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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 8, 2008
	)	9:20 a.m.
DAVID R. OLOFSON,	)	
	)	<b>VOLUME 3</b>
Defendant.	)	

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

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



1 P R O C E E D I N G S (9:20 a.m.)

2 THE COURT: Good morning, everyone. Do the parties  
3 wish to be heard before the jury comes out?

4 MR. FAHL: Yes, Your Honor. As the defense did put on  
09:20 5 a case and that case is now closed, I believe it's proper to  
6 renew our Rule 29 motion for a judgment of acquittal.

7 THE COURT: Obviously based upon all the evidence in  
8 the record in this case, considering what I've heard in this  
9 matter, the motion must be denied.

09:20 10 MR. FAHL: Thank you, Your Honor. That is all.

11 THE COURT: Mr. Haanstad?

12 MR. HAANSTAD: Your Honor, the government considered  
13 the possibility of putting on a rebuttal case and has decided  
14 not to.

09:20 15 THE COURT: All right. So are the parties prepared to  
16 argue at this time?

17 MR. HAANSTAD: Yes, Your Honor.

18 MR. FAHL: Yes, Your Honor.

19 THE COURT: Now, I did send out the instructions.  
09:21 20 After further review and consideration I decided not to change  
21 the one that we discussed yesterday concerning Section 924, so  
22 that will remain in the instructions.

23 All right?

24 MR. HAANSTAD: Yes, Your Honor.

09:21 25 MR. FAHL: Yes.

1 THE COURT: Bring out the jury.

2 (Jury in at 9:21 a.m.)

3 THE COURT: Members of the jury, the evidence in this  
4 case is closed. You will now hear final arguments.

09:22 5 Mr. Haanstad?

6 GOVERNMENT CLOSING ARGUMENT

7 MR. HAANSTAD: Good morning, ladies and gentlemen.

8 There are two central issues for you to resolve in this case.

9 We touched on these during the opening argument, and as you

09:22 10 probably noticed the evidence and testimony that was presented

11 yesterday was addressed primarily to these two issues. Those

12 two issues are:

13 One, whether Olofson's gun was a machine gun, that is,

14 whether it fired automatically. Keep in mind again the

09:22 15 definition of a machine gun.

16 And second, whether Olofson knew that his gun was a

17 machine gun or fired automatically at the time that he

18 transferred it to Mr. Kiernicki.

19 Now, if the answer to each of those questions is yes,

09:23 20 then you must return a verdict of guilty.

21 And you should use those two issues when you're

22 deliberating, when you're considering the evidence and when

23 you're listening to the arguments today, as a type of filter,

24 that is, a filter by which you sift out evidence that doesn't

09:23 25 really have any bearing on these two issues, and also a filter

1 by which the evidence which does directly and substantially bear  
2 on these two questions comes into your consideration.

3 If you do that you'll find that some of the testimony  
4 that was presented yesterday really doesn't directly address  
09:23 5 either of these two issues.

6 The testimony and the evidence that did, however, bear  
7 upon these two issues establishes beyond any reasonable doubt  
8 that, again, Mr. Olofson's gun was a machine gun, that is, it  
9 fired automatically as defined by federal statute, and that  
09:24 10 Mr. Olofson knew that his firearm operated in that way at the  
11 time that he transferred it to Mr. Kiernicki.

12 As to the first question, that is, whether this gun is  
13 a machine gun, again, throughout you should keep in mind the  
14 definition of a machine gun.

09:24 15 And you're going to receive a packet of jury  
16 instructions when you go back to deliberate and to consider  
17 these two issues. And in that packet of jury instructions,  
18 about six pages from the back, there's a definition of "machine  
19 gun." And I provided it, and it should be on your monitors.

09:24 20 Under federal statute, under the statute that  
21 Mr. Olofson is charged with violating, Section 922(o) of Title  
22 18, a machine gun is defined as: Any weapon which shoots, is  
23 designed to shoot, or can be readily restored to shoot,  
24 automatically more than one shot, without manual reloading, by a  
09:24 25 single function of the trigger.

1           That is, if you have a gun, you pull the trigger once  
2 and more than one shot is fired, that firearm is a machine gun.

3           Now, the people who testified yesterday, who had  
4 actually fired Exhibit 1, who had actually fired Mr. Olofson's  
09:25 5 firearm, all testified that when they did so, when they pulled  
6 the trigger more than one round was fired at a time.

7           Robert Kiernicki testified that after he received the  
8 firearm from Mr. Olofson he noticed that the selector switch  
9 could move into an unmarked third position.

09:25 10           Mr. Kiernicki testified that when he moved the firearm  
11 into that unmarked third position, it fired automatically; that  
12 is, when Mr. Kiernicki moved the selector switch into the  
13 unmarked third position and pulled the trigger once, more than  
14 one shot was fired.

09:25 15           Max Kingery testified. He's a firearms expert with  
16 the Bureau of Alcohol, Tobacco and Firearms. Like  
17 Mr. Kiernicki, Mr. Kingery testified that when he fired this  
18 firearm in a test fire, when he pulled the trigger once more  
19 than one round was fired. That is, like Mr. Kiernicki,  
09:26 20 Mr. Kingery testified that from his personal firsthand  
21 experience this firearm fired as a machine gun.

22           And you all have seen a video tape of this firearm  
23 being fired. That video tape clearly shows again that when you  
24 pull the trigger once, more than one round is fired.

09:26 25           The only testimony that was presented yesterday that

1 this firearm was not a machine gun came from the defendant's  
2 witness Mr. Savage, a person who has never fired Exhibit 1, and  
3 a person who until yesterday had not even seen Exhibit 1.

09:27 4 Nor has Mr. Savage had any kind of formal training or  
5 experience in firearms classifications. He's had no formal  
6 training or experience specifically in the conversion of AR-15s  
7 to M-16s. And, again, keep in mind, that's the conversion that  
8 we're talking about here.

09:27 9 Now, Mr. Savage may be of the opinion that Exhibit 1  
10 is not a machine gun. But it's also clear that Mr. Savage  
11 doesn't consider himself bound by the legal definition of  
12 machine gun.

09:27 13 You heard him testify yesterday that it wouldn't  
14 matter to him if he picked that gun up and pulled the trigger  
15 once and 50 rounds came out or 100 rounds came out, he still  
16 would not consider it a machine gun.

09:27 17 Well, how can that be under the definition that you  
18 have of a machine gun? Again, that's the definition that  
19 controls here, not any notion that Mr. Savage may have as to  
20 what constitutes a machine gun.

09:28 21 A machine gun is specifically designed by statute and,  
22 again, about six pages back -- six pages from the back of the  
23 packet of the jury instructions you're going to receive, that  
24 definition is provided. And clearly, under the legal definition  
25 of "machine gun" that you're going to be asked to apply,

1 Mr. Olofson's gun qualifies because, as Mr. Kingery testified,  
2 as Mr. Kiernicki testified, and as you yourselves all saw in the  
3 video, when you pull the trigger once on that firearm more than  
4 one round is fired.

09:28 5 And again, you should consider all the evidence in the  
6 case, but you should consider how that evidence fits together.

7 That is, you should assess witnesses' testimony against the  
8 objective evidence that you received. You should assess expert  
9 testimony, for example, against other expert testimony, other  
10 witness testimony, and other physical evidence that you've seen.

09:28 11 And I think when you do that, you'll find that, clearly, this  
12 weapon, that is Exhibit 1, the firearm that Mr. Olofson  
13 transferred to Mr. Kiernicki, qualifies as a machine gun.

14 Now, as to the second issue, that is, Mr. Olofson's  
09:29 15 knowledge that his gun was a machine gun, that is, his knowledge  
16 that that particular firearm fired in such a way that when he  
17 pulled the trigger once more than one round is fired, some of  
18 the evidence of Mr. Olofson's knowledge in this regard comes  
19 from his own words. While he was loaning the gun to  
09:29 20 Mr. Kiernicki, he told Mr. Kiernicki that he had fired it in  
21 that unmarked third position and it fired automatically in the  
22 past.

23 And when Kiernicki called Olofson after the Berlin  
24 police had come and talked to Kiernicki, when he was firing  
09:29 25 Exhibit 1 automatically at the Conservation Club in Berlin, when

1 Mr. Kiernicki called Mr. Olofson to tell him that, again,  
2 Mr. Olofson acknowledged that he had fired automatically in the  
3 past, telling Mr. Kiernicki it's odd that the police would  
4 approach you, I fired automatically at that same Conservation  
09:30 5 Club before and I've never had any problem with the police.

6 Moreover, Mr. Olofson is a person who clearly is  
7 interested and knowledgeable with respect to firearms broadly,  
8 but also is interested in and knowledgeable about machine guns,  
9 machine gun parts, and the conversion of non-automatic firearms  
09:30 10 into automatic firearms; more specifically, the conversion of  
11 AR-15s, like his firearm, into automatically firing M-16 machine  
12 guns.

13 Mr. Olofson told Agent Keeku that he knew how to  
14 convert an AR-15 into an M-16 machine gun. And again, that's  
09:30 15 the same conversion that took place with respect to this  
16 firearm. Again, Mr. Olofson told a federal agent that he knew  
17 how to make that conversion.

18 Now, there were a number of exhibits that were entered  
19 yesterday. And again, you should consider how these exhibits,  
09:31 20 this documentary evidence, for example, fits in with the  
21 testimony that was provided.

22 Here we have a case where not only do we have a  
23 firearm that Mr. Olofson transferred to Mr. Kiernicki, an AR-15  
24 that has M-16 parts and an AR-15 that with those M-16 parts  
09:31 25 fires automatically; and not only do we have a defendant,



1 Mr. Olofson, who is acknowledging to a federal agent that he  
2 knows how to convert an AR-15 into an M-16, but, as you heard  
3 yesterday, on Mr. Olofson's computer there's evidence of his  
4 ordering M-16 parts.

09:31 5 There's also, on his computer, a conversion manual for  
6 converting AR-15s to M-16 machine guns. And in that conversion  
7 manual it describes the replacement of AR-15 parts with M-16  
8 machine gun parts, the types of parts that Mr. Olofson was  
9 ordering. And, with those M-16 machine gun parts installed in  
09:32 10 the AR-15, in Mr. Olofson's gun, that gun fires as an automatic.

11 Ladies and gentlemen, there might be a bit of an  
12 inclination to consider a lot of extraneous evidence that was  
13 presented. But really, the evidence I've just laid out for you  
14 is the evidence that shows beyond any reasonable doubt that when  
09:32 15 Mr. Olofson transferred this AR-15 rifle to Mr. Kiernicki, the  
16 firearm fired automatically; that is, it qualified as a machine  
17 gun under the definition that you're required to apply.

18 Moreover, that evidence establishes that at the time  
19 that he transferred the machine gun to Mr. Kiernicki,  
09:33 20 Mr. Olofson knew that that firearm operated as a machine gun.

21 Based on all this evidence, ladies and gentlemen, the  
22 United States asks that you return a verdict of guilty.

23 DEFENSE CLOSING ARGUMENT

24 MR. FAHL: Ladies and gentlemen of the jury, like  
09:33 25 Mr. Haanstad, as you recall yesterday, I asked you to focus on

1 two things, the same two things that Mr. Haanstad is asking you  
2 to focus on: One, whether or not this is in fact a machine gun  
3 and; two, if it is in fact a machine gun, whether or not  
4 Mr. Olofson knew this at the time he gave his AR-15  
09:34 5 semi-automatic rifle to Mr. Kiernicki.

6 When thinking about these questions we must realize  
7 that it's the government's burden to prove to you beyond a  
8 reasonable doubt, and that Mr. Olofson does not have to prove  
9 that he is innocent. We are to presume he is innocent unless  
09:34 10 the government can prove otherwise beyond a reasonable doubt.

11 Looking first to whether this is a machine gun. We've  
12 heard discussions and differing opinions about things like:

13 Whether soft or hard primered ammunition can make a  
14 difference in a testing procedure;

09:34 15 The effect of using different ammunition calibers when  
16 test firing a weapon;

17 Whether this gun is firing multiple rounds on purpose,  
18 or a result of a condition called hammer follow through or  
19 firing pin bounce;

09:34 20 Whether those are malfunctions;

21 The importance of a bolt carrier or an auto sear when  
22 we're classifying something as a machine gun.

23 And while all these things are important and should be  
24 considered, most of this boils down to the simple question: Do  
09:35 25 we believe that the government has proven beyond a reasonable

1 doubt, beyond any doubt that Mr. Olofson's AR-15 semi-automatic  
2 rifle shoots or is designed to shoot multiple rounds. Now  
3 that's "shoot" in a present tense. That means if it was a  
4 machine gun that day it's a machine gun yesterday, it's a  
09:35 5 machine gun today.

6 So the government is saying that if we take this gun  
7 out today and take it to a firing range and we shoot it, it must  
8 act -- with any ammunition, it must act like a machine gun; that  
9 is, it must fire multiple rounds with a single pull of the  
09:35 10 trigger. And we don't know if it will do that.

11 Maybe if you put a certain type of ammunition in, it  
12 will, but maybe if you put a different kind, it doesn't, you'll  
13 have a hammer follow and nothing will happen.

14 Or maybe, you heard Mr. Savage say, maybe it will even  
09:35 15 blow up in your face.

16 Now, Mr. Haanstad and the government, they could have  
17 taken us out to a firing range yesterday, and they could of had  
18 us fire this gun to let you see in person how it fires with all  
19 these different ammunitions, but they didn't do that. And it's  
09:36 20 their burden to prove to you that this is today in fact a  
21 machine gun. It just doesn't have to happen to have fired  
22 multiple rounds on a couple of occasions; it either is a machine  
23 gun, or it's not, and it would need to do that today.

24 If there is any reasonable doubt as to whether that  
09:36 25 gun would today in fact shoot multiple rounds with a single pull

1 of the trigger, Mr. Olofson is not guilty, it's not a machine  
2 gun, you don't get to the second step.

3 But if you do, if you think, yeah, I think it would  
4 fire today multiple rounds and act like a machine gun, the  
09:36 5 government must prove that Mr. Olofson knew that; he knew it was  
6 a machine gun, he knew it fired multiple rounds at the time that  
7 he transferred this AR-15 semi-automatic. When he gave that to  
8 Mr. Kiernicki, he had to know.

9 Now, for the government to meet this burden  
09:37 10 Mr. Olofson must have knowingly transferred it. And Judge  
11 Clevert will instruct you that "knowing" means that Mr. Olofson  
12 knew that he was going to do it and was aware of the nature of  
13 his conduct and did not act through ignorance, mistake, or  
14 accident. In other words, Mr. Olofson must have actually known  
09:37 15 that at the time he transferred his AR-15 to Mr. Kiernicki, that  
16 it fired multiple rounds with a single pull of the trigger in  
17 that third position.

18 If you -- if we believe that Mr. Olofson was simply  
19 ignorant of the fact that it would fire this way in the third  
09:37 20 position, or that he was negligent, even if he was negligent in  
21 not discovering whether it would fire in this third position  
22 multiple rounds with a single pull of a trigger, if he was  
23 negligent in determining whether or not it was a machine gun,  
24 he's not guilty. He couldn't have been knowing if he was  
09:38 25 negligent. It couldn't have been knowing if he was ignorant.

1           Now, the government wants us to think that Mr. Olofson  
2 knew that he had a gun based on this manual on how to convert an  
3 AR-15 into an M-16. It's Exhibit 9. You'll have it with you as  
4 you deliberate.

09:38 5           And they want you to look at pages 10 and 11. Page 10  
6 has some AR-15 parts, page 11 has some M-16 parts. And they  
7 want to tell you that the manual simply says, swap these out and  
8 you have a machine gun.

9           Well, if it says that, that's a two-page manual, this  
09:38 10 thing is big. Look at it. Look through the pages. Read it.  
11 There's schematics, there is technical drawings. You would have  
12 to have a machine shop to do some of these alterations.

13           That's what the book is telling you how to do. Not  
14 just swap out some parts. And the evidence will show that  
09:39 15 Mr. Olofson, you heard, he didn't have any drill presses, he had  
16 a couple tools for reloading guns or some minor repairs. This  
17 wasn't a machine shop, and that's what's needed to convert an  
18 AR-15 into an M-16.

19           In fact, you heard Agent Keeku testify that  
09:39 20 Mr. Olofson said, yeah, I probably know how to convert one, I  
21 just don't have the skills. And those skills he was talking  
22 about was the machining skills. You become a gunsmith. It's  
23 not easy to do. And so, if he couldn't have the skills to do  
24 it, he couldn't have converted it.

09:39 25           And again, just simply swapping out these parts isn't

1 enough because, although the government's expert thought that  
2 there are only three of these individual parts, the trigger, the  
3 selector, the hammer, were enough to declassify it as a machine  
4 gun, Mr. Savage told you he talked to SGW/Olympic Arms, and they  
09:40 5 did manufacture this gun with all four parts. He told you that.  
6 And he spoke to them.

7 And he also told you that there was a recall; that a  
8 while ago they knew that there were some malfunctions so they  
9 issued a recall because of these parts.

10 Now, again, there was no paraphernalia. This hard  
11 copy that you have in front of you of Exhibit 9, of this how to  
12 convert an AR-15 into an M-16, they didn't find that printed out  
13 and sitting on his workbench. No, it was stuffed back in his  
14 computer in a folder, copied from a CD with hundreds -- you  
09:40 15 heard about a whole CD of documents that were downloaded  
16 including regulations, schematics, all these other things that  
17 were on that CD.

18 This wasn't pulled out and separate and something that  
19 Mr. Olofson was concentrating on. And you'll see that when you  
09:40 20 look through that manual that the conversions they talk about  
21 weren't done to this gun. There was no auto sear. There was no  
22 M-16 bolt carrier. And those are the things you need to convert  
23 an AR-15 to an M-16.

24 So without those, how would he have knowledge that  
09:41 25 this gun was going to misfire; that it was going to do this

1 hammer follow and cause sometimes multiple firings, sometimes  
2 not?

3 The government showed you another document on  
4 converting SKS rifles from semi-automatic to fully automatic  
09:41 5 machine guns. Again, this was in with all this other stuff, and  
6 he doesn't have an SKS rifle. I don't understand how it was  
7 relevant. And you get to decide what was relevant.

8 If you look at these other things. The e-mails.  
9 Mr. Haanstad told you, well, he talked about M-16 parts. Read  
09:41 10 the e-mails. We talked about magazines and clip bags. We don't  
11 talk about selector switches. We don't talk about hammers. We  
12 don't talk about triggers. And they don't show you any evidence  
13 that any of this was actually ordered or received. No future  
14 conversations between the two parties. It was just an inquiry;  
09:42 15 somebody asking Mr. Olofson if he had M-16 parts.

16 Where's the confirmation that he did? Where is the  
17 confirmation that they were shipped? Where's the confirmation  
18 that he bought them? They searched his house, they searched his  
19 basement, they got all this stuff. Where were the M-16 parts  
09:42 20 that they could bring in here to show you? They didn't have  
21 them. They aren't there.

22 Now, regarding Mr. Kiernicki and his testimony, he  
23 talked to you that after three times of going out he never moved  
24 this to the third setting. It was only his fourth trip, he  
09:42 25 asked Mr. Olofson what does this third setting do.

1           Now, remember it was Mr. Kiernicki who asked  
2 Mr. Olofson, what does this do? And while Mr. Kiernicki wasn't  
3 quite clear, depending on who was asking the question, he gave  
4 kind of a different answer. One of the answers was, well, yeah,  
09:42 5 he did say that this was the position to fire a three-round  
6 burst but it's missing the part so don't -- Mr. Olofson told him  
7 don't use it.

8           Well, if that's the case that's entirely consistent  
9 with this gun operating as a semi-automatic rifle, but having  
09:43 10 the third position on the selector switch. It's another way of  
11 saying, hey, if you put it over there, you would need an extra  
12 part, this auto sear to make it fire multiple rounds. It  
13 doesn't have it so it doesn't work, don't use it.

14           And that shows -- that doesn't show that he has  
09:43 15 knowledge that this was a machine gun. In fact, I think it  
16 shows the opposite, that maybe he thought it wasn't a machine  
17 gun. It wasn't.

18           And talking a little bit about the bullets that were  
19 used. You know, whether it's hard primer or standard which you  
09:43 20 use for hunting, you know, this is a military style weapon, this  
21 isn't a deer rifle. Mr. Olofson is in the military, you heard,  
22 he's in the reserves. Mr. Olofson, he knows to use military  
23 style ammo.

24           And if he's doing all that, you heard the first test  
09:44 25 the government took, it just had -- it's just a hammer follow



1 through, it didn't fire in that third position. And if that's  
2 what Mr. Olofson is using, that's what he fires with, how is he  
3 gonna know that you use the standard or soft primered ammunition  
4 that it's going to fire multiple rounds? He's a military guy,  
09:44 5 he uses military stuff.

6 Mr. Kiernicki also talked about, well, Mr. Olofson  
7 told me that, oh, he fires it automatically all the time, and he  
8 never has any problem with the police. Well, ask yourself this.  
9 If the police came almost immediately after hearing automatic  
09:44 10 fire when Mr. Kiernicki was firing, how come they never came all  
11 these times Mr. Olofson was supposedly firing automatically?  
12 You know, maybe instead what Mr. Olofson told him was, he says,  
13 I fire that gun up there all the time, I never have any  
14 troubles. Maybe that's what he said.

09:44 15 Turning to the broader question, why would anyone  
16 design a gun to malfunction? The experts testified, both said  
17 that this is a hammer follow thing, it's striking the primer,  
18 that's what's causing the extra -- the automatic action, the  
19 machine gun firing, it's this hammer follow.

09:45 20 But sometimes it works, sometimes it doesn't. If  
21 you're gonna design a machine gun, why would you design one that  
22 can jam after three or five or seven rounds? It just doesn't  
23 make sense.

24 And in the end, if you think of any of these  
09:45 25 questions, any of them makes some sense to you, Mr. Olofson

1 could not have knowingly transferred a machine gun. He couldn't  
2 have known that his AR-15 legal semi-automatic rifle would fire  
3 like a machine gun in this third position. And if that's so,  
4 Mr. Olofson is not guilty.

09:45 5 Thank you.

6 MR. HAANSTAD: Your Honor, could we approach briefly?

7 THE COURT: Surely.

8 (At side bar on the record.)

9 MR. HAANSTAD: Judge, I just wanted to -- I think that  
09:46 10 there was something of a misstatement of the law; that is, this  
11 notion that the machine gun has to fire automatically right now  
12 today.

13 We spent quite a bit of time focusing on the fact that  
14 the relevant time period is when it was transferred. And, I  
09:46 15 mean, I can of course point that out in rebuttal, but my concern  
16 is that if the jury gets to the point where they think, well,  
17 these are two reasonable interpretations of the same statute,  
18 that would be incorrect.

19 MR. FAHL: The statute says shoots. It doesn't say  
09:46 20 shots at one particular time, it says shoots. And to me that  
21 says this thing is or is not a machine gun. If it was a machine  
22 gun at one point -- I think the government can't say it's a  
23 machine gun today, yesterday it's not depending on what we do  
24 it. It has to be either is or it isn't, and so "shoots" is  
09:47 25 consistent with that theory.

1 MR. HAANSTAD: But the first part of that statute says  
2 not only shoots but also designed or can readily be restored to  
3 shoot.

4 MR. FAHL: Present tense. And the government can say  
09:47 5 that -- they can argue that because it did yesterday it probably  
6 will today.

7 THE COURT: I think it's sufficient for you to argue  
8 it. If you think I need to supplement the instructions I will  
9 do so.

09:47 10 MR. HAANSTAD: Okay, thank you.

11 A JUROR: Yes.

12 (End of discussion at side bar.)

13 GOVERNMENT REBUTTAL ARGUMENT

14 MR. HAANSTAD: Ladies and gentlemen, the defense has  
09:47 15 invited you to go down a number of paths that stray from the  
16 straightforward central issues in this case, the first again of  
17 which is, was Mr. Olofson's gun a machine gun?

18 Now, I've emphasized already that you should focus on  
19 the definition that's provided. And if you do so, you see that  
09:48 20 the statute covered not only as Mr. Fahl indicated a weapon that  
21 shoots automatically more than one shot -- and he's right,  
22 that's written in the present tense -- but there's no support in  
23 that statutory definition for the notion that right as you, as  
24 jurors, deliberate, we have to demonstrate to you that this  
09:48 25 particular gun shoots automatically. Because the definition

1 provides that a machine gun is any weapon which not only shoots  
2 but which is designed to shoot or can be readily restored to  
3 shoot automatically more than one shot with a single function of  
4 the trigger.

09:48 5 Now, the testimony that you've heard with respect to  
6 whether or not this firearm fires in that way covers a  
7 relatively broad period of time.

8 When the firearm, again, was transferred to  
9 Mr. Kiernicki, back in 2006, it fired automatically. And, in  
09:49 10 fact, it fired automatically before that point again because  
11 Mr. Olofson told Mr. Kiernicki that he had fired it in that  
12 position before. And it wasn't as though Mr. Olofson simply  
13 told Mr. Kiernicki that it didn't work; he told him that it  
14 jammed.

09:49 15 Well, again, that's consistent with pulling the  
16 trigger, having more than one round expelled, and then the  
17 weapon jamming. And that's what Mr. Kiernicki testified  
18 happened.

19 Now, when Mr. Kingery did the test he pulled the  
09:49 20 trigger once, it fired more than one round and did not jam. But  
21 remember, when Mr. Kiernicki was firing the firearm, he was  
22 firing non-automatic for about 100 to 120 rounds before he  
23 switched to fully automatic and pulled the trigger and jammed.

24 And the weapon had heated up while it was being fired  
09:49 25 non-automatically, those 100 to 120 rounds, so when he fired

1 automatically it jammed. Just like it fired automatically  
2 when -- or, I'm sorry, just like it jammed after firing  
3 automatically when Mr. Olofson had used the weapon.

4 Now, when Mr. Kingery did the test he didn't go  
09:50 5 through 100 to 120 rounds in non-automatic ammunition, or  
6 non-automatic firing mode before he conducted the test; that is,  
7 the gun hadn't heated up yet. He just pulled the trigger. And  
8 he did on one of the tests do a automatic test first -- or a  
9 non-automatic test first. But it wasn't 100 to 120 rounds. It  
09:50 10 wasn't like anything that was gonna heat up the gun to the  
11 extent that Mr. Kiernicki did when he was using it.

12 And again, when Mr. Kingery did the test fires,  
13 including the one that's on video that you've seen -- we didn't  
14 take you to a test range yesterday but we attempted to bring the  
09:50 15 test firing range to you by video taping this, and in that video  
16 tape you can see that when Mr. Kingery pulls the trigger once,  
17 more than one round is expelled, clearly satisfying the first  
18 part of that definition of "machine gun" that I've asked you now  
19 several times to focus on.

09:51 20 But remember, you don't necessarily have to stop there  
21 according to this definition because it also, the definition  
22 also includes firearms that were designed to shoot or can  
23 readily be restored to shoot automatically.

24 So again, under that definition there's no support for  
09:51 25 the notion that every time you go out and fire this weapon it

1 has to fire automatically. Simply not consistent with the plain  
2 language of this statute which the court is going to instruct  
3 you to follow.

4 Nor is there any support for the notion that you have  
09:51 5 to use a particular type of ammunition when you fire the  
6 firearm, and that only if you use a specific type of ammunition  
7 and it fires automatically does it qualify as a machine gun.

8 Again, that particular requirement, that any  
9 particular type of ammunition be used, simply is not included  
09:51 10 within this definition. And not only is not included, but it's  
11 not consistent with this definition because, again, it covers  
12 not only shoot but also which are designed or can readily be  
13 restored to shoot automatically.

14 Now, as I mentioned earlier, it's somewhat tempting to  
09:52 15 sort of point by point discuss all of the evidence that came  
16 out, but the fear is that it's, again, gonna lead you down a  
17 path that's really not -- right on this, right in connection  
18 with the straightforward central issues that are presented in  
19 this case.

09:52 20 But, to the extent that there's some concern, for  
21 example, that some kind of special ammunition was used in order  
22 to induce this automatic fire, keeping aside, setting aside for  
23 one minute whether that matters even under this definition,  
24 remember the testimony was that the unique type of ammunition  
09:52 25 that was used was the military grade ammunition that Officer

1 Kingery used in that first test fire that he did. That was the  
2 nonstandard ammunition, the military stuff.

3 When Mr. Kingery, on a subsequent test, used regular  
4 standard commercially available civilian ammunition, the type of  
09:53 5 ammunition that you would go out and buy at the sporting goods  
6 store, and he popped that ammunition into Exhibit Number 1,  
7 Exhibit 1 fired automatically. It did so on the second test and  
8 it did so again on this test that you've seen and which you can  
9 see again when you're back deliberating.

10 Now, Mr. Fahl also mentioned the manual, that is,  
11 Exhibit 9. And, again, you'll have this back with you so you  
12 can go through it. Now, he made much of the fact that Exhibit 9  
13 is multiple pages, and, in fact, I believe it's 31 pages. And  
14 the implication seemed to be that somehow you had to follow the  
09:53 15 steps that are laid out in here from page 1 all the way through  
16 page 31 in order to convert a weapon into an automatic; that is,  
17 in order to convert an AR-15 into an M-16 machine gun.

18 But if you look at this AR-15 to M-16 conversion  
19 manual, you'll see that's not the case. It describes instead  
09:54 20 multiple ways in which an AR-15 can be converted to an M-16.

21 One of those ways that it describes is contained on  
22 pages 10 and 11 of this book, and that is, the taking out and  
23 discarding of the AR-15 parts and the replacement of them with  
24 M-16 parts.

09:54 25 And again, Mr. Kingery testified that based on his

1 extensive training, his extensive experience and his examination  
2 of this particular firearm, that if the four components that  
3 were M-16 components in this AR-15, four components which are  
4 identified in this manual, if those four components are changed  
09:55 5 from AR-15 components to M-16 components, the result is going to  
6 be that a weapon will fire automatically.

7 And not only is that the case in a general sense, that  
8 is, with respect to firearms in general, more importantly, for  
9 purposes of your deliberations, Mr. Kingery testified that was  
09:55 10 the case with respect to this particular gun.

11 And that's what your focus should be on. It shouldn't  
12 be on this testimony about what might have happened in some  
13 hypothetical case. It shouldn't be about what's happened in  
14 other cases. You're asked to decide whether or not this  
09:55 15 particular gun fires automatically. And not only have you seen  
16 it with your own eyes fire automatically, but you've heard this  
17 explanation as to why it fires automatically.

18 Now, there's also a bit of a danger, I'm afraid, that  
19 you're gonna focus too much on the possible modifications  
09:56 20 or performance of this gun. There's no requirement that you  
21 find that Mr. Olofson himself performed the modifications that  
22 converted this AR-15 into an M-16.

23 In fact, there's no requirement that you believe that  
24 the gun's been modified to fire as an M-16. The sole issue that  
09:56 25 you have to decide is whether or not the gun in fact fires



1 automatic. That is, even if a gun came from the manufacturer  
2 assembled as a machine gun, if Mr. Olofson's in possession of  
3 that type of gun, that is, a non-modified but nonetheless  
4 machine gun, and he then transfers it to Mr. Kiernicki, he's  
09:56 5 guilty, he falls within this definition.

6 The significance of the evidence of Mr. Olofson's  
7 knowledge and his expertise, and the significance of the  
8 evidence that Mr. Olofson himself again is ordering M-16 parts  
9 and is, consistent with the manual that's in his possession, in  
09:57 10 possession of a gun that has those M-16 parts dropped in in  
11 place of AR-15 parts, the significance of all that is not to  
12 establish that Mr. Olofson himself modified the firearm; the  
13 significance is to establish that if the firearm had been  
14 modified, or if for whatever reason the weapon fired  
09:57 15 automatically, he has sufficient knowledge to know that.

16 And again, if you focus on the two questions you'll  
17 see that; again, two questions being whether the gun fired  
18 automatically and whether Mr. Olofson knew it fired  
19 automatically.

09:57 20 Again, whether Mr. Olofson knew that it fired  
21 automatically, not whether Mr. Olofson had modified it to fire  
22 automatically, not whether anybody else had modified it to fire  
23 automatically; simply whether he knew that it in fact fired  
24 automatically at the time that he transferred it to  
09:57 25 Mr. Kiernicki.

1           Deciphering knowledge of that type is a difficult  
2 enterprise, and it's not the sort of thing upon which there  
3 usually exists a lot of direct evidence. But the Judge is going  
4 to instruct you, and you'll have in your jury instruction  
09:58 5 packet, that there are two different types of evidence, there's  
6 direct evidence and there's circumstantial evidence. And direct  
7 evidence means that evidence that results from direct firsthand  
8 perception. Circumstantial evidence is evidence where you see a  
9 certain fact and you infer from that fact that something else is  
09:58 10 so.

11           In this case much of the evidence with respect to  
12 Mr. Olofson's knowledge is circumstantial evidence. But the  
13 Judge is going to instruct you that evidence isn't any weaker  
14 just because it's circumstantial evidence; that is, you examine  
09:58 15 all of the evidence, circumstantial and direct, and give it the  
16 appropriate weight as you see appropriate when viewed in light  
17 of all the other facts and evidence that's in the case.

18           Now, again, what we're trying to determine, intent,  
19 that is, knowledge, whether somebody, for example, in this case  
09:59 20 knew that a weapon was a machine gun; it's not as though we can  
21 hook a machine up to a person and really find out what's in  
22 their mind. Instead we proceed circumstantially.

23           And there are certain facts that we know. For  
24 example:

09:59 25           That Mr. Olofson is ordering M-16 machine gun parts;

1           That Mr. Olofson told Special Agent Keeku that he knew  
2 how to convert AR-15s into M-16s;

3           That not only is Mr. Olofson ordering M-16 parts, but  
4 that he has a manual, again, describing how to convert an AR-15,  
09:59 5 which is what he has, into an M-16 machine gun;

6           And, that one of the conversion methods that's  
7 described in that book is the replacement of AR-15 parts with  
8 M-16 machine gun parts.

9           From those facts we're not asking you to conclude  
10:00 10 necessarily that Mr. Olofson performed the modifications.  
11 Instead, we're asking you to infer the fact that he at least  
12 would have known that his firearm was firing automatically.

13           Now, another piece of evidence that's relevant with  
14 respect to whether or not Mr. Olofson knew this gun was firing  
10:00 15 automatically is the simple fact that it did fire automatically.

16           And let me explain. Again, to flip the switch to that  
17 unmarked third position and then pull the trigger doesn't take  
18 much effort. And once that switch is flipped and the trigger is  
19 pulled, you've seen what happens; I mean, you see what automatic  
10:01 20 fire looks like.

21           So you have to ask yourself, how likely is it that  
22 somebody has a gun that can simply be flipped to another switch,  
23 and that when that simple process is done and they pull the  
24 trigger, that happens. And what you see on the video is the  
10:01 25 result. How likely is it that somebody is not going to know

1 that that's the case?

2 You as jurors have to decide how plausible that is.  
3 But you should also assess that possibility in light of all the  
4 other facts in the case. That is, you should compare that  
10:01 5 position to the assertions that Olofson made when he lent the  
6 gun to Kiernicki; that is, that he knew that that third position  
7 was there and that he had fired it there before and it had  
8 jammed; his statement to Kiernicki that he had fired  
9 automatically in the past at the Conservation Club where  
10:02 10 Mr. Kiernicki was.

11 And you should consider how plausible it is that  
12 somebody who makes those sorts of statements with respect to  
13 this gun, and who is in possession of this gun that clearly  
14 fires automatically, and who, again, is ordering M-16 parts, has  
10:02 15 a manual describing how to place M-16 parts into an AR-15 in  
16 order to convert that AR-15 into an automatic, how likely is it  
17 that that person, who also by the way happened to acknowledge to  
18 Agent Keeku that he knew how to convert AR-15s into M-16  
19 automatics, how likely is it that that person wouldn't really be  
10:02 20 aware that with a simple flip of the switch his firearm would do  
21 that, would do what you see on that video tape?

22 (Video played.)

23 MR. HAANSTAD: Again, ladies and gentlemen, asking  
24 yourself how likely it is that someone with that level of  
10:03 25 involvement, someone who goes out of their way to have manuals

1 like this, to order parts -- and by the way, the manual, keep in  
2 mind the testimony was that the manual was last accessed on I  
3 believe July 16th of 2006. Keep in mind how significant that is  
4 in terms of the timeline of this case.

10:03 5 It's not as though this manual had been tucked away  
6 and not accessed for years. Instead, on July 13th of 2006,  
7 Robert Kiernicki is at the Conservation Club in Berlin,  
8 Wisconsin firing automatically.

9 On July 13th of 2006, also, Mr. Kiernicki informs  
10:04 10 Mr. Olofson not only that he was firing automatically but also  
11 that he had a problem with the police because he was firing  
12 automatically. Again, that's on July 13th.

13 On July 19th of 2006, the search was conducted at  
14 Mr. Olofson's residence. So, again, July 13th and July 19th,  
10:04 15 we've got firing automatically, Exhibit 1, firing automatically,  
16 and being taken by the police, and July 19th of 2006, the search  
17 warrant being executed at Mr. Olofson's house. Right in that  
18 relevant time period he's still accessing this conversion  
19 manual, the conversion manual that sets forth what was done to  
10:04 20 this particular firearm to cause it to fire automatically.

21 Based on all this, ladies and gentlemen, keeping in  
22 mind the statutory definition of "machine gun," that is, again,  
23 any weapon which shoots, or is designed to shoot, or can be  
24 readily restored to shoot, automatically more than one shot,  
10:05 25 with a manual reloading by a single function of the trigger --

1 that is, again, any weapon that will shoot more than one round  
2 with one pull of the trigger, or that is designed to shoot that  
3 way, or can be readily restored though shoot that way, is a  
4 machine gun.

10:05 5 Keeping that in mind and focusing on the two questions  
6 that both parties have asked you to focus on, the answer to  
7 those questions, in light of all this evidence, is clear. That  
8 is: Mr. Olofson -- Mr. Olofson's firearm, Exhibit 1, the AR-15  
9 that's been converted to an M-16 machine gun, clearly fired  
10:05 10 automatically and, therefore, qualified as a machine gun. And,  
11 at the time that he transferred that machine gun to  
12 Mr. Kiernicki, Mr. Olofson knew that.

13 Because those things are so, again, the United States  
14 asks you to return a verdict of guilty.

10:05 15 Thank you.

16 JURY INSTRUCTIONS

17 THE COURT: Members of the jury, you have seen and  
18 heard all of the evidence and the arguments of the attorneys.  
19 Now I will instruct you on the law.

10:06 20 You have two duties as a jury. Your first duty is to  
21 decide the facts from the evidence in the case. This is your  
22 job and your job alone.

23 Your second duty is to apply the law that I give you  
24 to the facts. You must follow these instructions, even if you  
10:06 25 disagree with them. Each of the instructions is important, and

1 you must follow all of them.

2 Perform these duties fairly and impartially. Do not  
3 allow sympathy, prejudice, fear, or public opinion to influence  
4 you. You must not be influenced by any person's race, color,  
10:07 5 religion, national ancestry, or sex.

6 Nothing I say now, and nothing I said or did during  
7 the trial, is meant to indicate any opinion on my part about  
8 what the facts are or about what your verdict should be.

9 The evidence consists of the testimony of the  
10:07 10 witnesses, the exhibits admitted in evidence, and the  
11 stipulations.

12 A stipulation is an agreement between both sides that  
13 certain facts are true or that a person would have given certain  
14 testimony.

10:07 15 Certain things are not evidence. I will list them for  
16 you.

17 First, testimony that I struck from the record or that  
18 I told you to disregard is not evidence and must not be  
19 considered.

10:08 20 Second, anything you may have seen or heard outside  
21 the courtroom is not evidence and must be entirely disregarded.  
22 This includes any press, radio, or television reports you may  
23 have seen or heard. Such reports are not evidence and your  
24 verdict must not be influenced in any way by such publicity.

10:08 25 Third, questions and objections by the lawyers are not

1 evidence. Attorneys have a duty to object when they believe a  
2 question is improper. You should not be influenced by any  
3 objection or by my ruling on it.

10:08 4 Fourth, the lawyers' statements to you are not  
5 evidence. The purpose of these statements is to discuss the  
6 issues and the evidence.

7 Some of you have heard the phrases "circumstantial  
8 evidence" and "direct evidence." Direct evidence is the  
9 testimony of someone who claims to have personal knowledge of  
10:09 10 the commission of a crime which has been charged, such as an  
11 eyewitness.

12 Circumstantial evidence is the proof of a series of  
13 facts which tend to show whether the defendant is guilty or not  
14 guilty. The law makes no distinction between the weight to be  
10:09 15 given either direct or circumstantial evidence. You should  
16 decide how much weight to give to any evidence. All the  
17 evidence in the case, including the circumstantial evidence,  
18 should be considered by you in reaching your verdict.

19 You are to decide whether the testimony of each of the  
10:09 20 witnesses is truthful and accurate, in part, in whole, or not at  
21 all, as well as what weight, if any, you give to the testimony  
22 of each witness.

23 In evaluating the testimony OF any witness, you may  
24 consider, among other things:

10:10 25 The witness' intelligence; the ability and opportunity



1 the witness had to see, hear, or know the things that the  
2 witness testified about; the witness' memory; any interest,  
3 bias, or prejudice the witness may have; the manner of the  
4 witness while testifying; and the reasonableness of the witness'  
10:10 5 testimony in light of all the evidence in the case.

6 You should use common sense in weighing the evidence  
7 and consider the evidence in light of your own observations in  
8 life.

9 In our lives, we often look at one fact and conclude  
10:11 10 from it that another fact exists. In law we call this  
11 inference. A jury is allowed to make reasonable inferences.  
12 And any inferences you make must be reasonable and must be based  
13 on the evidence in the case.

14 You may find the testimony of one witness or a few  
10:11 15 witnesses more persuasive than the testimony of a larger number.  
16 You need not accept the testimony of the larger number of  
17 witnesses.

18 The indictment in this case is the formal method of  
19 accusing the defendant of an offense and placing the defendant  
10:11 20 on trial. It is not evidence against the defendant and does not  
21 create any inference of guilt.

22 The defendant is charged in the indictment as follows:

23 Count one.

24 The grand jury charges that: On or about July 13th,  
10:11 25 2006, in the State and Eastern District of Wisconsin, David R.

1 Olofson, knowingly transferred a machine gun.

2 The firearm involved in this offense was an Olympic  
3 Arms, .223 caliber SGW Rifle, model CAR-AR, bearing serial  
4 number F7079.

10:12 5 All in violation of Title 18, United States Code,  
6 922(o) and 924(a)(2).

7 The defendant has pleaded not guilty to the charge.

8 The defendant is presumed to be innocent of the  
9 charge. This presumption continues during every stage of the  
10:12 10 trial and your deliberations on the verdict. It is not overcome  
11 unless from all of the evidence in the case you are convinced  
12 beyond a reasonable doubt that the defendant is guilty as  
13 charged. The government has the burden of proving the guilt of  
14 the defendant beyond a reasonable doubt.

10:13 15 This burden stays with the government throughout the  
16 trial. The defendant is never required to prove his innocence  
17 or to produce any evidence at all.

18 You have heard a witness give opinions about matters  
19 requiring special knowledge or skill. You should judge this  
10:13 20 testimony in the same way that you judge the testimony of any  
21 other witness. That a witness has given an opinion does not  
22 mean that you are required to accept it. Give the testimony  
23 whatever weight you think it deserves, considering the reasons  
24 given for the opinion, the witness' qualifications, and all of  
10:14 25 the other evidence in the case.

1           You have heard evidence that before the trial a  
2 witness made a statement that may be inconsistent with the  
3 witness' testimony here in court. If you find that it is  
4 inconsistent, you may consider the earlier statement only in  
10:14 5 deciding the truthfulness and accuracy of that witness'  
6 testimony in this trial. You may not use it as evidence of the  
7 truth of the matters contained in that prior statement. If that  
8 statement was made under oath, you may also consider it as  
9 evidence of the truth of the matters contained in that prior  
10:14 10 statement.

11           The indictment charges that the offense was committed  
12 on or about July 13th, 2006. The government must prove that the  
13 offense happened reasonably close to that date, but is not  
14 required to prove that the alleged offense happened on that  
10:15 15 exact date.

16           When the word "knowingly" is used in these  
17 instructions, it means that the defendant realized what he was  
18 doing and was aware of the nature of his conduct, and did not  
19 act through ignorance, mistake or accident. Thus, to obtain a  
10:15 20 conviction, the government must prove that the defendant knew of  
21 the features of the gun that made it a machine gun as defined by  
22 federal law when he transferred the gun. You may not conclude  
23 that the defendant had knowledge if he was merely negligent in  
24 not discovering the truth.

10:16 25           A machine gun is any weapon which shoots, is designed

1 to shoot, or can be readily restored to shoot, automatically  
2 more than one shot, without manual reloading, by a single  
3 function of the trigger.

4 To sustain the charge of transferring a machine gun,  
10:16 5 the government must prove the following propositions:

6 First, that the defendant knowingly transferred a  
7 machine gun; and, second, that the defendant knew, or was aware  
8 of, the essential characteristics of the firearm which made it a  
9 machine gun.

10:16 10 The term "transfer" includes selling, loaning, giving  
11 away, or otherwise disposing of.

12 If any reference by the court or by counsel to matters  
13 of evidence does not coincide with your own recollection, it is  
14 your recollection which should control during your  
10:17 15 deliberations.

16 Upon retiring to the jury room, you are directed to  
17 read through the jury instructions which will be provided.  
18 Then, select one of your number as your foreperson who will  
19 preside over your deliberations. In determining who will serve  
10:17 20 as your foreperson, you should consider the ability of that  
21 person to conduct your deliberations in a fair manner with due  
22 regard for the right of each jury member to be heard.

23 A verdict form has been prepared for you. It reads:

24 We, the jury, find the defendant, David R. Olofson,  
10:18 25 and there is a space for insertion of your verdict of either

1 guilty or not guilty, of the offense charged in the indictment  
2 in violation of 18 United States Code, Sections 922(o) and  
3 924(a)(2). Dated at Milwaukee, Wisconsin this blank day of  
4 January, 2008. And then there is a line for the foreperson's  
10:18 5 signature.

6 You should take this form to the jury room and when  
7 you have reached unanimous verdict on the verdict, your  
8 foreperson will date and fill in the form to state the verdict  
9 upon which you agree.

10:19 10 The verdict must represent the considered judgment of  
11 each juror. In order to return a verdict, it is necessary that  
12 each juror agree thereto. Your verdict must be unanimous.

13 It is your duty, as jurors, to consult with one  
14 another and to deliberate with a view to reaching agreement, if  
10:20 15 you can do so without violence to individual judgment. Each of  
16 you must decide the case for yourself, but do so only after an  
17 impartial consideration of the evidence with your fellow jurors.

18 While consulting with fellow jurors, keep in mind that  
19 any notes that were taken during the course of the trial are  
10:20 20 entitled to no greater weight than the memory or impression of  
21 each juror as to what the testimony may have been.

22 Also, in the course of your deliberations, do not  
23 hesitate to re-examine your own views and to change your opinion  
24 if convinced it is erroneous. But do not surrender your honest  
10:20 25 conviction as to the weight or effect of evidence solely because

1 of the opinion of your fellow jurors, or for the mere purpose of  
2 returning a verdict.

3 You are not partisans. You are judges of the facts.  
4 Your only interest is to ascertain the truth from the evidence  
10:20 5 in the case.

6 I do not anticipate that you will need to communicate  
7 with me. But if you do, do so only -- the only proper way to do  
8 so is in writing, signed by the foreperson. And if your  
9 foreperson is unwilling to do so, by some other juror, and given  
10:21 10 to the bailiff.

11 You will note from the oath which will be given to the  
12 bailiff that he as well as all other persons are forbidden to  
13 communicate in any way or manner with any member of the jury on  
14 any subject touching on the merits of the case.

10:21 15 Bear in mind also that you are never to reveal to any  
16 person how the jury stands, numerically or otherwise, until  
17 after you have reached a unanimous verdict.

18 Now, there are several things I must add.

19 First, there is, next to the water cooler, a green  
10:22 20 button. And when you push that button, it alerts us that you  
21 have a question or concern or a verdict. So, utilize that if  
22 necessary.

23 Two. You are not to deliberate if any person is  
24 absent from the room. So if someone needs a smoke break, if  
10:22 25 someone is in the restroom, if someone is for some reason

1 indisposed, you may not continue your deliberations in that  
2 person's absence.

3           Lastly, one of you will not be deliberating, at least  
4 not at this time. There are 13 of you and one of you will be  
10:23 5 dismissed momentarily. Despite that, the person who is  
6 dismissed should not discuss this case or do any research with  
7 respect to this case unless or until he or she hears from the  
8 court that this case has been concluded and that a verdict has  
9 been reached.

10:23 10           That's because from time to time people start  
11 deliberations and can't continue deliberations. Sometimes  
12 people get sick or whatever and they can't go on, and we then  
13 have to bring in the reserve juror and renew deliberations as  
14 though nothing had previously taken place.

10:24 15           So in a couple moments we will get the numbers of all  
16 of the jurors and we will pull the number of the juror who is  
17 going to be relieved of further responsibility. The bailiff  
18 will see to it that you are then escorted out and will return  
19 and take the oath.

10:24 20           So we will stand at recess for a couple moments while  
21 we get the information and we will resume as quickly as we can.  
22 So please remain seated.

23           Counsel, please come forward.

24           (At side bar on the record.)

10:25 25           THE COURT: Does anyone in particular wish to -- do

1 you want to withdraw it? Number 8. All right. Before you move  
2 back, are there any questions or concerns with respect to the  
3 instructions?

10:26 4 MR. HAANSTAD: I have a little bit of the same  
5 concern, I tried to address it, but I was wondering if it would  
6 be possible in the second element that's listed under -- the  
7 first substantive instruction was just the definition of machine  
8 gun, but the next one was the two elements?

9 THE COURT: Yes.

10:26 10 MR. HAANSTAD: Would it be possible to modify that  
11 second element just to reiterate that, again, what we're talking  
12 about when we talk about essential characteristics are that it  
13 shoots, is designed to shoot, or it can readily be restored to  
14 shoot automatically?

10:26 15 MR. FAHL: That's already in the prior instruction.  
16 You can just flip the page back and see that it's there.

17 THE COURT: It's in the instruction, isn't it?

18 MR. HAANSTAD: It is. I wanted to make sure that that  
19 was clear, and that's what we were talking about, the essential  
10:26 20 characteristics though; that we're not talking about any notion  
21 that it's gotta fire automatically every time you do it or right  
22 now.

23 THE COURT: Well, first the instructions have been  
24 read. The instruction has been placed on the screen in front of  
10:27 25 the jury, and the jury will have a complete set of all of the



1 instructions which they have been asked to read before they  
2 begin deliberation. I don't know whether stating anything else  
3 would add to what the jury will have to consider when they go to  
4 the jury room. If this were a case where the jury was just  
10:27 5 given oral instructions there might be a need to add something  
6 to make it clear to the jury.

7 MR. HAANSTAD: And when you say just oral  
8 instructions, are you referring to my placing that instruction  
9 on the screen?

10:27 10 THE COURT: Yeah, you placed that instruction on the  
11 screen.

12 MR. HAANSTAD: Because I'm talking about modifying one  
13 other than that.

14 THE COURT: Let me pull the instructions so I can see  
10:27 15 what you're referring to.

16 MR. HAANSTAD: Okay.

17 (Pause.)

18 MR. MULLINS: It's the elements. It says shoots,  
19 designed to shoot.

10:28 20 MR. HAANSTAD: Yeah, basically just a comma after  
21 "essential characteristics." That is, was -- this is the  
22 definition that was placed on the screen.

23 THE COURT: Yes, the machine gun instruction.

24 MR. HAANSTAD: Right. And it defines the  
10:28 25 characteristics of a machine gun, obviously. And just to make

1 it clear that this instruction doesn't somehow relate to its  
2 need to presently today fire automatically.

3 What I was proposing was that after the essential  
4 characteristics issue -- comma, that is, was aware that the  
10:28 5 firearm shoots, was designed to shoot or can be readily be  
6 restored to shoot automatically.

7 MR. FAHL: I think Mr. Haanstad made the argument  
8 effectively, and if you just turn back the page and you'll see  
9 what the essential elements of a machine gun are. You don't  
10:29 10 need them both.

11 THE COURT: I would agree. I don't think we need to  
12 add that to the substantive instruction which is captioned 18  
13 U.S.C. Section 922(o).

14 The instruction does relate back to the earlier  
10:29 15 instruction and the jury can read. I don't see a need for the  
16 court to emphasize the point that you argued, because to me it's  
17 clear from what is before the jury and what is in the materials  
18 that the machine gun must have the characteristics that are  
19 defined prior to the substantive instruction.

10:29 20 Is there anything else with respect to the  
21 instructions you'd like to have modified or in some way  
22 emphasized?

23 MR. HAANSTAD: No, Your Honor.

24 MR. FAHL: No, Your Honor.

10:29 25 THE COURT: All right. We'll dismiss juror number 8

1 and then we'll instruct the bailiff.

2 And before you leave I'd like to ask you to look at  
3 the exhibits so that you can confirm that those are the exhibits  
4 that should go to the jury room, and to ensure that the list of  
10:30 5 exhibits which will go to the jury room -- well, I don't know  
6 whether we need a list because there are so few exhibits. But  
7 to make sure that the list of exhibits received is consistent  
8 with what you believe is in the record, because ultimately they  
9 will have to be filed with the clerk's office and I want to make  
10:30 10 sure the record is clear.

11 Is there anything else we need to touch on?

12 MR. HAANSTAD: No.

13 MR. FAHL: No.

14 THE COURT: All right.

10:30 15 (End of discussion at side bar.)

16 THE COURT: Juror number 8, Jeffrey Miller, you are  
17 excused at this time. As I said, please remain available in the  
18 event your presence will be required in order to complete  
19 deliberation.

10:31 20 I do want to thank you on behalf of all of the parties  
21 associated with this case. Our system of justice is dependent  
22 on people such as yourself. We can't uphold our laws and ensure  
23 the freedoms that are guaranteed under our Constitution unless  
24 citizens like you step up, and I appreciate your stepping up and  
10:32 25 serving in this case. With that you are dismissed. The bailiff

1 will escort you to the jury room where you can retrieve your  
2 personal belongings and provide him with the necessary  
3 information so he can contact you.

4 (Alternate juror discharged.)

10:32 5 THE COURT: While that's occurring would the parties  
6 please consult with one another with respect to the exhibits.

7 I do want to note as the attorneys confer that we will  
8 not be sending Exhibit Number 1 to the jury room. If you need  
9 to see Exhibit Number 1, or to examine it, you can send out a --  
10:32 10 ring the bell, send out a note, and we will then reassemble and  
11 allow you to return to the courtroom to examine Exhibit Number 1  
12 in the presence of the parties if the parties decide they want  
13 to be here in the courtroom when that occurs.

14 If there is any such examination here in the  
10:33 15 courtroom, there is to be no discussion concerning Exhibit  
16 Number 1 or any other matter in the case. All of your  
17 discussions should take place behind closed doors where you will  
18 have complete privacy.

19 Counsel?

10:33 20 (Pause.)

21 THE COURT: By the way, if the jury room should become  
22 uncomfortable, if you need the air to be changed in some way,  
23 let us know. I can't assure you that there will be an immediate  
24 change in the temperature or air-conditioning because I have to  
10:36 25 make a telephone call and someone has to do something on the

1 computer in order to effect the heat in this courtroom. We are  
2 merely tenants.

3 You should also know that your lunch will be provided  
4 by the court, and so the bailiff will circulate lists that you  
10:36 5 can choose from with respect to what you will be eating. If it  
6 is necessary for us to go beyond 5:00 o'clock you will be given  
7 an opportunity to contact your families so that they will know  
8 something about your whereabouts and your schedule. Any contact  
9 with your family will be monitored by the bailiff to ensure that  
10:37 10 there is no discussion of the case.

11 (Bailiff sworn.)

12 THE COURT: Please rise and return to the jury room.

13 (Jury out at 10:38 a.m.)

14 THE COURT: Please be seated. Is there anything else  
10:39 15 to attend to at this time?

16 MR. HAANSTAD: Not for the government, Your Honor.

17 MR. FAHL: Not for the defense, Your Honor.

18 THE COURT: All right. The bailiff will be out  
19 momentarily and I'd like you to eyeball what the bailiff has  
10:39 20 taken into the jury room. I do that as a way of ensuring that  
21 the parties know what has been sent into the jury room and so  
22 that we don't have any questions later. I've had some  
23 experiences where people have claimed that something was sent to  
24 a jury inadvertently, and I don't want that sort of claim to  
10:39 25 arise. And so it's sort of like a belt-and-suspenders type

1 deal.

2 So, Mr. Hill, would you retrieve the exhibits and let  
3 the parties see what you have retrieved and will be taken to the  
4 jury room.

10:40 5 The bailiff is being handed 12 sets of instructions as  
6 well as the verdict form. Please remain available to return to  
7 the courtroom on 15 minutes' notice.

8 All right, I assume Mr. Hill has your phone numbers  
9 and can reach you as quickly as possible. Unless there's  
10:40 10 something else we stand informal.

11 MR. HAANSTAD: Thank you.

12 MR. FAHL: Thank you, Your Honor.

13 (Recess taken for jury deliberations at 10:41 a.m.,  
14 until 12:33 p.m.)

12:33 15 THE COURT: Be seated, please. Please make sure your  
16 mics are on.

17 At approximately 12:06 the court received a note from  
18 the jury. You should have a copy in front of you. It reads:  
19 The jury requests a copy of the testimony of witness Robert  
12:33 20 Kiernicki.

21 I invite your responses.

22 MR. MULLINS: Well, Your Honor, from the defense I  
23 don't think -- we don't object to the request, I guess I would  
24 refer to the court's instruction referring to the jury's  
12:34 25 recollection controlling if court or counsel -- court or

1 counsel's statements do not coincide with that recollection.  
2 Although I don't think the instruction is necessarily  
3 inconsistent with allowing them to see the transcript.

4 THE COURT: So is that a yea or a nay?

12:35 5 MR. MULLINS: I'm not requesting it but if the court  
6 thinks it's appropriate we're not objecting to it. So I guess  
7 it's a yea. Yes, we think it should go to the jury if they're  
8 asking for it. I don't think there's anything improper about  
9 it.

12:35 10 THE COURT: Mr. Haanstad?

11 MR. HAANSTAD: That would be fine with the government,  
12 Your Honor.

13 THE COURT: Well, there is no transcript per se.  
14 However, it is certainly possible to have the testimony read.  
12:35 15 If there is something produced in writing it is not the official  
16 transcript and the official transcript is the one that would be  
17 edited because from time to time things go into the reporter's  
18 notes that need correction.

19 I am told that the testimony of Mr. Kiernicki lasted  
12:36 20 approximately 35 minutes. Is that correct, Mr. Schindhelm?

21 THE REPORTER: Yes, sir.

22 THE COURT: That being so is there any reason why the  
23 court should not ask the reporter to read back the testimony of  
24 the witness?

12:36 25 MR. MULLINS: No I don't believe so, Your Honor.

1 MR. HAANSTAD: No, Your Honor.

2 THE COURT: Off the record.

3 (Discussion off the record.)

4 THE COURT: Why don't we try to convene in about 30  
12:37 5 minutes. I'll send a note to the jury and let them know that we  
6 will get back to them in approximately 30 minutes.

7 MR. MULLINS: Very well.

8 MR. HAANSTAD: Thank you.

9 THE COURT: All right.

10 (Recess taken at 12:37 p.m., until 1:28 p.m.)

11 THE COURT: The reporter has reviewed his notes and I  
12 assume he is in a position to read back the testimony of  
13 Mr. Kiernicki.

14 However, as you certainly may be aware, this court  
01:28 15 does have a digital recording system, FTR Gold, which may be  
16 played so that the jury hears the actual questions and answers  
17 with respect to Mr. Kiernicki's testimony. That being so is  
18 there any reason why the court should not utilize the FTR Gold?

19 MR. HAANSTAD: Not from the government, Your Honor.

01:29 20 MR. MULLINS: Just to make sure, Mr. Haanstad and I  
21 were discussing this before, that maybe some of the questions  
22 from the attorneys were not recorded. If that were the case I  
23 would object to playing the recording. If it is a complete  
24 recording then we have no objection.

01:29 25 THE COURT: Well, it's my understanding that the



1 recording is clear. I will just check with my clerk so that she  
2 can come out and set it up and we can play it. If there is  
3 anything that is inaudible we certainly have the court  
4 reporter's notes that can be utilized.

01:29 5 MR. MULLINS: If the court could remove the definition  
6 of "machine gun" from the monitors. Thank you.

7 THE COURT: The clerk will be right here.

8 (Pause.)

9 THE COURT: Let's note I ask the court reporter to  
01:32 10 note the starting time from the FTR Gold. As you know, the FTR  
11 Gold is not the official record of the court. At this point we  
12 would be utilizing the court reporter's notes, and if there is  
13 any perceived discrepancy the parties certainly should let the  
14 court know and we will proceed as may be appropriate.

01:33 15 Is there any question or concern in that regard?

16 MR. HAANSTAD: No, Your Honor.

17 MR. MULLINS: No, Your Honor.

18 THE COURT: I've instructed the reporter to attempt to  
19 capture stenographically the questions and answers that will be  
01:33 20 played via the FTR Gold.

21 When the clerk is ready to begin we'll call out the  
22 jury.

23 THE CLERK: I'd like to just check it once.

24 THE COURT: All right.

01:34 25 MR. MULLINS: Your Honor, if it appears that a

1 question is not recorded would the court ask the parties to  
2 interject and ask the court reporter to read the question?

3 THE COURT: Yes.

4 MR. MULLINS: Very well.

01:34 5 THE COURT: And if necessary we'll have a read-back.  
6 If there is anything that's questionable we'll have a read back.

7 (Discussion off the record.)

8 THE COURT: Let's go back to the beginning where he's  
9 called to ensure that we have everything.

01:36 10 (Discussion off the record.)

11 THE COURT: Okay. Let's go back.

12 THE BAILIFF: All rise for the jury.

13 (Jury in at 1:36 p.m.)

14 THE COURT: Proceed.

01:37 15 (Unofficial audio recording of testimony of Robert  
16 Kiernicki played to the jury. For stenographic reporting of  
17 playback, see separate volume.)

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1 (At side bar on the record.)

2 THE COURT: Do the parties have any concerns regarding  
3 what was just played for the jury?

4 MR. MULLINS: No.

02:14 5 MR. HAANSTAD: No.

6 THE COURT: Very well.

7 (End of discussion at side bar.)

8 THE COURT: You may return to the jury room.

9 (Jury out at 2:15 p.m.)

02:15 10 THE COURT: Be seated. Are there any additional  
11 matters to be attended to at this time?

12 MR. HAANSTAD: No, sir.

13 MR. MULLINS: No, Your Honor.

14 THE COURT: All right, please remain available by  
02:15 15 phone.

16 MR. HAANSTAD: Thank you.

17 MR. MULLINS: Thank you.

18 (Recess taken at 2:16 p.m., until 2:55 p.m.)

19 (Jury in at 2:55 p.m.)

02:56 20 THE COURT: Does the jury have a verdict?

21 THE FOREPERSON: Yes, Your Honor, we do.

22 THE COURT: Would you please hand it to the bailiff.

23 (Pause.)

24 THE COURT: United States of America, Plaintiff, vs.  
02:56 25 David R. Olofson, Case Number 06-CR-230.

VERDICT

1  
2 We, the jury, find the defendant David R. Olofson  
3 guilty of the offense charged in the indictment in violation of  
4 18 United States Code, Sections 922(o) and 924(a)(2), dated  
02:56 5 Milwaukee, Wisconsin this 8th day of January 2008.

6 Starting with the foreperson, was this and is this now  
7 your verdict?

8 THE FOREPERSON: Yes, it is.

9 JURORS IN UNISON: Yes.

02:57 10 A JUROR: Yes.

11 THE COURT: Back row?

12 A JUROR: Yes.

13 A JUROR: Yes.

14 A JUROR: Yes.

15 A JUROR: Yes.

16 A JUROR: Yes.

17 A JUROR: Yes.

18 THE COURT: The juror in blue, is that -- is this your  
19 verdict?

02:57 20 A JUROR: Yes.

21 THE COURT: All right.

22 Members of the jury, I do want to thank you for your  
23 jury service in this matter. As I said when your fellow juror  
24 was released earlier, our system is dependent on citizen  
02:57 25 involvement. In order for us to carry out our laws from time to

1 time we are called upon to serve in the capacity that you've  
2 served in this case.

3 I do want you to know that we appreciate the sacrifice  
4 in terms of time and in terms of your schedules in order to  
02:57 5 carry out these responsibilities.

6 With that, you may return to the jury room for further  
7 comment and instruction.

8 (Jury out at 2:58 p.m.)

9 THE COURT: Be seated, please.

02:58 10 Do the parties wish to be heard?

11 MR. HAANSTAD: Your Honor, the government has nothing  
12 at this time.

13 MR. MULLINS: Nothing from the defense, Your Honor.

14 THE COURT: Very well. The court will see to it that  
02:58 15 the clerk enters the verdict.

16 That being so, it is appropriate that the matter be  
17 scheduled for a sentencing hearing.

18 The presentence report in this matter will be  
19 scheduled for completion and submission on April 1st;

02:58 20 The objections, if any, would be due on the 15th of  
21 April;

22 And the sentencing hearing would be held on the 8th of  
23 May at 2:30 p.m.

24 Are these dates satisfactory?

02:59 25 MR. HAANSTAD: Yes, Your Honor.

1 MR. MULLINS: Yes, Your Honor.

2 THE COURT: Please note that if there are objections,  
3 comments or motions with respect to sentencing, they must be  
4 filed by the April 15th date in order to be considered timely  
02:59 5 and subject to appropriate review.

6 Is there anything further with respect to this matter  
7 in light of what I've just said?

8 MR. HAANSTAD: No, Your Honor, thank you.

9 MR. MULLINS: Not from the defense, Your Honor.

02:59 10 THE COURT: The defendant is to remain on bail subject  
11 to the same conditions as previously.

12 Does the probation office need the defendant to report  
13 today?

14 PROBATION OFFICER: Yes.

03:00 15 THE COURT: Mr. Olofson, you are to report immediately  
16 to the probation office so that they can begin the review  
17 process necessary to produce the presentence report in a timely  
18 fashion. All right? Please note that you must appear and  
19 cooperate with probation as required in order for your  
03:00 20 conditions of bail to remain in effect. All right? I will see  
21 you on the 8th of May at 2:30 p.m.

22 We stand in recess.

23 Please note that there is an Exhibit Number 1 in this  
24 case which is a weapon. The gun is to remain in the possession  
03:00 25 of the government until further notice. Is there any reason to

1 proceed in any other way?

2 MR. HAANSTAD: No, Your Honor.

3 MR. FAHL: No, Your Honor.

03:00

4 THE COURT: The other exhibits will remain on file  
5 here with the court.

6 MR. FAHL: Thank you.

7 MR. HAANSTAD: Thank you.

8 (Proceedings concluded at 3:01 p.m.)

9 \* \* \*

10 UNITED STATES DISTRICT COURT

11 EASTERN DISTRICT OF WISCONSIN

12

13 I, JOHN T. SCHINDHELM, RMR, CRR, Official Court

14 Reporter for the United States District Court, Eastern District

15 of Wisconsin, do hereby certify that I reported the foregoing

16 proceedings, and that the same is true and correct in accordance

17 with my original machine shorthand notes taken at said time and

18 place.

19

20

21 \_\_\_\_\_  
Official Court Reporter

22 United States District Court

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24 Dated January 31, 2008, at Milwaukee, Wisconsin.

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