UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 08-2294

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID R. OLOFSON,

Defendant-Appellant.

BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S MOTION TO REVIEW DISTRICT COURT'S DENIAL OF MOTION FOR RELEASE PENDING APPEAL

I. Background.

Under 18 U.S.C. § 3143, an individual found guilty of an offense and sentenced to a term of imprisonment shall be detained unless the judicial officer finds:

> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under § 3142(b) or (c) of this title; and

> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in –
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> > (i) reversal,
> >
> > (ii) an order for a new trial,
> >
> > (iii) a sentence that does not include a term of imprisonment, or
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> > (iv) a reduced sentence to a term of imprisonment less than the total time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b).

On may 13, 2008, David Olofson was sentenced to thirty-months imprisonment after a jury found him guilty of knowingly transferring a machine gun in violation of 18 U.S.C. §§ 922(o) and 924(a)(2). At the conclusion of the sentencing hearing, Olofson asked that the district court file a notice of appeal on his behalf. Subsequently, Olofson asked that the district court stay the imposition of the sentence and continue his conditions of release pending appeal.

In support of his request to stay the imposition of the sentence and continue his conditions of release, Mr. Olofson argued that because he has been compliant with pretrial services during his eighteen months of "pretrial" supervision and because of significant ties to the community he is not a risk of flight. Moreover, Mr. Olofson argued that his appeal is not solely for the purpose to delay

serving his sentence. Instead, Mr. Olofson argued that his appeal presented substantial questions that would lead either to a reversal or to a new trial.

The government argued that Olofson did not establish that he was not a danger to the community or that a substantial question of law or fact was present. From the bench and in n a summary, the district court denied Olofson's motion to stay the execution of the sentence and continue his release pending appeal. The district court memorialized the ruling in a short order dated May 15, 2008.

II. Argument.

A. Danger to The Community And Risk of Flight.

Mr. Olofson is not a danger to the community nor a risk of flight. As noted in his request to the district court, Mr. Olofson had been released pending trial, pending sentencing and the district court has allowed Mr. Olofson to remain free on bond post-sentencing so that he can self-report to the Bureau of Prisons.

The standard for the determination of whether a defendant poses a risk of flight or a danger to the community in 18 U.S.C. § 3143(b), which governs the release of a defendant pending appeal, is the same as the standard governing the release of a defendant pending sentencing in 18 U.S.C. § 3143(a). In both instances, the defendant must demonstrate by clear and convincing evidence that he is neither a risk of flight nor a danger to the community. Here, the district court allowed Mr. Olofson to continue his release on a personal recognizance bond pending his

sentencing after a jury found him guilty of transferring a machine gun. In order to do so the district court found by clear and convincing evidence that Mr. Olofson was neither a flight risk nor a danger to the community.

Nothing has changed with regard to the facts or circumstances surrounding this case to question the district court's decision to allow Mr. Olofson to remain free on a personal recognizance bond. In fact, the district court has allowed Mr. Olofson to self-report to the Bureau of Prisons once a facility is designated. If the district court found Mr. Olofson to be either a flight risk or a danger to the community it surely would not have allowed Mr. Olofson to continue his release on a personal recognizance bond so that he can self-report to the Bureau of Prisons.

B. Substantial Question.

The meaning of "substantial question," has been a disputed issue and has resulted in a split in the circuits. *See United States v. Miller*, 753 F.2d 19 (3d Cir. 1985) (defining substantial question as "one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful"); *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985) (what constitutes a substantial question should be determined on a case-by-case basis); *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985) (a substantial question is a "fairly debatable" one and synonymous with "fairly doubtful"); *United States v. Hatterman*, 853 F.2d 555, 557

(7th Cir. 1985) (following *Giancola* and noting that, for purposes of bail pending appeal, the court is not required to predict the appeal's outcome). A substantial question is a close question – one that could go either way. *United States v. Bilanzich*, 771 F.2d 292, 298 (7th Cir. 1985). However, the Court is not required to predict the outcome of the appeal. *United States v. Lane*, 281 F.3d 638, 639 (7th Cir. 2002).

Mr. Olofson's appeal will raise the following substantial questions[1]: whether or not the jury instruction defining the term machine gun should include language that excludes a malfunctioning weapon; whether or not the statutory definition of machine gun is unconstitutionally vague as applied to Mr. Olofson; and whether the district court erred in denying Olofson's motion to dismiss the indictment based upon Second Amendment concerns and an over-extension of the commerce clause. Each issue is of itself substantial and would result in either a new trial or a vacation of his conviction and sentence if Mr. Olofson is successful with the issue on appeal.

1. Definition of Machine Gun.

Section 922(o) of Title 18 of the United States Code makes it unlawful for a person to possess or transfer a machine gun. The definition section of the

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[1]This list is not meant to be an all-inclusive list of issue that Mr. Olofson will raise on appeal. There are issues, such as the reasonableness of Olofson's sentence, which would not qualify as a substantial question. And there may be other issues, both contemplated and not yet contemplated, that warrant further consideration after the trial and sentencing transcripts are reviewed.

statute indicates that the term machine gun has the definition afforded it in 26 U.S.C. § 5845(b). 18 U.S.C. § 921(a)(23). Section 5845(b) defines the term machine gun:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading by a single function of the trigger.
>
> The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under control of a person.

26 U.S.C. § 5845(b).

Mr. Olofson's first proffered jury instruction sought to add the following language to end of the statutory definition of machine gun:

> However, a weapon that fires automatically due to a malfunction of the weapon is not a machinegun for the purposes of the statute unless the malfunction is a result of an intentional manipulation of the weapon to convert the weapon from a semi-automatic weapon to a machinegun.

This added paragraph was added to the instruction in an effort to give meaning to the United States Supreme Court's holding in *Staples v. United States*, 511 U.S. 600 (1994), which grafted a knowledge requirement onto the statute. Mr. Olofson's argument was that a weapon that fires automatically due to a malfunction does not "shoot" as that term is used in the statute and that a malfunctioning weapon must not be considered a machine because a person cannot know that something is a machine gun if it is not operating in a manner that was not intended.

After this proposed jury instruction was rejected by the district court, Mr. Olofson proposed the following jury instruction:

> The term "machine gun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading by a single function of the trigger.
>
> *The term "automatic" or "fully automatic" refer to a weapon that fires repeatedly with a singly pull of the trigger. That is, once a trigger is depressed, the weapon will automatically continue to fire until the trigger is released or the ammunition is exhausted.*
>
> The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under control of a person.
>
> However, a weapon that fires automatically due to a malfunction of the weapon is not a machine gun.

(Emphasis added). The highlighted language was taken from footnote one of *Staples* and was approved by this Court in *United States v. Fleischli*, 305 F.3d 643, 655 (7th Cir. 2002)(other ground abrogated by statute)(quoting *Staples v. United States*, 511 U.S. at 602 n.1). Again, the purpose of the added language was to give effect to the knowledge requirement of the Supreme Court's holding in *Staples*. The district court rejected this instruction and instead instructed the jury that the definition of the term machine gun is merely: "A machine gun is any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."

The instruction given to the jury fails to taken into account the holding in *Staples* that requires scienter as to the nature of the weapon. This is a substantial question given the holdings of *Staples* and *Fleschli*. If the Court agrees with Olofson that the district court's instruction defining the term "machine gun" is inadequate, a new trial will be warranted.

2. Void For Vagueness.

Post-trial, Mr. Olofson renewed his motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29. He argued that based upon the facts of the case, 26 U.S.C. § 5845, which defines the term "machine gun" is unconstitutionally vague, because it fails to place clear limits on which weapons can be considered "machine guns" and because the statute, as written, allows for arbitrary and capricious

enforcement of the statute. At the sentencing hearing, the district court denied Mr. Olofson's renewed Rule 29 motion.

"The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Collins*, 272 F.3d 984, 988 (7th Cir. 2001)(quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Vague statutes pose two problems. First, "they fail to provide due notice so that ordinary people can understand what is prohibited. *Id*. Second, "they encourage arbitrary and discriminatory enforcement." *Id.* The second prong is a more serious issue than the first. *Id*.

With regard to the second problem, "the legislature must establish minimal guidelines to govern law enforcement." *Kolender* 461 U.S. at 358. "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a 'standardless sweep' [that] allows policemen, prosecutors and juries to pursue their personal predilections." *Id*.(quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). Because Olofson does not challenge the statute on First Amendment grounds, his challenge is examined on an as-applied basis. *Collins*, 272 F.3d at 988. An "as applied" challenge is not ripe until all of the facts have been revealed. *United States v. Reed*, 114 F.3d 1067, 1070 (10th Cir. 1997).

This case poses the issue of whether Mr. Olofson weapon is a malfunctioning, but legal, AR-15 rifle or an illegal machine gun. The government's expert testified that in each test, the weapon was exhibiting the "hammer follow through"malfunction. However, depending upon the type of ammunition used sometimes it functioned like a machine gun and sometimes it did not. With the hard-primered military style (but commercially available) ammunition, the weapon did not fire multiple rounds with a single pull of the trigger. With the soft-primered hunting ammunition, the weapon did fire multiple rounds with a single pull of the trigger. Based upon these facts, even if Mr. Olofson was aware of the tests, he could not know whether he had a malfunctioning rifle or a machine gun. Moreover, the government's fluid interpretation of the statue allows for arbitrary enforcement of the statute. On these facts and based upon the government's interpretation of the statute, it is clear that the ATF can manipulate its testing procedures to arbitrarily turn a malfunctioning weapon into a machine gun. Because the statute is subject to such arbitrary enforcement, it is unconstitutionally vague. If Olofson is successful on this claim, his conviction and sentence will likely be vacated.

3. Motion to Dismiss.

Mr. Olofson filed a pretrial motion to dismiss the indictment in this case because Congress exceeded its authority to regulate interstate commerce when it prohibited the intrastate transfer of a machine gun and because prohibiting the

transfer of a machine gun infringes Olofson's Second Amendment right to keep and bear arms.

The first theory, dismissal based upon an inappropriate exercise of Congress' interstate commerce authority is at odds with the Seventh Circuit's decision in *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996). No other circumstances give rise to question the Seventh Circuit's holding in *Kenney*, which lends doubt to its classification as a substantial question. The second theory, which is based on Olofson's Second Amendment rights, is also at odds with Seventh Circuit case law. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999). However, the United States Supreme Court has taken up the question of whether two District of Columbia statutes violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for use in their homes. *District of Columbia v. Heller*, 128 S.Ct. 465 (November 20, 2007). Oral argument in *Heller* was held on March 18, 2008 and an decision is imminent. If the Supreme Court determines in *Heller* that the Second Amendment concerns individual rights and does not concern state-regulated militias, it would abrogate this Court's decision in *Gillespie* and likely make Mr. Olofson's case one of, if not, the first cases in this Circuit to deal squarely with the issue of gun regulation post-*Heller*. And the affirmance would indicate that Mr. Olofson's prosecution under 18 U.S.C. § 922(o) was in violation of the Second

Amendment. As such, Mr. Olofson's appeal may raise a substantial question, one that would likely lead to the vacation of his sentence and conviction.

IV. Conclusion.

For the above stated reasons, David R. Olofson respectfully requests that this Court grant his motion to stay the execution of his sentence and for his release pending appeal.

Dated at Milwaukee, Wisconsin, May 30, 2008.

Respectfully submitted,

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