

## **THE GLOVER TAPE: Caught In The Act of Innocence**

John Glover's passion was firearms. He loved to build rifles from the kits he ordered and made his creations so precise he was known throughout the gun show circuits as a master craftsman. While his rifles did not bring top dollar (only because he did not want to take advantage of fellow gun enthusiasts), those who purchased John's rifles were promised the best, most accurate rifle for the money.

When the BATF knocked on his door in July, 2002, asking to see his guns, he had no problem letting them in and displaying all the firearms in the house. The agents explained to John that someone had reported that he was manufacturing illegal semi-automatic assault weapons in his garage shop, and they were just conducting a routine check to see if the story had any basis. After examining John's firearms, the BATF agents left quietly thanking John for his cooperation. They saw everything John had and seized nothing. John thought nothing of it because his guns were perfectly legal. "As far as we are concerned, this matter is closed," they said.

Three months later, the same BATF agents called John and asked if they could come to his house again to look at his guns. At the arranged time, the agents appeared with local law enforcement. John had all of his guns laid out for inspection. This visit, however, would be different. The agents explained that John's rifles used primarily imported parts and had more than three characteristics of illegal assault weapons. They proceeded to confiscate seven rifles for violations of 18 U.S.C. § 922(r).

Such was the beginning of a "series of unfortunate events," as the BATF might call it. John called it a nightmare.

Gun enthusiasts can build their own weapons from parts kits which can be purchased over the internet, at gun shows, and from publications such as the "Shotgun News." Depending on the weapon, the kits cost a couple hundred dollars, and the finished product depends on the workmanship of the builder. Once finished, the rifle must still comply with the various and specific requirements of the Firearm Owners Protection Act (FOPA), 18 U.S.C. § 921, *et seq.*

The FOPA allows certain semi-automatic (one trigger pull, one shot) assault weapons to be built from parts kits that can be purchased from a variety of sources. Rather than buy an AK-47, many gun owners would rather build the rifle themselves using imported and domestic parts. Glover had built seven FN-FAL type rifles<sup>1</sup>, a favorite of marksmen because of its accuracy. FAL's are similar in style to the American M-14 but considered more accurate because of its design. Since most FAL's are manufactured outside of the United States for military purposes, the foreign made FAL's contain a safety sear allowing the rifle to fire automatic. None of John's rifles contained a safety sear or had a provision allowing a safety sear to be installed.

When the BATF seized his rifles, John explained to them that the rifles were not finished and would comply with the FOPA when completed. In 30 minutes, John explained, he could make each of the rifles compliant. His pleas fell on deaf ears of agents intent on following the letter of the law. But, one rifle, now in the hands of the agents, held a secret not even John knew which would become the basis for trouble for John for the next year.

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<sup>1</sup> "FN-FAL" is Fusil Automatique Leger or "Light Automatic Rifle" designed in Belgium by Fabrique National and copied by the military in many countries.

Since domestic manufacturers of parts (Enterprise Arms, Pacific Armament Corporation and Williams Arms, for example) are heavily regulated by the BATF, the Government did not want individual gun enthusiasts to buy foreign parts and construct, on their own, illegal semi-automatic assault weapons. Therefore, Congress made it illegal to assemble from *imported parts* any rifle identical to those listed in 18 U.S.C. § 921(a)(30)(A), which includes copies of FAL-type rifles.

A rifle having ten or more imported parts (listed in 178 C.F.R. § 178.39<sup>2</sup>) qualifies as an illegal assault weapon, punishable by five years imprisonment. This prohibition forces individuals to use primarily domestic parts which are heavily regulated by the Government.

Finally, even if a semi-automatic assault weapon contains less than ten imported parts, it may still be illegal if it has the ability to accept a detachable magazine and has at least two of:

- (i) a folding or telescopic stock;
- (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
- (iii) a bayonet mount;
- (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and
- (v) a grenade launcher.<sup>3</sup>

Since none of John's guns were illegal, he did not concern himself with anything except how to retrieve his rifles. He was served with the requisite forfeiture papers, which he filled out and sent to the BATF. Each rifle, as a finished product, would only

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<sup>2</sup> The rifle must have "10 or less" foreign parts of the following: (1) Frames, receivers, receiver castings, forgings or stampings; (2) Barrels; (3) Barrel extensions; (4) Mounting blocks; (5) Muzzle attachments; (6) Bolts; (7) Bolt Carriers; (8) Operating guides; (9) Gas pistons; (10) Trigger housings; (11) Triggers; (12) Hammers; (13) Sears; (14) Disconnectors; (15) Buttstocks; (16) Pistol grips; (17) Forearms, handguards; (18) Magazine bodies; (19) Followers; and (20) Floorplates.

<sup>3</sup> 18 U.S.C. § 921(a)(30)(B).

bring about \$400-\$600 at a local gun show so he could not afford to pay an attorney to fight the confiscation. His job at a local gunsmith didn't pay well, and he supplemented his family's income building the FAL rifles from the kits he ordered.

In May, 2003, John received a surprising call from BATF agent J.J. Berger. He explained that John had been indicted by the Grand Jury for the Western District of North Carolina for six counts of possession of illegal assault weapons, one count of manufacturing a fully automatic machine gun, and one count of possession of a machine gun. The agent informed him that he would need to be in Federal Court in a few days with an attorney to answer the charges.

John was devastated. While the seized FAL rifles did not yet technically comply with the Act, the rifles were a work in progress and, by the time they were finished, would be compliant.<sup>4</sup> John was confused as to how one of his rifles could be considered a machine gun. He had not built any of the guns to fire full-auto. Many sleepless nights were to follow.

John Glover's indictment alleged six separate violations of 18 U.S.C. § 922(v), "Manufacture, transfer or possession of a semi-automatic assault weapon;" one count of violation of 18 U.S.C. § 922(o), "Manufacture, transfer, possession or sale of a machine gun;" and possession of an unregistered machine gun, a violation of 26 U.S.C. § 5861.<sup>5</sup> The maximum punishment for each count was five years imprisonment; ten years each for manufacture and possession of a machine gun.

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<sup>4</sup> All Glover had to do to most of the rifles is unthread the barrel and/or remove the bayonet mount; either operation would take less than ten minutes per gun.

<sup>5</sup> Section 5845(b) of the NFA defines the term "machine gun" as "any weapon 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

John was confused and frightened by the charges. He had sought guidance from the BATF in December, 2002, when he began to build FAL rifles from parts kits. He received a letter from Curtis Bartlett, Chief, Firearms and Technology Branch of the BATF, informing him of the requirements of the above statutes. He made certain his rifles conformed to the BATF directive. There was no way one of the rifles was a machine gun, unless, he explained, the rifle had been tampered with.

When discovery arrived, the BATF report indicated that each rifle was examined not by a *technician* at the agency but by an *enforcement* officer, Michael J. Cooney. The report recited that each of the FAL rifles possessed features that put them within the prohibitions in 922(v), but the rifles were not yet completed and the BATF knew that. John's explanation was left out of the report. The report further stated that rifle #4, upon examination, "metal had been removed from the front section of the hammer/trigger axis locking plate found within the trigger group housing. This modification permits additional forward travel of the hammer which then pushes the firing pin forward. When the selector was rotated to the 'auto' selector position, Exhibit 4 shoots automatically more than one shot, without manual reloading, by a single function of the trigger."

"No way," John replied. "Impossible." But we wondered why an enforcement officer in Washington, DC, would fabricate an official BATF report.<sup>6</sup>

Rifle #4 was John's prize rifle. He had built it several years ago and used it in sharpshooter competitions where he had won many awards. It was the oldest of the seized rifles, but by far, the best constructed. Common sense would say there was no

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<sup>6</sup> The BATF report stated that Agent Berger and Cheramie had "field tested" each of the 11 rifles Glover showed them on July 9, 2002. According to the BATF agents, two of the rifles had "field-tested" positively as being fully automatic. On the October 15, 2002 visit, six of the seven FAL rifles seized "field tested as possibly being fully automatic." How a rifle "dry fires" fully automatic is beyond the expertise of this author, and most firearms experts.

possibility that the sharpshooter competitions would allow a fully automatic machine gun at their venue. We, therefore, had to prove the report and the BATF were wrong. So much for the presumption of innocence.

We were put in contact with Mr. Len Savage of Historic Arms, L.L.C., in Franklin, Georgia, who designs and builds rifles for a living. He has designed and created many sought-after firearms and has daily conversations with the BATF. He knows the names of all BATF technicians, having dealt with each at some time. He was immediately suspicious as to why an enforcement officer was examining John's rifles. He explained a technician would be the best person to determine whether a firearm was a machine gun, and, more importantly, why.

When Savage read the BATF report, his conclusion was the same as John's, "No way." He explained that the trigger axis locking plate had as much to do with the ability of the rifle to fire automatic as does the sight at the end of the barrel. The locking plate serves only to keep the firing pin from springing out during cleaning. He poured over Agent Cooney's report and concluded that the Agent's conclusions were impossible. "We have to examine and fire that rifle," Savage insisted.

Reports of scientific tests are discoverable under Rule 16 of the Federal Rules of Criminal Procedure. It is also well-settled that the prosecution must allow the defense access to all scientific tests or experiments so as to allow its experts the opportunity to test, and, if possible, duplicate the Government's experts' findings. How the testing is to be conducted is up to the Government, in its fairness, to determine.

At first, the AUSA was reluctant to allow Glover to be at the testing range since he was an indicted felon. I explained to the AUSA that Glover was the only one in the

world who could verify that the rifles being examined were, in fact, his. My concern was that the BATF would bring to the test rifles that were not Glover's and/or were tampered with. By this time, our trust factor with the BATF was eroding, and, while I did not share my concerns with the AUSA, he saw the advantage of allowing Glover as a witness to the tests. Glover could not participate but would be the cameraman for the taping of the tests.

Len Savage was confused, if not frustrated, by Cooney's report. Maybe it did fire three rounds, but the reason was not the "axis locking plate." The obvious risk of having Cooney fire rifle #4 again on videotape would be that the rifle may, indeed, fire automatic and, therefore, verify Cooney's findings. Where would our defense be then? The risk was huge, but Savage insisted that if rifle #4 fired automatic, it was not by design, and he was determined to find out why.

There are surprisingly few cases on what qualifies as a machine gun. The statutory definition is simple enough, but where does *mens rea* come in? The best case defining the Government's burden in this regard is *Staples vs. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

In *Staples*, the defendant was prosecuted for possession of an unregistered machine gun (26 U.S.C. § 5845(b)). At trial, Staples testified that the rifle had never fired automatically when he possessed it, and that he was ignorant of any automatic firing capability. The defendant requested the Court to charge the jury that the Government must prove beyond a reasonable doubt that the defendant "knew that the gun would fire automatically." The District Court rejected Staples' proposed instruction, and instead charged the jury as follows: "The government need not prove the defendant knows he's

dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation."

The Supreme Court held that Congress did not intend to eliminate a *mens rea* requirement for violation of that statute. "Thus, to obtain a conviction, the government should have been required to produce evidence that petitioner knew of the features of his AR-15 that brought it within the scope of the act." 511 U.S. 600, 610 S.Ct. 1793. The conviction was reversed.

The Court further stated that the user/defendant must know of the capability of the weapon to fire automatically or the intent element cannot be proven. Thus, if an individual inherits a rifle from a relative and does not know it has been altered to fire automatic, he cannot be found guilty of possession of a machine gun.

In *United States vs. Hitt*, 981 F.2d 422 (9<sup>th</sup> Cir. 1992), the defense argued the rifle in question was modified to fire automatic by the previous owner, which was the reason that the rifle was malfunctioning. The Appellate Court reversed the conviction on an evidentiary ruling in which the trial court admitted a photograph of the defendant's multiple-firearms which tended to unduly prejudice the defendant. The jury, apparently, did not believe defendant's experts who could not replicate the automatic firing of the rifle.

Was rifle #4 designed to fire as a machine gun? John Glover said no; the BATF said yes. We would soon find out.

Arrangements were made at the Law Enforcement Range to examine the rifles seized from Glover and fire rifle #4. We met early that morning with Savage and Russell



Weeks, another expert who sells firearms commercially. Savage showed me a detailed drawing of the FAL and its working parts and explained in detail each part of Cooney's report and why it was wrong. John would run one videotape recorder and my associate, David Strickland, would have another camcorder as backup.

After John verified, on tape, that the guns Cooney brought were his, Cooney put one round in rifle #4 and pulled the trigger. One bang. He then put three shells in the clip and moved the selector switch to "auto" and pulled the trigger. We held our breath.

Bang!

Only one shot had fired. Agent Cooney said, "Light primer hit caused the weapon to fire one time."

He again loaded three shells into the magazine of #4. Once again only one shot rang out. Again and again, Cooney tried to duplicate his testing of the "machine gun," but #4 would only fire one round. He even tried several different types of ammunition, to no avail.<sup>7</sup>

Savage retrieved and examined each unspent and spent casing after each attempt. He realized that rifle #4 was malfunctioning and warned Cooney (on videotape) that the gun was firing "out of battery" and was dangerous. Such a defect could allow #4 to explode. We were asked to back up. Despite the warnings and obvious danger, Cooney proceeded, sweating in the hot, May, Carolina sun.

Then, on the last attempt, #4 fired three shots with one trigger pull. Everyone there was aghast (except Cooney who had managed, finally, to duplicate his findings.)

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<sup>7</sup> Ammunition manufactured by Remington, Winchester, Portuguese Military and Chile Military were used in the testing.

Savage wondered what makes a rifle fire single shots then multiple shots without warning.

Glover, the BATF agents, the defense experts, and attorneys went into the facility to further examine #4 as well as the other FAL's John had built. Savage could scarcely hold his enthusiasm and curiosity. He disassembled #4 in about 20 seconds. Agent Cooney then admitted, on videotape, *he had not taken the gun apart*. He further admitted he did not know how to disassemble the FAL. Once it fired automatic, he examined the receiver for anything unusual and noticed a chip taken out of the axis locking plate. The chip, Cooney concluded, was the cause of the multiple round firings. Savage pointed out this condition is usually a result of "dry firing" and is not a modification but a by-product of extreme use.

Len Savage then held up the firing pin spring, dirty and brittle from age and use. The spring that pushes the firing pin back into place after a round had discharged was worn out, causing the firing pin to "float" and not recede to its original safe position. Parts of the spring were coming off in shavings in Savage's hand. In two minutes, he had solved the mystery of why #4 behaved so erratically. A \$0.30 part had caused Glover to be indicted by a Federal Grand Jury. It was no wonder the official BATF report was wrong – Cooney had not bothered to disassemble the weapon to see why it had behaved like a machine gun. Had Agent Cooney taken a few minutes to disassemble the rifle (which, ironically, he could not do), he could have seen the problem which was obviously not by design and which caused the multiple round firings.<sup>8</sup>

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<sup>8</sup> Savage also pointed out that #4 had no safety sear/machine gun gear which is a necessary part in a fully automatic machine gun. The absence of this sear should have been obvious to anyone familiar with automatic firearms.

We copied the videotape for the AUSA, who posited, "He got the rifle to fire more than one round with a single pull of the trigger," which, technically, makes #4 a machine gun. We also provided him with a detailed report by Savage as to the real cause behind the automatic firings. However, we still had the problem that there were six more rifles that fit the definition of illegal assault weapons.

There are no cases found which define, or even relate to, the definition of "design," in that the Government must prove that the rifle was "designed" to fire more than one round with a single pull of the trigger. Relying on the "intent" issue in *Staples* only would allow us a decent jury argument. We were afraid that, as much as John knew about guns, the jury might find he knew or should have known that the rifle had the capabilities of a machine gun. Obviously, the BATF would stand by their report that the rifle fired more than once with a single pull of the trigger, and, since it did so on two different occasions, Glover should have known #4 was a machine gun. The Government could withstand a Motion to Dismiss, and, thus, leave Glover's innocence to be proven by Savage and others.

We decided that we would take the fight to the Government first. The videotape evidence was compelling and clearly showed Agent Cooney's frustrated attempts at proving #4 was a machine gun, as he had written in his report. We decided to file Motions which would get us into court and allow a Federal Judge the opportunity to observe for himself the quality (or lack thereof) of the Government's evidence. We were determined to show the Court video, and then maybe the Judge would conclude as a matter of law that the rifle did not fit the "intent" requirement of *Staples*, nor was the gun "designed" to fire automatic because it was simply a *malfunction*. The legal inquiry had

no precedent – could a malfunctioning rifle be considered a machine gun within the definition of 26 U.S.C. § 5845(b) of the NFA? If the Court could see that the weapon was merely malfunctioning, then perhaps he could “encourage” the prosecution to not proceed.

We filed a Motion to Dismiss and attached as evidence Cooney’s report and the videotape, also starring Agent Cooney.

All experienced trial lawyers, particularly in criminal defense know the value of the right timing. Even if the Court dismissed the machine gun charges, Glover still had six other rifles for which he could be prosecuted and the videotape would be irrelevant.

The Motions to Dismiss were filed on August 13, 2004. On September 13, 2004, the Assault Weapons Act was not renewed by Congress and therefore “sunsetting.”<sup>9</sup> That event meant that the other six rifles confiscated by the BATF from Glover were now perfectly legal. The six rifles could still be viewed by a jury as illegal when seized but, since the law that made them illegal in the first place was no longer in effect, we had a valid argument for the Court and jury.

On October 11, 2004, I received the call all defense attorneys cherish. All charges against John Glover would be dismissed with prejudice.

It is the author’s opinion that the BATF did not want a Federal Judge to see, first hand, the sloppiness of their investigation of Glover. Because Agent Cooney could not or would not disassemble rifle #4, a man with no prior criminal record was called to answer for crimes he did not commit.

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<sup>9</sup> Sections 922, 923, and 924 of the FOPA were enacted on September 13, 1994, for a ten year period. Since Congress would not touch the issue, the repeal went into effect September 13, 2004.

I was later advised by the AUSA that the Glover tape, as it is now called, has made its way to various websites. The "Jews for the Preservation of Firearms" website is selling the videotape for \$17.76. Other websites such as "Gun Owners of America" have linked the JPFO site for easy reference. There is a bill to be submitted by Congress sponsored by the National Rifle Association that *requires* the BATF to videotape *all* firearm tests if the testing is the subject of a criminal investigation. Glover is considering a lawsuit against the BATF under the Tort Claims Act.

The Glover case stands, if anything, for the need of defense counsel to take the fight to the Government and not to rely on any supposedly "scientific" test that implicates a defendant. Many times the science is only as good as the scientist, and it is incumbent on defense attorneys to challenge, at every opportunity, the Government's scientists, experts, and methods. We must be aggressive in our endeavor as "justice is truth in action," (Benjamin Disraeli, 1851).

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