discuss
18 your testimony with anyone unless you have been advised the case
19 has been completed.

03:52 20 THE WITNESS: Yes, Your Honor. Your Honor, what do I
21 do --

22 THE COURT: You can leave those.

23 THE WITNESS: Thanks.

24 (Witness excused at 3:52 p.m.)

03:52 25 THE COURT: Mr. Haanstad?

1 MR. HAANSTAD: Your Honor, the government rests.

2 THE COURT: Members of the jury, please return to the
3 jury room for a short while.

4 (Jury out at 3:52 p.m.)

03:53 5 THE COURT: Be seated, please. I'd like to first
6 review the exhibits that the government shows that it has
7 offered so that we can identify them clearly and there's no
8 question what is before the jury. Mr. Haanstad?

9 MR. HAANSTAD: Exhibit 1.

03:54 10 THE COURT: And that is?

11 MR. HAANSTAD: That is the firearm.

12 THE COURT: AR-15?

13 MR. HAANSTAD: Yes.

14 THE COURT: All right. Serial number?

03:54 15 MR. HAANSTAD: Serial number F7079.

16 THE COURT: All right. Number 2?

17 MR. HAANSTAD: Exhibit 2 is the video of the test fire
18 of the machine gun.

19 THE COURT: All right. Number 3?

03:54 20 MR. HAANSTAD: Actually, Your Honor, there's a long
21 series of skipped numbers.

22 THE COURT: I don't show anything for 3, 4, 5, 6, 7 or
23 8.

24 MR. HAANSTAD: Correct.

03:54 25 THE COURT: All right. Next we have 9?

1 MR. HAANSTAD: 9, manual AR-15 to M-16 conversion
2 book.

3 THE COURT: All right.

4 MR. HAANSTAD: Exhibit 10. Document full auto SKS
03:55 5 conversion.

6 THE COURT: All right. Number 11?

7 MR. HAANSTAD: September 10th, 2003 e-mail regarding
8 machine guns and sovereignty.

9 THE COURT: All right.

03:55 10 MR. HAANSTAD: Exhibit 12, June 28, 2005 and July 6,
11 2005 e-mail exchange regarding M-16 parts.

12 THE COURT: All right.

13 MR. HAANSTAD: Exhibit 13. Document requirements for
14 purchasing machine guns.

03:56 15 THE COURT: Does the defense take exception with
16 respect to any one of the exhibits just described?

17 MR. MULLINS: No, Your Honor.

18 THE COURT: And we have Defense Exhibit number 100 for
19 identification, report of Officer Kingery, correct?

03:56 20 MR. FAHL: Correct. Not offered.

21 THE COURT: I said for identification.

22 MR. FAHL: Sorry, Your Honor.

23 THE COURT: Is there anything else that needs to be
24 placed before the jury before the government's case is subject
03:57 25 to any motions?

1 MR. HAANSTAD: No, Your Honor.

2 THE COURT: Does the defense wish to be heard?

3 MR. FAHL: Yes. We have a motion for judgment of
4 acquittal pursuant to Federal Rule of Criminal Procedure 29(a).

03:57 5 THE COURT: The motion is heard but it is denied.

6 Does the defense wish to offer a case in chief?

7 MR. FAHL: We do. We wish to call Len Savage as an
8 expert.

9 THE COURT: All right. Where does the government
03:57 10 stand with respect to Mr. Savage in light of the other matters
11 that have been taken up?

12 MR. HAANSTAD: Your Honor, again, it depends on what
13 his testimony is going to be. I agree that if he's going to
14 testify simply to his firsthand knowledge and what he perceived
03:57 15 when he looked at this particular gun, then we're not within
16 Rule 703, we're just under Rules 702 and 601.

17 But if he's going to go further than that and testify
18 to things like possible explanations for this gun firing
19 automatically and some of the other things that were referenced
03:58 20 earlier, then I think that we're moving closer to Rule 703
21 territory, and if that's the case the government would oppose
22 his qualifications as an expert.

23 THE COURT: Well, considering the vagueness of the
24 matters as they stand now we will proceed and if there are
03:58 25 objections we will entertain the objections as may be

1 appropriate. Or, to put it differently, if it's necessary to
2 send out the jury or to have an offer of proof, the court will
3 do that. We'll proceed as far as we can before we break at
4 5:00. Is there anything else at this time?

03:58 5 MR. HAANSTAD: No, Your Honor.

6 MR. FAHL: No, Your Honor.

7 THE COURT: All right. Bring in the jury. Would you
8 please remove the exhibits before the jury comes in. The ones
9 right there, yes. Does anyone need to refresh before the jury
03:59 10 comes in?

11 (No response.)

12 THE COURT: All right.

13 (Jury in at 3:59 p.m.)

14 THE COURT: The defense may proceed.

04:00 15 MR. FAHL: The defense calls Len Savage, Your Honor.

16 THE REPORTER: Raise your right hand, please.

17 LEN SAVAGE, DEFENSE WITNESS, DULY SWORN

18 THE REPORTER: State your name and spell your name for
19 the record.

04:01 20 THE WITNESS: My name is Len Savage, S A V A G E.

21 DIRECT EXAMINATION

22 BY MR. FAHL:

23 Q. Mr. Savage, where are you from?

24 A. I'm from Georgia.

04:01 25 Q. Where in Georgia?

1 A. Franklin, Georgia.

2 Q. And how are you employed?

3 A. I co-own a firearms business with my wife, Historic Arms,
4 LLC.

04:01 5 Q. How long have you owned that company?

6 A. I think we formed it in 2001 and got our FFL in 2002 if I
7 remember correctly.

8 Q. What is the nature of your company?

9 A. I do firearms research and development. We design
04:01 10 semi-automatic versions of historic machine guns. Sometimes we
11 do NFA repair, National Firearms Act covered weapons, machine
12 guns, short-barreled rifles, short-barreled shotguns, silencer.

13 Q. And what types of weapons have you designed?

14 A. Specifically?

04:02 15 Q. Maybe a couple examples of some particular weapons.

16 A. The brand Mark II semi-automatic, the 971 Sport Rifle, the
17 RPD semi-automatic, the MAG-58 semi-automatic, and a host of
18 other caliber conversion systems. I may be missing a few,
19 but --

04:02 20 Q. Okay. In designing a semi-automatic weapon what rules or
21 guidelines must you follow?

22 A. Well, the National Firearms Act and the Gun Control Act of
23 1968. The controlling part of that is gonna be United States
24 Code, Chapter 26, Section 5845(b). The definitions of a machine
04:02 25 gun are what I deal with.

1 Q. And the purpose --

2 THE COURT: One second, please. Please approach,
3 Counsel.

4 (At side bar on the record.)

04:03 5 THE COURT: Special Agent Harding is in the back. I
6 just wanted to remind you of that. Is it likely that he is to
7 testify again?

8 MR. FAHL: Not at all.

9 THE COURT: Okay. Just wanted to be sure.

04:03 10 MR. FAHL: Thank you.

11 (End of discussion at side bar.)

12 BY MR. FAHL:

13 Q. And the purpose of that is to make sure that your
14 semi-automatic does not function as a machine gun.

04:03 15 A. That is correct. We also send them to the ATF to verify
16 that they're compliant with all federal law.

17 Q. And is that their role in helping you design these firearms,
18 or the role that they play when you're designing a firearm?

19 A. I call it cheap insurance. I want to make sure that
04:04 20 anything I design and build is compliant with the law.

21 Q. How frequent is your contact with the ATF when you're
22 designing a firearm?

23 A. It varies. There's been times where I've almost contacted
24 them weekly. It all depends on what design I'm working on at
04:04 25 the time and whether or not it's already approved. On a regular

1 basis to be sure.

2 Q. What is required of you to obtain and keep the FFL, which is
3 the federal firearm license?

4 A. Well, an application letting them know that there's a couple
04:05 5 other minor requirements, safe storage, understanding of the
6 federal firearms law, allowing the ATF to come in and do their
7 inspections from time to time to verify that I am following the
8 law.

9 THE COURT: Would you please pull your mic closer?

04:05 10 THE WITNESS: Forgive me.

11 BY MR. FAHL:

12 Q. Prior to your work as owner of Historic Arms, LLC, what did
13 you do?

14 A. I repaired and built machinery.

04:05 15 Q. You said you did research and development for some other
16 firearm companies, which companies have you done work for?

17 A. Ohio Ordinance Works, Century International Arms, Calico
18 Light Weapon Systems. With a C.

19 Q. Are you familiar with the AR-15 weapon?

04:05 20 A. Yes, I am.

21 Q. How have you become familiar with it?

22 A. I have repaired a few of them. A couple of the firearm
23 systems that I've worked on utilize an AR-15 fire control.

24 Q. And are familiar with ATF regulations concerning AR-15
04:05 25 weapons and AR-15 fire control systems?

1 A. Yes, I am.

2 Q. And are you familiar with M-16 weapons or M-16 fire control?

3 A. Yes, I have, and I've not only repaired them but I also have
4 fired them.

04:06 5 Q. And in your training and experience with semi-automatic
6 weapons and machine guns, are you familiar with the ammunition
7 that goes with those particular weapons?

8 A. Yes, I am.

9 Q. And are you familiar with the nature of types of ammunition
04:06 10 and what the functions of each part of the ammunition does?

11 A. Yes, I am.

12 Q. Why must you be familiar with the different types, brands or
13 specifications of ammunition?

14 A. Because my personal welfare and health depends on it.

04:06 15 Q. And why is that?

16 A. You put the wrong ammunition in a firearm and it could kill
17 you or injure you.

18 Q. Have you ever testified as an ask expert witness before?

19 A. Yes, I have.

04:06 20 Q. Where was that?

21 A. That would be out in Seattle.

22 Q. What was the name of that case?

23 A. U.S. v. Quan.

24 Q. What was the nature of the Kwan case?

04:06 25 A. The nature of my testimony had to do with a supposed machine

1 gun.

2 Q. What kind of machine gun was that?

3 A. It wasn't a machine gun --

4 Q. (Interrupting) Well, what kind --

04:07 5 A. -- it was a semi-automatic.

6 Q. What kind of a machine gun was it alleged to have been?

7 A. An M-14.

8 Q. Have you published any articles about firearms that you
9 either designed or built or any other firearms?

04:07 10 A. I haven't published any, but there's been quite a few
11 published about my firearms and some of my work.

12 Q. What sort of technical training do you have?

13 A. I have an honorable withdrawal card from the UAW, I'm a
14 journeyman machine builder. A gun is a very simple machine.

04:07 15 Q. When did you first design and build a firearm?

16 A. That would be in the eighth grade.

17 Q. And what type of weapon was that?

18 A. It was a simple .22 zip type gun. It caused quite a
19 stirring in the school at the time.

04:07 20 Q. Are you involved in any legislation pending before Congress?

21 A. I have had some involvement with the Fairness and Firearms
22 Testing Act.

23 Q. And what's the nature of that legislation?

24 A. It would mandate that the ATF videotape all examinations and
04:08 25 tests of firearms.

1 Q. Have you examined the firearm at issue here today that's
2 Exhibit 1 which is sitting over on that desk there?

3 A. Yes, I have.

4 Q. When did you examine this firearm?

04:08 5 A. This afternoon during lunch.

6 Q. And did you test fire the firearm?

7 A. No, I did not.

8 Q. Is there a reason why you would not need to test fire the
9 weapon?

04:08 10 A. From my examination and from what I saw on the video, I
11 wouldn't want to attempt it.

12 MR. FAHL: I offer Mr. Savage as an expert witness,
13 Your Honor.

14 THE COURT: Do you wish to be heard or to
04:08 15 cross-examine?

16 MR. HAANSTAD: Your Honor, could we approach?

17 THE COURT: Yes.

18 (At side bar on the record.)

19 MR. HAANSTAD: I take it from your foundation that you
04:09 20 are trying to lay that you are proposing to have him testify as
21 to -- provide expert testimony.

22 MR. FAHL: Yeah. The testimony that he will be
23 proffering is, first of all, his examination which I think you
24 concede is all right. What he saw when he looked at the weapon.

04:09 25 The other thing I would have him testify is about the

1 hammer follow condition.

2 MR. HAANSTAD: He hasn't seen that.

3 MR. FAHL: What?

4 MR. HAANSTAD: He hasn't seen that.

04:09 5 MR. FAHL: No, he hasn't seen it. In this particular
6 firearm he did not see it. I will develop -- and if you want me
7 to -- I mean, that he is familiar with hammer follow.

8 The other thing that I will establish is his --

9 MR. HAANSTAD: (Interrupting) First of all, I'm not
04:10 10 sure if I understand why that's relevant, the hammer follow. I
11 mean, there's no indication that that's what was going on with
12 respect to this particular gun. And there's no indication that
13 it makes any difference under the statute. If you pull the
14 trigger once and it fires more than one round, no matter what
04:10 15 the cause it's a machine gun.

16 MR. FAHL: And that's where I think we have some
17 issues. The Staples case, footnote one Justice Thomas said you
18 have to -- you know, it has to go without stopping -- until then
19 -- and that was adopted by the 7th Circuit.

04:10 20 And under that jury instruction, if that one goes
21 through, you know, we'll have an issue about the hammer follow
22 and what happened with the three rounds and then stopping.

23 It definitely will go to knowledge.

24 MR. HAANSTAD: I kind of wonder if we should resolve
04:10 25 that before we sort of risk confusing the jury on an issue

1 that's not going to be of any significance in the case.

2 I mean, I've read Staples and I'm familiar with
3 footnote 1.

4 THE COURT: Do you have any objection to this witness
04:11 5 as an expert witness?

6 MR. HAANSTAD: Yes.

7 THE COURT: And what is the objection?

8 MR. HAANSTAD: I don't believe that a foundation has
9 been laid. I don't think that he's established that he's got
04:11 10 requisite training or experience to qualify him to provide this
11 kind of testimony.

12 THE COURT: I am going to take up this issue outside
13 the presence of the jury.

14 (End of discussion at side bar.)

04:11 15 THE COURT: Members of the jury, please return to the
16 jury room for a while.

17 (Jury out at 4:11 p.m.)

18 THE COURT: Be seated, please.

19 You may voir dire the witness, Mr. Haanstad.

04:12 20 MR. HAANSTAD: Thank you, Your Honor.

21 VOIR DIRE EXAMINATION

22 BY MR. HAANSTAD:

23 Q. Mr. Savage, you have had no trade-schooling or gunsmithing,
24 right?

04:12 25 A. When you say I have no gunsmithing --

1 Q. I'm sorry, you've had no trade school in gunsmithing; is
2 that right?

3 A. No, sir, I haven't, that's a maintenance course.

4 Q. So you have not had any, right?

04:12 5 A. No, sir.

6 Q. And you've never had any formal training in firearms
7 classification, right?

8 A. No, sir. I'm not in law enforcement.

9 Q. And you have no formal training in federal firearms laws,
04:13 10 right?

11 A. No, sir, other --

12 Q. (Interrupting) And you've had no specialized training with
13 respect to AR-15 to M-16 conversions, right?

14 A. When you say training that's --

04:13 15 Q. (Interrupting) Specialized formal training?

16 A. From a school or from another master gunsmith or from
17 another manufacturer? I mean, I need you to -- I have had
18 training --

19 Q. (Interrupting) What kind of formal training have you had?

04:13 20 THE COURT: One second. Please give him a chance to
21 answer fully.

22 Go ahead.

23 THE WITNESS: I'm kind of confused, he said did I have
24 any training. I regularly meet with other manufacturers,
04:13 25 sometimes in person, sometimes they come to my shop. And we

1 discuss design characteristics. In that sense I've been
2 trained. No, it was not at a school.

3 BY MR. HAANSTAD:

04:13 4 Q. Okay. So the answer would be no formal training, but you've
5 had these informal gatherings with other manufacturers.

6 A. Yes, sir.

7 Q. And you haven't taken any armorer's courses put on by gun
8 manufacturers, have you?

04:14 9 A. I design guns. I think what you're akin to saying is
10 because -- if I can draw an analogy here, are you saying if I
11 were an automobile designer because I wasn't a certified
12 mechanic I'm not qualified to be an automobile designer?

13 Q. No, I'm just asking the question whether you have ever had
14 any armorer's courses that were put on by gun manufacturers.

04:14 15 A. Their maintenance courses, no.

16 Q. You have not?

17 A. No.

18 Q. And you don't have any formal experience, do you, in
19 firearms classifications?

04:14 20 A. That sounds like a federal law enforcement class.

21 Q. So you don't?

22 A. No, sir. But I have designed quite a few firearms and
23 worked extensively with the ATF, and I have had many of my
24 firearms classified as lawful to possess. Since about 2001 it's
04:14 25 been fairly constant communication with the ATF.

1 Q. And I think I heard you say that you've designed firearms
2 with the ATF, right?

3 A. Well, I said I submitted them to the ATF to verify that
4 they're compliant with all the laws, and since they've approved
04:15 5 them, if you will, or classified them as lawful to possess.

6 Q. Okay. In your -- I have a copy of your CV, okay? And in
7 your CV, you claim that similar methods to what you were just
8 saying that you and your company both have, quote, always worked
9 very closely with BATFE.

04:15 10 A. Yes, sir, we have.

11 Q. But in fact, you have no formal working relationship with
12 the agency, right?

13 A. If I want to be a manufacturer I better have a formal
14 working relationship with the ATF. They're my regulating agency
04:15 15 and I'm a federal licensee. I have to work with them, I am
16 mandated by law to have a working relationship with the ATF.

17 Q. So when you say you work with them, you're talking about
18 submitting things and asking them to rule on them, right?

19 A. Yes, and I also had ATF officers come to me and ask them to
04:16 20 explain some things and they have come to my shop for training
21 if you will.

22 Q. Who would that be?

23 A. Agent Bicknees (ph) I believe out of the Atlanta office
24 showed up. We had about a 45-minute session of what is and what
04:16 25 isn't a firearm and requires a 4473 for transfer.

1 Q. I'm sorry, Agent Bicknees?

2 A. I think, Ralph Bicknees I believe was his name. And I can
3 tell you the date I remember the last time they came out. It
4 was Valentine's Day.

04:16 5 Q. Okay. Anyone else?

6 A. I'm trying to think. I have had occasional calls and asked
7 to explain things to --

8 Q. (Interrupting) From ATF?

9 A. -- local agents. Yes, local agents. I've got a good
04:16 10 working relationship with the local office.

11 Q. Okay. Anyone in addition to Agent Ralph Bicknees that's
12 relied on you for advice?

13 A. I don't have the name in front of me, but I wanna think
14 maybe it's Joel Shepard, we've discussed things and he has
04:17 15 called and asked questions.

16 Q. Okay. Now, you're not suggesting, are you, that ATF has
17 ever sought you out as a formal advisor or consultant?

18 A. What do you mean by formal?

19 Q. Well, I get the impression that maybe some ATF agents are
04:17 20 stopping by to talk with you. I don't get the impression
21 necessarily that they're sort of working in their official
22 capacity when they do that.

23 A. Really? They showed me their credentials.

24 Q. Okay. They showed you their credentials and then asked you
04:17 25 for advice on firearms?

1 A. They've asked me questions about firearms.

2 Q. Okay.

3 A. Yes.

04:17 4 Q. So you think that you have a closer working relationship
5 with ATF than other people who occasionally seek formal rulings
6 from the agency and things like that?

7 A. Yes. I mean --

8 Q. You classify your relationship as different from that.

9 A. Pardon me?

04:18 10 Q. You would classify your relationship with the ATF as
11 different from that sort of ordinary manufacturer who might
12 occasionally seek formal rulings from the agency?

13 A. Due to the fact of the volume of the firearm systems I
14 designed, yes, it is more than average. That's why other people
04:18 15 in the industry seek me out to do this.

16 Q. Okay. Now, you say that in your CV that you have been a
17 technical advisor or expert witness in the following federal
18 court cases, right? Are you familiar with that part of your CV?

19 A. Yes, sir. Yes, sir.

04:18 20 Q. And you list Kwan first of all, right?

21 A. Yes, sir.

22 Q. And did you actually testify in that case?

23 A. Yes, I did.

24 Q. And you list United States vs. Glover?

04:19 25 A. Yes, sir.

1 Q. Did you testify in that case?

2 A. No, they dismissed.

3 Q. You list United States vs. Wrenn?

4 A. Yes.

04:19 5 Q. Did you testify in that case?

6 A. No, they dismissed the firearms charges.

7 Q. So the only time where you actually were an expert witness
8 was Kwan?

9 A. That I was allowed to testify, yes.

04:19 10 Q. Okay. Now, in the CV that you submitted in the Kwan case,
11 you claim to have been an expert witness in Glover and Wrenn.
12 How is that?

13 A. I was the expert. They brought me in to do the test.

14 Q. You were an expert witness?

04:19 15 A. I did not testify. They dismissed the charges prior to me
16 having the ability to testify, when it was found that they
17 goofed. They meaning the ATF.

18 Q. Just two things there then. First of all, so when it says
19 in your CV that you submitted in the Kwan case that you were a
04:20 20 technical advisor or expert witness in the following federal
21 court cases, and you then list U.S. vs. Glover and U.S. vs.
22 Wrenn, in which of those two cases were you an expert witness?

23 A. I was hired as an expert witness in both of those cases. I
24 never had the opportunity to testify, they dismissed the charges
04:20 25 as soon as they figured out they made a mistake.

1 Q. Okay. Now, that's correct, in Wrenn the firearms related
2 charges were dismissed.

3 A. That is correct.

4 Q. But before they were dismissed the district judge ruled that
04:20 5 you could not testify as an expert in that case, right?

6 A. Well, I guess that U.S. Attorney kind of pulled the same
7 trick you did.

8 Q. Is that right? The judge ruled that you couldn't testify as
9 an expert in Wrenn?

04:20 10 A. Because they allowed me to sit in the courtroom. And that
11 was part of the dismissal in the agreement. When that happened
12 it was pretty much a zoo.

13 Q. Well, in that case you had not prepared a written report
14 with respect to your examination of the firearm, right?

04:21 15 A. That's incorrect, I had prepared a written report. The
16 attorney didn't turn it into the court.

17 Q. So it wasn't submitted to the court.

18 A. That is correct.

19 Q. And that report wasn't submitted to the court and then you
04:21 20 sat through the testimony, and on the basis of those two things
21 that's why you were not allowed to testify as an expert.

22 A. I don't know. I don't know what the basis was.

23 Q. Okay. So we're clear, in Glover and Wrenn then you did not
24 testify as an expert witness.

04:21 25 A. Glover and Wrenn they dismissed the firearms charges. No

1 expert testified in Glover and Wrenn about the firearms, for the
2 government or for the defense.

3 Q. Okay. So the only case in which you were an actual, in
4 which you were actually an expert witness was Kwan.

04:22 5 A. The only case that I was given the opportunity to testify
6 was U.S. v. Kwan.

7 Q. Okay. In your CV you claim that you were featured in two
8 documentary films, one is called BATFE Fails the Test, and the
9 other is called The Gang, right?

04:22 10 A. That is correct.

11 Q. They're documentaries?

12 A. Yes, sir.

13 Q. Who produced them?

14 A. Jews for the Preservation of Firearms Ownership, and I
04:22 15 believe Gun Owners of America had to do with BATFE Fails the
16 Test as well, if I remember correctly. I don't recall --

17 Q. Now, Jews for the Preservation of Firearms Ownership, is
18 that an organization, would you say, who has as one of its, the
19 main planks in its agenda battering ATF?

04:22 20 A. I wouldn't call it battling the ATF, I would call it making
21 sure that the ATF follows the law.

22 Q. Okay. What about The Gang, who produced that?

23 A. The Gang was produced by JPFO.

24 Q. Okay. Now, have you ever seen an advertisement on the JPFO
04:23 25 website for the movie the, as you call it, a documentary The

1 Gang? There's a pretty prominent advertisement that's displayed
2 there right now for it.

3 A. Yes, I have seen it.

4 Q. In that advertisement -- or to the side of that
04:23 5 advertisement it claims that, and this is a quote from it: The
6 BATFE is notorious for its incompetence, racism, routine
7 perjury, and outright brutality to firearms owners?

8 A. I'll have to take your word for it. I don't have it in
9 front of me.

04:23 10 Q. Would it surprise you to know that that's the type of
11 organization that produced this documentary that you say
12 featured you?

13 A. Wouldn't surprise me at all.

14 Q. Okay. Now, also in your CV you list a number of
04:24 15 publications. You call them I think national publications,
16 right? Yes, national publications, in which products you have
17 designed and manufactured, as well as discoveries of ATF
18 Firearms Technology Branch behavior, have been published in
19 these publications. That's what you represent here, right?

04:24 20 A. Yes.

21 Q. Now, when you say your discoveries of ATF Firearms
22 Technology Branch behavior, can you give us an example of that?

23 A. Sure. I had a problem with a classification that didn't
24 make sense scientifically or mechanically, and upon a conference
04:24 25 call with the ATF management I discovered quite by accident that

1 they don't have written standardized testing procedures. Which
2 means if I send in a firearm today it may be tested in one
3 manner, but if I send the identical firearm in tomorrow and
4 another gentleman at FTB tests it, because there's no written
04:25 5 standardized testing procedure it could be tested with two
6 completely different tests with two completely different test
7 results.

8 Q. Okay. Now, in a few different forums you've spoken out
9 against ATF in that way, right? Not just in these publications,
04:25 10 but also in some of these movies that were put together like The
11 Gang?

12 A. When you say spoken out?

13 Q. Well, you've been critical of the way that ATF conducts
14 tests, let's say, for example; is that right?

04:25 15 A. I've been asking the ATF to get a written standardized
16 testing procedure so as a manufacturer I can follow that
17 standardized testing procedure and will know how my firearm is
18 going to be tested and to design it accordingly. So --

19 Q. Now, as a result of your working with ATF, have you come to
04:26 20 feel that somehow they're responsible for damaging your
21 business?

22 A. Somehow when you say, are we talking maliciously or --

23 THE COURT: One second. Mr. Haanstad, I'm curious
24 about this question and whether or not it goes to this witness'
04:26 25 ability to testify as an expert for the defense. It appears to

1 go rather far afield.

2 MR. HAANSTAD: Well, and I apologize if it does, Your
3 Honor. All I'm trying to establish is that rather than come in
4 and testify based on his expert -- based on any kind of
04:26 5 expertise that he has, it appears that Mr. Savage is instead
6 attempting to use this case as a platform to advance some sort
7 of political agenda.

8 And where the specific line of questioning was going I
9 think goes to the bias of this particular witness if he's going
04:26 10 to testify about procedures that the ATF conducted in this
11 particular case or ATF procedures more generally.

12 Apparently after Mr. Savage testified in -- or
13 actually he didn't testify, but whatever his involvement was in
14 the United States vs. Wrenn case --

04:27 15 THE COURT: I have a transcript from Wrenn in front of
16 me.

17 MR. HAANSTAD: Okay.

18 THE COURT: And it appears that the questions you've
19 asked are similar to the ones that were asked in Wrenn.

04:27 20 MR. HAANSTAD: I wasn't aware of that.

21 THE COURT: So I go back to my original request, I
22 should say concern. You seem to be going far afield.

23 MR. HAANSTAD: Okay.

24 THE COURT: The last series of questions related to
04:27 25 matters other than any opinion that may be offered by Mr. Savage

1 and whether or not Mr. Savage is competent to offer such opinion
2 or opinions.

3 MR. HAANSTAD: Okay.

4 THE COURT: Confine your examination to those
04:28 5 concerns.

6 MR. HAANSTAD: Yes, Your Honor.

7 BY MR. HAANSTAD:

8 Q. Now, you also talk about in your CV, again these national
9 publications, one of them that you list is TAPCO.

04:28 10 A. That's right, they publicize that and send that out to
11 practically every FFL holder and anybody else who wants it.
12 Their catalogs are somewhat collectable, they put them out once
13 or twice a year.

14 Q. Okay. Have you had an article published in that
04:28 15 publication?

16 A. I had -- the 971 Sport Rifle was on the front cover along
17 inside -- there was a short blurb about me and that I had
18 designed it for a local firearms manufacturer in Georgia.

19 Q. What do you mean by a short blurb?

04:29 20 A. A letter. Just a short letter to everybody on the inside of
21 the front cover. By Buddy Daniels.

22 Q. So Buddy Daniels wrote a letter that was published in this
23 magazine that mentioned you?

24 A. Yes.

04:29 25 Q. Okay. And do you know what the standards or criteria are

1 for having something published in TAPCO?

2 A. I have no clue.

3 Q. You don't know if there's a board of experts, for example,
4 that's going to decide what's going to be published?

04:29 5 A. I told you I have no clue.

6 MR. FAHL: I'm going to object, Your Honor. Again,
7 this seems to be going to the same -- if we want to talk about
8 --

9 THE COURT: Objection sustained. Ask another
04:29 10 question.

11 MR. HAANSTAD: Well, Your Honor, those are all the
12 questions I have. They're all in that same light. That is, the
13 things that he represents in his CV as somehow being --

14 Typically when experts provide a CV they list
04:29 15 publications. They're publications that are peer reviewed or
16 otherwise somehow prestigious in the area, or in the field, and
17 it doesn't appear that these are.

18 If you don't think that's an appropriate line of
19 questioning I have nothing further.

04:30 20 THE COURT: Does defense have any further questions of
21 the witness before the court rules?

22 MR. FAHL: No, Your Honor.

23 THE COURT: Mr. Savage may proceed and testify based
24 upon his experience in the field. If there is a specific
04:30 25 question with respect to which the government believes the

1 witness is not qualified, it will certainly have to voice any
2 objection that it may have, otherwise we'll proceed as one
3 normally would on direct and cross-examination.

4 Bring in the jury.

04:31 5 (Jury in at 4:31 p.m.)

6 CONTINUED DIRECT EXAMINATION

7 BY MR. FAHL:

8 Q. Now, Mr. Savage, you testified that you examined this gun
9 today?

04:31 10 A. Yes, I did.

11 Q. And in what way was the gun examined?

12 A. Well, I wasn't allowed to touch it, but Agent -- or, I'm
13 sorry, FEO Kingery was able to display it to me and perform a
14 function check for me as I observed.

04:32 15 He also opened up the weapon so that I could look at
16 its internal components, as well as remove the hand guards from
17 the barrel so that I could look for some marking and information
18 that would be stamped on the barrel.

19 Q. And with regard to the systems check, what did that reveal
04:32 20 to you if anything?

21 A. That firearm is malfunctioning.

22 Q. And how so?

23 A. The frame of receiver is not the frame of receiver of a
24 machine gun. Specifically, there's not an axle pin hole for the
04:32 25 auto sear. So it doesn't have a provision for an auto sear.

1 So, therefore, the frame or the receiver of that weapon is not
2 the frame or receiver of a machine gun, and it did not contain
3 what is called a DIAS in the industry, or a drop-in auto sear.

04:33 4 Q. So how did your examination reveal that it was a
5 malfunctioning -- is it a malfunctioning AR-15?

6 A. Yes, it is.

7 Q. And what is the malfunction?

8 A. The malfunction specifically is that when placed in the
9 unmarked position the disconnecter wasn't functioning properly.

04:33 10 The reason it's unmarked is you're not supposed to put
11 it there. That particular firearm when it was built, according
12 to my research, I contacted Olympic Arms, and they told me mid
13 '80s. Prior to 1986, most AR-15s were manufactured with M-16
14 fire control components.

04:33 15 Q. And which fire control components would be used generally
16 when manufacturing this type of rifle?

17 A. When that particular firearm was manufactured in the serial
18 number range?

19 Q. Yes.

04:33 20 A. They would have used an M-16 trigger, disconnecter, hammer.
21 Sometimes a selector, sometimes not.

22 Q. And when you did your visual inspection what did that
23 reveal?

04:34 24 A. That it was standard for the firearm that was built in that
25 era. It also revealed that it had an AR-15 bolt carrier, not an

1 M-16 bolt carrier.

2 Q. And what is the significance of having an AR-15 bolt
3 carrier?

4 A. An AR-15 bolt carrier precludes or stops full auto fire.

04:34 5 In an M-16, the auto sear, or the part that holds back
6 the hammer and allows full auto fire, the M-16 bolt carrier is
7 what contacts the auto sear and allows the hammer to trip in
8 time when the bolt and bolt carrier are locked in battery.
9 There was no auto sear nor provision for one and it had an AR-15
04:34 10 bolt carrier. It's designed specifically to prevent full auto
11 fire.

12 Q. What did you notice when you inspected the barrel of the
13 rifle?

14 A. The barrel of the rifle was marked caliber 5.56.

04:35 15 Q. And how about the side of the rifle, what was that marked?

16 A. It's marked .223-5.56.

17 Q. And what does that mean?

18 A. That means that that receiver could have been built with
19 either a .223 chamber and barrel, or a 5.56 NATO chamber and
04:35 20 barrel.

21 Q. And what's the difference?

22 A. A .223 Remington is a varmint cartridge. It's designed for
23 shooting stuff like prairie dogs three or 400 yards out.

24 You're looking at a target that's about six inches in
04:35 25 diameter. A .223 has got what they call a faster lock time. It

1 has to do with the type of primer. Burn rate on powders could
2 be different. Even grain rate on the bullet could be different.

3 Q. In layman's terms, what's the difference between a .223
4 ammunition and a 5.56 ammunition?

04:36 5 A. .223 Remington ammunition is typically used in bolt action
6 rifles.

7 Q. And 5.56?

8 A. 5.56 NATO is a military caliber, it's used in the M-16, it's
9 used in quite a few other weapons.

04:36 10 Q. Now, you've reviewed the reports that Officer Kingery issued
11 in this case?

12 A. Yes, I did.

13 Q. With regard to Mr. Kingery's October 20th report, he noted a
14 condition called hammer follow. Can you explain that for the
04:36 15 jury?

16 A. Hammer follow or hammer follow-through or hammer follow-down
17 is where the hammer on the inside of the firearm follows the
18 bolt carrier forward as it strips around and puts it into the
19 chamber.

04:36 20 It's exceedingly dangerous because of the pressures
21 involved with this type of ammunition. If the bolt doesn't lock
22 into the lugs before the hammer and the firing pin and then runs
23 into the primer and then you have an ignition, if for some
24 reason that bolt's not locked due to hammer follow, you could
04:37 25 have a catastrophic failure.

1 Q. Now, can a hammer follow occur in the semi-automatic, the
2 setting that's marked fire on this rifle, or can it only occur
3 in the unmarked third setting?

4 A. Are we talking this specific firearm?

04:37 5 Q. Yeah.

6 A. It only happened when you flipped it to that unmarked area.

7 Q. Is there a reason why it would do that? Is there something
8 that's different about that third selector?

9 A. When you say different, different in an M-16 or different
04:37 10 in an --

11 Q. In the AR-15. If you have an M-16 selector switch in the
12 AR-15, is there something that's distinctive about the third
13 setting that would cause it to occur or not occur in the third
14 but not the second or vice-versa?

04:38 15 A. There's a cam that's been ground into the selector shaft.
16 And what it does, it keeps the disconnecter from engaging the
17 hammer.

18 Q. Can hammer follow occur when a properly functioning auto
19 sear is present?

04:38 20 A. No.

21 Q. Why not?

22 A. Because that's the purpose of an auto sear is to prevent
23 hammer follow. It's to make sure that the bolt and bolt carrier
24 are in battery and it is safe to ignite the cartridge.

04:38 25 Q. And when you examined this gun it had an AR-15 bolt carrier?

1 A. Yes.

2 Q. Does the AR-15 bolt carrier have any relationship to hammer
3 follow?

4 A. I wasn't allowed to touch the weapon. An AR-15 bolt carrier
04:38 5 typically has a ramp ground into it to prevent hammer follow
6 from impacting the firing pin. Later models actually I think
7 put a notch on the hammer, but it's to prevent full auto fire.

8 Q. But from your inspection you were not able to tell whether
9 that was present?

04:39 10 A. The ramp, no.

11 Q. Yeah. And you would have had to have taken the gun apart to
12 examine that.

13 A. I would have had to have disassembled the firearm, yes.

14 Q. Did you review Officer Kingery's November 20th, 2006 report
04:39 15 before testifying here today?

16 A. Yes, I did.

17 Q. In the second test they used a, what they call a -- what
18 Officer Kingery called a standard primered ammunition. And he
19 called the first test a hard primered ammunition. Do you know
04:39 20 the difference between the two?

21 A. Yes. Military primered is typically harder.

22 An AR-15 is an interesting firearm. The firing pin
23 has no retaining spring on it to prevent the firing pin from
24 impacting the primer. It relies solely on the hard primer to
04:40 25 push back the firing pin.

1 Q. So, but can you explain just briefly what the difference
2 between a soft primered or a standard primered and a hard
3 primered ammunition is?

4 A. When you say standard primer there's --

04:40 5 Q. Well, standard primer is what --

6 THE COURT: One second. You can't testify.

7 MR. FAHL: I'm sorry.

8 THE COURT: Ask another question.

9 MR. FAHL: Yes.

04:40 10 BY MR. FAHL:

11 Q. Can you tell me the difference between a hard primered
12 ammunition and something that is -- has less of a hard primer to
13 it?

14 A. Soft primered ammunition? Sure. The reason for soft
04:40 15 primered ammunition is what they call lock time. The thinner
16 primer allows when the hunter pulls the trigger, that the firing
17 pin goes through it and it bangs into it, ignites the cartridge
18 a little quicker than a hard primer.

19 The reason for that is if something is 300 yards out
04:40 20 and if it even sneezes, the time period between the bullet
21 leaving the barrel and reaching its target is shortened.

22 Q. Okay.

23 A. Or from when you pull the trigger I should say.

24 Q. Would a gun fire differently in the semi-automatic position,
04:41 25 the fire position, not the third position, the semi-automatic

1 position, if it's fired with soft primered ammunition?

2 A. Yes. Lock time would be increased. And depending on what
3 brand, make and model of ammunition -- Mr. Kingery's report
4 didn't denote -- he said brand but he didn't say what lot number
04:41 5 or what type.

6 If you were to put soft primered ammunition into an
7 AR-15 that was well worn, it could ignite just by chambering it,
8 just from what they call firing pin bounce.

9 Q. And you noticed that, you said that Officer Kingery noted
04:42 10 hammer follow in the first test. If you're using soft primered
11 ammunition in the semi-automatic firing position, does that
12 cause an additional problem?

13 A. Say that one more time?

14 Q. If you're using soft primered ammunition does the hammer --
04:42 15 when you have a hammer follow condition in the gun, a noted
16 hammer follow malfunction, does that have an effect on the soft
17 primered ammunition if you're firing in either the
18 semi-automatic position or the fully automatic position?

19 A. In that particular firearm I would be hesitant because it
04:42 20 could injure you or kill you.

21 Q. In which position?

22 A. Certainly in that third unmarked position. Because all the
23 parts aren't there for automatic fire, and hammer follow could
24 result in what's called an out of battery ignition and it could
04:42 25 be catastrophic. Literally the gun could blow up in your hands.

1 Q. If I told you that a firearm such as this one fired three
2 rounds of ammunition with one pull of the trigger and then
3 jammed, would that be consistent with hammer follow?

4 A. That would tell me that that firearm is broken and defective
04:43 5 and I would immediately cease firing and inspect internal
6 components.

7 Q. And let's assume you determined you had a hammer follow
8 situation, what would you do to remedy that situation?

9 A. I could replace the selector, I could replace the internals,
04:43 10 there's a lot of things. I could just modify those parts to try
11 to prevent that from happening. I would repair it, in other
12 words.

13 Q. In your opinion does the hammer follow condition render this
14 or any particular rifle a machine gun?

04:43 15 A. No.

16 MR. FAHL: Nothing further at this time.

17 THE COURT: Cross?

18 I still plan to break at 5:00 o'clock.

19 CROSS-EXAMINATION

04:44 20 BY MR. HAANSTAD:

21 Q. Mr. Savage, defense counsel asked you some questions about
22 your qualifications. I just wanted to touch on a few of those.

23 First of all, have you had any formal training at all
24 in firearms classification?

04:44 25 A. No, sir, I'm not law enforcement.

1 Q. Have you had any trade schooling in gunsmithing?

2 A. No, not in gunsmithing. In machinery design. A gun is a
3 machine, it's a simple machine.

4 Q. But you had no trade schooling in gunsmithing, right?

04:45 5 A. No, sir.

6 Q. You've had no formal training with respect to federal
7 firearms laws, right?

8 A. No, sir. But my livelihood depends that I know that.

9 Q. Okay. But that was a yes-or-no question, okay?

04:45 10 A. Sorry.

11 Q. Okay. Have you had any specialized training in AR-15 to
12 M-16 conversions, formal specialized training?

13 A. No, sir, I have not gone to school for that.

04:45 14 Q. And you don't have any formal training with respect to
15 firearms classifications, right?

16 A. Again, I'm not in law enforcement.

17 Q. So you've not received any training where they teach you how
18 to go through, examine a firearm and determine whether or not it
19 satisfies the federal statutory definition of a machine gun?

04:45 20 A. I didn't say that. I have had training. You said any
21 training, now you're saying formal training. Which is it?

22 Q. It's formal training.

23 A. I have not had any formal training. I have not gone to
24 school for that.

04:46 25 Q. Okay. Now, you testified that you examined the Olympic Arms

1 firearm, Exhibit 1, right?

2 A. Yes, I have.

3 Q. And have you ever test fired it?

4 A. No, I wouldn't want to.

04:46 5 Q. Have you ever seen it test fired?

6 A. I saw the video.

7 Q. Okay.

8 A. And as a matter of fact, the video shows that the guy who
9 was shooting it was so afraid to fire it from the shoulder he
04:46 10 had to hold it out in front of him. So he knew it was
11 dangerous.

12 Q. Sir, again, it was a yes-or-no question, and if there's more
13 that the defense team thinks that you should add, they'll have
14 an opportunity to come up and ask you guess after I do, okay?

04:46 15 So you've seen the video test fire; that's the only
16 time that you've seen that gun test fired.

17 A. I saw a portion of it. Was that all of it?

18 Q. You saw a portion of it here in court today you mean.

19 A. Yes, I did.

04:46 20 Q. Okay. And as you sit here right now can you testify as to
21 whether or not that particular firearm would fire automatically?

22 A. Could I testify whether it would?

23 Q. Yes.

24 A. I'll take the government's word that that gun's
04:47 25 malfunctioning.

1 Q. Well, I don't think that was the government's word.

2 A. Well, the government said -- the government's video shows
3 that gun malfunctioning.

4 Q. Do you know right now if you took that gun and were able to
04:47 5 test fire it, and if you pulled the trigger once, would it fire
6 more than one round?

7 A. I wouldn't do that after seeing that video.

8 Q. Okay, but can you tell the jury whether or not you know if
9 that firearm would fire more than one round with one pull of the
04:47 10 trigger right now?

11 A. I'm telling you specifically that gun is malfunctioning and
12 is broken.

13 Q. Do you know how many rounds it would fire if you pulled the
14 trigger?

04:47 15 A. It wouldn't matter, it would still be broken whether it shot
16 one or 50 or 100, it's still a defective firearm.

17 Q. And if you pull the trigger once and it shot 50 or 100,
18 would that change your opinion as to whether or not this is a
19 machine gun?

04:48 20 A. No, it wouldn't because a malfunctioning firearm is not a
21 machine gun. If you had a double-barreled rifle and you pulled
22 one trigger and both went off accidentally, is the
23 double-barrelled rifle according to your definition a machine
24 gun because it fired more than one --

04:48 25 Q. (Interrupting) Okay, sir --

1 A. -- function of the trigger?

2 Q. Again, I'm asking questions, okay?

3 A. Forgive me.

04:48 4 Q. You say that if you were to take that firearm, pull the
5 trigger once, and more than one round fired, if you determined
6 that in your head it was because it was malfunctioning you would
7 not classify that as a machine gun, right?

8 A. No, because it's a defective firearm.

04:48 9 Q. And according to what standard would you disqualify that as
10 a machine gun? Where is the authority for that?

11 A. The ATF. In 1986 they actually issued a safety warning to
12 everybody in the industry and asked that everybody stop using
13 M-16 parts in AR-15 rifles.

04:49 14 Q. But you're familiar with the statutory definition of a
15 machine gun, right?

16 A. Yes, I am. And it doesn't say by malfunction, it says by
17 design. That gun is not designed to fire full auto.

04:49 18 Q. Doesn't it say any firearm that fires automatically more
19 than one round, single function of a trigger without manual
20 reload?

21 A. Shoots or is designed to shoot. That is not designed to
22 shoot more than one round per function of the trigger.

23 Q. It says "or," right? Shoots or is designed to shoot.

04:49 24 A. I don't have -- there's actually six separate definitions,
25 but the bottom line is that is not the frame or receiver of a

1 machine gun, that is not a machine gun, that is a malfunctioning
2 defective weapon.

3 Q. And you're confident making that determination without ever
4 having test fired it yourself.

04:49 5 A. After viewing the video and viewing Agent Kingery's first
6 report and his second report -- and since they contradict each
7 other he's got a 50 percent error rate going -- I would not fire
8 that firearm until I took it apart and repaired it.

9 MR. HAANSTAD: I have nothing further at this time,
04:50 10 Your Honor.

11 MR. FAHL: Nothing further.

12 THE COURT: Redirect? You may step down.

13 (Witness excused at 4:50 p.m.)

14 THE COURT: Does the defense have another witness?

04:50 15 MR. FAHL: No, Your Honor.

16 THE COURT: Very well. Members of the jury, I will
17 see you here tomorrow at 9:00 o'clock.

18 Please do not discuss this case among yourselves or
19 allow anyone to discuss this matter with you. Please keep an
04:50 20 open mind. Please leave your notebooks with the bailiff. And
21 have a good evening.

22 (Jury out at 4:50 p.m.)

23 THE COURT: Please be seated. Is the defense prepared
24 to rest?

04:51 25 MR. FAHL: Yes, Your Honor.

1 THE COURT: I'd like to inquire of the defense
2 regarding the defendant's right to testify. Has there been
3 discussion between the defendant and his counsel concerning the
4 defendant's right to testify?

04:51 5 MR. FAHL: Yes, Your Honor.

6 THE COURT: Would you like to voir dire your client
7 with respect to that right?

8 MR. FAHL: No, Your Honor. I mean, we've conferred
9 previously.

04:51 10 THE COURT: Mr. Olofson, do you understand that as a
11 defendant in this case you have a right to testify?

12 THE DEFENDANT: Yes, I do.

13 THE COURT: And do you understand the decision whether
14 or not to testify is yours and yours alone?

04:52 15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Do you wish to avail yourself of the
17 opportunity to testify in this case?

18 THE DEFENDANT: Yes, I do.

19 THE COURT: So you do want to testify.

04:52 20 THE DEFENDANT: No, Your Honor. I want to -- I
21 believe you said avail? As far as my understanding the word is
22 excuse myself from it?

23 THE COURT: You want to avail yourself of the right
24 not the testify then.

04:52 25 THE DEFENDANT: Yes, sir, I do not want to testify.

1 THE COURT: And it is your desire that your case be
2 closed at this time without offering additional testimony; is
3 that correct?

4 THE DEFENDANT: I would actually like to confer with
04:52 5 my counsel on that matter for a moment.

6 THE COURT: All right, surely.

7 (Defendant and defense counsel confer.)

8 MR. FAHL: No additional witnesses, Your Honor.

9 THE COURT: Mr. Olofson, do you agree with that?

04:54 10 THE DEFENDANT: After conferring with counsel I do
11 agree with that, Your Honor.

12 THE COURT: Very well. I'd like to ask the parties to
13 take a couple of moments and review the proposed instructions
14 and to see whether or not there is any instruction that needs to
04:55 15 be recrafted or any additional instructions that need to be
16 given.

17 MR. HAANSTAD: Your Honor, would it be possible for
18 the government to -- I don't think it's likely, but just to hold
19 over the possibility of a short rebuttal witness tomorrow?

04:55 20 THE COURT: Yes.

21 MR. HAANSTAD: Okay.

22 THE COURT: Is there anything else?

23 MR. HAANSTAD: No, Your Honor.

24 THE COURT: All right, we'll go off the record. The
04:55 25 reporter is excused.

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(Discussion off the record.)

(Proceedings concluded for the day at 4:55 p.m.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court
Reporter for the United States District Court, Eastern District
of Wisconsin, do hereby certify that I reported the foregoing
proceedings, and that the same is true and correct in accordance
with my original machine shorthand notes taken at said time and
place.

Official Court Reporter
United States District Court

Dated January 31, 2008, at Milwaukee, Wisconsin.

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E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>OFFERED</u>	<u>ADMITTED</u>
1	Olympic Arms .223 caliber SGW Rifle,	37	37
	model CAR-AR, S/N F7079		
2	Video of test fire demonstration.	111	111
9-13	9 Manual: AR-15 to M-16 Conversion	74	74
	Book;		
	10 Document: Full Auto SKS Conversion;		
	11 9/10/03 Email RE Machine Guns and		
	Sovereignty;		
	12 6/28/05 & 7/6/05 Email exchange RE		
	M-16 parts;		
	13 Document requirements for purchasing		
	Machine Guns.		