Q. Mr. George told you he was keeping records, did he not?
A. Yes. That's what he requested our identification for. Yes.
Q. You found one such record during the search, is that correct? 11:06:
A. That's correct.
MR. ROOD: Nothing further, Your Honor.
THE COURT: All right. You may step down.
You may call your next witness.
MR. ROOD: At this time, Your Honor, the Government rests. 11:06:
THE COURT: Ladies and gentlemen, we're going to take a 15-minute recess.
Please remember the admonition.
(Jury out at 11:06 a.m.) 11:06:
THE COURT: The record will reflect the presence of the defendant and counsel outside the presence of the jury.
Mr. Hentoff?
MR. HENTOFF: Your Honor, may I make a motion?
THE COURT: You may, if you'll do it at the podium. 11:07:
MR. HENTOFF: Your Honor, I'm going to make a motion for a directed verdict on the grounds that the State has failed to offer any proof on a necessary element of the offense.
We have received no evidence whatsoever that the items that are marked into evidence are, in fact, firearms as defined 11:07:

by Section 921. There was no expert or anybody else who testified that these are capable of being converted into or are capable of -- of -- becoming -- I'm -- I'm at a loss for the word but what I'm trying to say is that you have to establish that they're firearms under the definition of Section 921, that they are capable of being converted into projecting a propellant through gas, and there are other requirements as well under the definitions. We've received no evidence to that effect. 11:08:

Now, we've called them firearms, they've been introduced into evidence, but, you know, nobody -- we can't just -- the Government can't make its case just by assuming that they are working firearms, that they satisfy the definitions. They have to introduce specific evidence to show that each one of the exhibits are firearms under the definition of 921, and that testimony was not elicited. And therefore I would ask the Court to issue a directed verdict. 11:08:

THE COURT: Is that the only basis upon which you're moving?

MR. HENTOFF: I will also move on the basis of sufficiency of the evidence with particular respect to the proof of principal objective being profit. 11:09:

I don't believe that they've introduced sufficient evidence to sustain a directed verdict motion on the issue of that Mr. George was engaged in dealing in firearms with the 11:09:

principal objective of profit and livelihood. The statute requires both elements to be present and they have introduced absolutely no financial information to indicate that Mr. George was making -- was -- principal objective was livelihood. They had every opportunity to do so by examining bank records, 11:09:
subpoenaing other information, and they've failed to do so.

And we're the only ones in this case that are going to provide any kind of significant financial information in our case, assuming that we get that far, but it was their obligation to do so as an element -- proving an element of the 11:10:
offense in their case in chief, and they have not done so.

Thank you.

THE COURT: Thank you.

Mr. Rood?

MR. ROOD: Your Honor, as to his second point, it's 11:10:
obvious each and every gun that we introduced into evidence that we were able to trace.

THE COURT: Repeat your last sentence. Each and every --

MR. ROOD: Each and every gun that we introduced into 11:10:
evidence we were able to trace. We established the price Mr. George paid for it and the price he sold it for. That certainly is evidence that he made a profit on it.

As to whether or not he --

THE COURT: How many -- I haven't looked at those 11:10:

documents yet and so I -- as I recall, they -- the evidence -- the evidence indicates those documents would have shown what he paid for them and we do have some instances where he made sales to the undercover agent and we know what the amount was so we know what the profit was in those instances. If I looked at those documents would I see the -- what he sold them for in each instance, too? 11:11:

MR. ROOD: The ones we've introduced are the ones he sold to the undercover officers, Your Honor.

THE COURT: All right. But those are the only -- let's call them resales we have evidence of. 11:11:

MR. ROOD: Correct. That's the only ones charged in the indictment.

THE COURT: All right.

MR. ROOD: So we have evidence of that. 11:11:

THE COURT: All right.

MR. ROOD: And Mr. Hentoff is correct that we, in fact, have called these firearms. We've called them guns. We have treated them with the fact that they need to be safe. We believe that based upon the evidence presented, Your Honor, that that element of the statute has been satisfied as well. 11:11:

MR. HENTOFF: If I could have a brief follow-up, Your Honor?

THE COURT: Well, wait a minute. Give me a chance.

MR. HENTOFF: Yes, sir. 11:12:

THE COURT: I've got a question or two, Mr. Rood.

MR. ROOD: Yes, Your Honor. Let me get the book.

THE COURT: What's the basis upon which this jury might find that the principal objective of this -- of the -- of his time, attention and labor, the principal objective would be livelihood and profit? 11:12:

MR. ROOD: I certainly believe, Your Honor, that the evidence that Mr. George has purchased or acquired over 400 guns in an 18-month period of time, that the search indicates that 21 of those guns were recovered during the course of the execution of the search warrant, the reasonable inference is that those guns are gone. The only evidence concerning what he did with those guns is in the form of the undercover purchases made by ATF. In each and every one of those instances he made a profit. 11:13: 11:13:

So that's --

THE COURT: Those numbered how many?

MR. ROOD: We bought eight.

THE COURT: With the profit running from a hundred, two hundred dollars each. 11:13:

MR. ROOD: Well, certainly the one which is the P38, I forget which it is, but he purchased that for $31 and eight dollars shipping. He sold that for $140, telling the agent that that was a bargain at 140. The testimony from Mr. Nunn, who sold him that gun, indicates in his opinion a P32 -- I mean 11:14:

a .32 caliber Davis in prime condition would be worth a maximum of $70 dollars. It's obvious that that gun was sold for a profit.

As to whether or not he engaged in that as his livelihood, we certainly -- the only evidence we have concerning what his income was was that he made $631 a month from Social Security disability. He obviously had expenses for that and he had expenses for buying guns. There's no other source of income that he could have used, at least to the evidence to date, that we're aware of other than the sale of guns.

THE COURT: Well, his inheritance.

MR. ROOD: We don't have any evidence as to what the inheritance was, when it was received, whether or not he still had it, Your Honor. The only livelihood that we have evidence of is the sale of guns.

THE COURT: All right. Anything further, Mr. Rood?

All right. The Court will grant the defendant's -- what has been characterized as a Rule -- what has been characterized as a motion for directed verdict, more properly characterized as a Rule 29 motion for judgment of acquittal, and I do so not on the basis initially argued that there has been a failure to prove that these are firearms per 921. As pointed out, they've been called that, referred as that. It may even be something that between the testimony and the

physical items themselves a jury could conclude that they're capable of working. I don't think that's rocket science.

But I do so on the basis that the definitional term requires that a person devotes -- I'm looking at the stipulated instruction -- a person who devotes time, attention and labor to dealing in firearms as a regular course of trade or business. 11:16:

And if I stop right there, on the strength of the evidence before the Court I think it is problematic as to whether this was -- whether it has been shown that it was a trade or business, and certainly the evidence is equally consistent with it being a hobby, passion, addiction that took on rather significant proportions. But even if one assumed that the evidence shows that it was a trade or business, the requirement that it be a trade or business with the principal objective of livelihood and profit is such that, in my judgment, the jury could and would and should acquit the defendant, and accordingly, on that basis the Court does so. 11:16: 11:17:

Now, I note that the number of the sales were up in the 400 -- the number of transactions were up in the 400-some, a rather breathtaking number, I concede, but again, that is -- those numbers, while perhaps breathtaking, should not alone allow this jury to infer and any inference would be, I think, engaging in almost speculation, that these numbers were the -- that it constituted a business whose principal objective was 11:18: 11:18:

livelihood and profit.

I also note and concede that at least nine of the transactions generated a profit, and indeed maybe a handsome profit, but that does not form the basis of a legitimate inference that the others do or at least a legitimate inference 11:19:
that would allow this jury to find beyond a reasonable doubt that this did constitute such a business.

And indeed, the -- really, the uncontradicted evidence comes from the statements of the defendant himself in which he tells the agent that -- and I think this simply buttresses the 11:19:
Court's conclusion, but he tells the agent that he was not doing business, even doing business on the side, that he was simply trying to make room in his house for whatever.

And so I think his own statements -- arguably, they may have been self-serving. However, the uncontradicted 11:20:
evidence is he didn't know he was talking to an ATF agent. And so, again, I think it is uncontradicted that he is denying that it was a -- even a part-time business much less a business whose primary and principal objective was livelihood and profit. 11:20:

It is also significant and perhaps would not in and of itself be conclusive but significant in terms of all of the items that were not found that were sought by the search warrant and apparently would typically be sought in this type of a case. 11:21:

So for those reasons, the Court grants the Rule 29 motion.

Anything either counsel wants to add?

MR. HENTOFF: I'll let Mr. Rood go first.

MR. ROOD: I have nothing, Your Honor. 11:21:

MR. HENTOFF: Very briefly, Your Honor.

I -- I've -- I'm not sure what the Court's authority is with regards to items that were seized but I'm going to research it and I may be filing a motion -- if you have the authority, I may be filing a motion with the Court for an order 11:21: returning the items that were seized from Mr. George. I just don't know -- I have to research it to see what the Court's authority is.

THE COURT: Very well.

MR. HENTOFF: The other thing is I want to clarify for 11:21: Mr. George that he is no longer under any conditions of release and that he can possess a firearm now.

THE COURT: I know of no reason he should remain under conditions of release. Do you, Mr. Rood?

MR. ROOD: No, Your Honor, I do not. 11:21:

THE COURT: All right. Any conditions of release are deemed -- are ordered removed.

I do want to bring -- I'm sorry.

MR. ROOD: One thing, Judge.

I'm not sure specifically what Mr. Hentoff is 11:22:

referring to concerning items seized. If it's items seized during the course of the search warrant, they can be returned to Mr. George when he goes down and identifies and picks them up. We have no interest in keeping those. Obviously, the guns now belong to ATF. It's an expenditure of federal funds. So we bought them and we would maintain them. 11:22:

MR. HENTOFF: Yeah, but there are also a few guns that were seized.

THE COURT: It sounds like -- sounds like I don't have an issue and if I do today is not the time to resolve it. 11:22:

MR. HENTOFF: Thank you, Your Honor.

THE COURT: I will bring the jury back in, though, and announce to them what the Court has done.

MR. HENTOFF: Mr. George wants to thank you, Your Honor. 11:22:

THE DEFENDANT: Words fail me, Your Honor. Thank you. You've done a just thing.

MR. HENTOFF: Okay.

(Jury in at 11:23 a.m.)

THE COURT: Please be seated. 11:24:

The record will reflect the presence of the defendant, counsel and the ladies and gentlemen of the jury.

Ladies and gentlemen, you're about to be excused. But let me explain why.

As you heard before the recess, the Government has 11:24:

rested its case. At that point, under our laws and under our procedures, the defendant is entitled to make what we used to call a motion for directed verdict, and that literally in the older days, some of which I almost go back to, but in the older days simply meant that the defendant was asking the Court to direct the jury to go return a verdict of acquittal. We don't go through that ceremony anymore but the purpose is still the same. 11:25:

At that point, the defendant asks now under our rules for the Court to render a judgment of acquittal, and at that point, then, it is up to the Court to look at the evidence that has been presented and look at it with an eye toward giving it the most favorable light to the Government but, nonetheless, the Court must decide on the strength of that evidence whether there is sufficient evidence to substantiate a conviction, and in so doing the Court must look, then, at the law to decide when that evidence is applied to the law a conviction beyond a reasonable doubt could be sustained. 11:25:

And in this case, in looking at the evidence in the light of the law, the Court has now granted the judgment of acquittal on that basis and in particular on the basis -- and these details appear on the record outside your presence, but basically, the Court concluded that there was not sufficient evidence to show that these transactions constituted a business whose principal objective was profit and livelihood. 11:26:

There are more details than what you need to hear now on the record before, but I want you to understand how the system works and how it has worked in this case, and by virtue of that, then, your service in this case has now concluded.

But I don't want to conclude our time together here without just again thanking you for that service. I trust that as a result of this service you have an even keener understanding of this bedrock principle of our justice system provided for by our constitution and you can understand better, hopefully, than before how the willingness of people such as yourselves to serve is what breathes life into what could otherwise be a hollow right to have a trial by jury, because if folks aren't willing to serve and take time out of their lives then that becomes a rather hollow right. 11:27: 11:27:

And just to refresh all our recollections, when the Declaration of Independence was drafted our founding fathers cited the denial of the right to trial by jury to the colonists as a justification for the revolution against England, and indeed, Thomas Jefferson said, "I consider trial by jury as the only anchor ever yet imagined by man by which a government can be held to the principles of its constitution." John Adams called trial by jury the heart and lungs of liberty. 11:28: 11:28:

So I'm proud that folks such as yourselves are willing to serve on juries and ensure that our rights as citizens are protected. Your service here today certainly serves to uphold 11:29:

the principles of the constitution, to preserve the heart and lungs of our liberty.

And on behalf of my colleagues on the Federal Court and District of Arizona, I thank you very, very much.

You're now dismissed. You're now released from the admonition. You are free to discuss the case. You're free not to discuss the case, as you may choose. As I dismiss you to the jury room, if you would like to speak with the lawyers you may do so, and if you do please wait in the jury room and you'll be escorted back into the courtroom for that purpose. But if you wish to leave you are free to leave without talking to anyone.

Thank you again. We're in recess.

(Proceedings recessed at 11:30 a.m.)

C E R T I F I C A T E

I, DAVID C. GERMAN, Official Court Reporter, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the proceedings and testimony reported by me on the date specified herein regarding the afore-captioned matter are contained fully and accurately in the notes taken by me upon said matter; that the same were transcribed by me with the aid of a computer; and that the foregoing is a true and correct transcript of the same, all done to the best of my skill and ability.

DATED at Phoenix, Arizona, this 28th day of February, 2008.

s/David C. German
DAVID C. GERMAN, RMR, CRR