No. 08-2294

In The United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID R. OLOFSON,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Wisconsin

Petition for Rehearing *En Banc* of Defendant-Appellant

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May 15, 2009

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APPELLANT'S DISCLOSURE STATEMENT

The defendant-appellant herein, David R. Olofson, through his undersigned counsel, submits this Disclosure Statement pursuant to Rule 26.1(b), Federal Rules of Appellate Procedure ("Fed. R. App. P."), Rules 26.1(c) and 35, Circuit Rules of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit Rules"):

1. The defendant-appellant, David R. Olofson, is a natural person, and not a corporation. Mr. Olofson now is represented herein by Herbert W. Titus, Esquire, who is counsel of record, and William J. Olson, Esquire, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, VA 22180, and by Robert E. Sanders, Esquire, of Mark Barnes & Associates, 1350 I Street, N.W., Suite 1255, Washington, D.C. 20005.

2. The defendant-appellant, David R. Olofson, was previously represented herein by Brian T. Fahl and Brian P. Mullins, Federal Defender Services of Wisconsin, Inc., who also represented Mr. Olofson in the District Court — the United States District Court for the Eastern District of Wisconsin. Prior to such representation by Messrs. Fahl and Mullins, Mr. Olofson was represented in the District Court by Christopher Rose of the law firm of Rose & Rose, 5529 6th Avenue, Kenosha, WI 53140.

3. The plaintiff-appellee is the United States of America, represented by Assistant United States Attorney Gregory J. Haanstad, 517 E Wisconsin Ave, Room 530, Milwaukee, WI 53202.

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FRAP RULE 35(b)(1)(A) STATEMENT

The panel decision[1] in United States v. Olofson (No. 08-2294) conflicts with both Staples v. United States, 511 U.S. 600 (1994) and United States v. Fleischli, 305 F.3d 643 (7th Cir. 2002). Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

STATEMENT OF THE CASE

On January 7, 2008, David Roland Olofson was tried and convicted for violation of 18 U.S.C. §§ 922(o) and 924(a)(2) which prohibit the transfer of a machine gun. At trial, the sole factual issues were: (i) whether the firearm, which Olofson had admittedly transferred, was a malfunctioning semiautomatic AR-15 or a fully-automatic firearm, *i.e.*, a machine gun, as defined in 26 U.S.C. § 5845(b)[2]; and (ii) whether Olofson knew at the time of the transfer that his AR-15 had all the characteristics of a machine gun.

Olofson requested that the jury be instructed to decide those issues according to the definition of "automatic" adopted in Staples v. United States, 511 U.S. 600 (1994), and applied in this circuit in United States v. Fleischli, 305 F.3d 643 (7th

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[1] The panel included two Seventh Circuit judges (Manion and Kanne), with a District Judge (Kendall) sitting by designation.

[2] In pertinent part, 26 U.S.C. § 5845(b) defines "machine gun" as "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." Olofson was charged with unlawful transfer of an AR-15, which was designed and manufactured to be a semi-automatic weapon. Olofson was never charged with converting it into a machine gun; therefore, only the first criterion ("which shoots ... automatically") is at issue here.

Cir. 2002). Adopting *verbatim* the Staples/Fleischli definition, Olofson asked the trial judge to instruct the jury that a machine gun is:

> a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will **automatically** continue to fire until its trigger is released or **the ammunition is exhausted**. [Staples, 511 U.S. at 603, n.1; Fleischli, 305 F.3d at 655 (emphasis added).]

The district court denied Olofson's request. The panel opinion affirmed, "conclud[ing] that Olofson's proffered instruction was **not** an accurate statement of the law, and that the district court properly rejected it." United States v. Olofson, Slip Opinion ("Slip Op."), p. 10 (May 1, 2009).

Having ruled the Staples/Fleischli definition of "automatic" to be an **inaccurate statement of law** — not just inapplicable to this case — the panel has, in effect, overruled the Staples/Fleischli interpretation of "automatic," and substituted its own conflicting interpretation — based on an analysis rife with errors of law and fact — that a firearm is an "automatic" weapon, and therefore a machine gun, if the firearm has "a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation." *See id.*, pp. 9-10.

ARGUMENT

I. THE STAPLES/FLEISCHLI DEFINITION OF AUTOMATIC IS AUTHORITATIVELY BINDING.

According to the panel, the "precise definition of 'automatically' was not at issue [in Staples and] therefore, the Court's discussion of the terms 'automatic' and 'fully automatic' was immaterial to its holding." Slip. Op., p. 7. In support of its

narrow reading, the panel observed that "the Court prefaced its explanation of the terms 'automatic' and 'fully automatic' with the phrase '[a]s used here.'" *Id.* On the basis of this introductory phraseology, the panel concluded:

> Thus, rather than interpreting a statute the Court simply was providing a glossary for terms frequently appearing in the opinion. Therefore, *Staples* did not establish a requirement for district courts to instruct juries on the meaning of 'automatically' from § 5845(b). [*Id.*]

In sum, the panel read the Staples footnote as if the Court had casually adopted a definition of "automatic" as a guide to understanding its opinion, not as an authoritative interpretation of the meaning of "automatically" as it appears in § 5845(b). The panel's reasoning is flawed.

The panel wrested the Staples definition completely out of context. After quoting the pertinent statutory language that a machine gun is "any weapon which shoots ... or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger," the Staples Court stated: "Thus, any fully automatic weapon is a 'firearm' **within the meaning of the Act**." Staples, 511 U.S. at 602 (emphasis added). Then, appending footnote 1 to "the Act," the Staples Court explained:

> **As used here**, the terms "automatic" and "fully automatic" refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once the trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are "machineguns" within the meaning of the Act. [*Id.*, 511 U.S. at 602, n.1 (emphasis added).]

Grammatically, the introductory phrase, "as used here," refers directly to "the Act," not to the court's opinion, as the panel asserts. Indeed, the word "here" means

"at this point in space," or "in this location," not "in what follows." Webster's Third New International Dictionary, p. 1058 (1964). Had the Court meant its definition as a guide to the reader of its opinion, and not an interpretation of "the Act," itself, the Court would have used "hereinafter," *i.e.,* "in the following part of this opinion." *See id.*, p. 1059.

Not only did the Staples Court tie its footnote directly to "the Act," but also it reinforced that link to the Act by concluding its footnote with the sentence: "Such weapons are 'machineguns' **within the meaning of the Act.**" Staples, 511 U.S. at 602, n.1. Such words belie the panel's contention that the footnote was designed to serve merely as a "glossary of terms ... appearing in the opinion." *See* Slip Op., p. 7. Rather, the footnote defines **one statutory term** — a fully automatic firearm — and places that term in contradistinction to a "semiautomatic" firearm that does not qualify as a fully automatic firearm as defined by 'the Act." *See* Staples, 511 U.S. at 603-04.

Having strikingly misconstrued Staples, the panel then substantially misread Fleischli. Looking behind the language of the opinion, the panel decided that the Fleischli court "never purported to be setting forth a comprehensive definition of 'automatically' from Section 5845." Slip Op., p. 8. Rather, the panel surmised that the court had merely "borrow[ed] terminology from *Staples* in order to stamp out the appellant's 'disingenuous argument,'" without any consideration that the Staples footnote was precedentially binding. *Id.* Completely missing from

the panel's assessment of Fleischli is the Fleischli court's express acknowledgment that the Supreme Court's "commonsense explanations of the terms 'automatic' and 'semiautomatic'" were the product of the Supreme Court's "interpretation of the National Firearms Act." Fleischli, 305 F.3d at p. 655 (emphasis added). Thus, the Fleischli court rejected the appellant's argument that the Staples definition was "not binding":

> We think the Court's meaning is plain enough. If Fleischli's minigun, with one application of the trigger, continued to fire until the trigger was released or the ammunition exhausted, it was a machine gun **within the meaning of the Act.** [*Id.* (emphasis added).]

As a matter of fact, in addressing the mens rea issue in Staples, it was necessary for the Court to define the essential characteristics of a machine gun. *See* Reply Brief of Appellant, pp. 5-7.

II. THE PANEL'S DEFINITION OF "AUTOMATICALLY" IS NOT AN ACCURATE STATEMENT OF THE LAW.

Initially, the panel dismissed Olofson's reliance on the Staples/Fleischli definition of automatic as "misplaced." *See* Slip Op., p. 8. After it adopted its own definition of automatic, however, the panel decided that the Staples/Fleischli "was **not** [even] an accurate statement of the law."[3] *See* Slip Op., p.10. At no point did the panel ever explain why the Staples/Fleischli definition was inaccurate. Instead, it simply adopted its own definition, based upon the proposition that the meaning of

[3] If the panel believed that Staples and Fleischli were "not accurate statements of the law," the panel should have circulated its proposed opinion for a vote to rehear the case *en banc*. *See* Circuit Rule 40(e).

"automatically" in the definition of a machine gun, as set forth in § 5845(b), is the meaning of the word as it "was commonly used and understood in 1934, the year in which the definition of 'machinegun' became law with the passage of the National Firearms Act" that year being "'[t]he most relevant time for determining a statutory term's meaning.'" Slip Op., p. 9. Thus, relying on the 1934 edition of Webster's New International Dictionary — a "leading dictionary" — the panel plucked out and adopted the second definition of "automatic" — "[having] a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation" as the correct meaning of automatic as applied to a firearm. *Id.*

Amazingly, the panel ignored completely the relevant definition, that of an "automatic gun," even though it was on the same page of the same dictionary:

> A firearm which, after the first round is exploded, by gas pressure or force of recoil automatically extracts and ejects the empty case, loads another round into the chamber, fires, and repeats the above cycle, **until the ammunition is exhausted, or pressure on the trigger is released.** [Webster's New International Dictionary, p. 187 (1934) (emphasis added).]

This relevant definition was completely consistent with Staples, Fleischli, and Olofson's defense, and completely inconsistent with the panel's new interpretation.

The panel also neglected a mother lode of legislative history that directly related to the meaning of "automatic" as applied to a machine gun. As originally proposed, the National Firearms Act of 1934 would have defined a "'machine gun' [as] any weapon designed to shoot **automatically or semiautomatically** twelve or more shots without reloading." *See* H.R. Rep. No. 9066, 73d Cong., 2d Sess. In

testimony presented to the House of Representatives, Committee on Ways and Means, Karl T. Frederick, President of the National Rifle Association, stated that the proposed definition was "wholly inadequate and unsatisfactory." *See* National Firearms Act: Hearings Before the Committee on Ways and Means, H.R. Rep. No. 9066, 73rd Cong., 2d Sess., p. 39 (April 16, 1934). In response to a request from a committee member for a more adequate definition, Mr. Frederick proposed that the definition be revised so as to read:

> A machine gun ... as used in this act means any firearm ... which shoots automatically more than one shot without manual reloading, by a single function of the trigger. [*Id.,* at p. 40.]

In explanation, Mr. Frederick stated that "[t]he distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire **as long as there is any ammunition in the belt or in the magazine.**" *Id.* (emphasis added). When asked by another committee member why Mr. Frederick included "in [his] definition the phrase 'with one function of the trigger,'" Mr. Frederick responded: "Because that is the essence of a machine gun." Further, in response to a question from another committee member whether a "Colt automatic pistol [is] a machine gun," the following exchange took place:

> Mr. Frederick: No sir. I do not think that in the eyes of a ballistic engineer it would be so regarded....
> Mr. Cohrane: **Does not the Colt automatic pistol continue to shoot as long as you exert pressure upon the trigger**?
> Mr. Frederick: **No sir. It requires a separate pull of the trigger for every shot fired**. [*Id.*, p. 42 (emphasis added).]

Finally, in another exchange about the different meanings of "automatically" and "semiautomatically," Mr. Frederick, referring back to the Colt pistol which he had previously testified was **not** a machine gun, stated:

> There are **automatic features** about the Colt pistol in the sense that when a shot is fired the action of the gas not only expels the bullet from one end of the barrel, but it expels the empty shell from the other end, and it is so devised that upon return of the carriage through a spring, it puts another shell in place of the old one. That is in a sense automatic, and that principle is found in a machine gun. **But that is not the distinguishing feature of a machine gun.** [*Id.*, pp. 41-42 (emphasis added)].

In this testimony, Mr. Frederick made clear that only a firearm which continues to fire more than one shot at the single pull of a trigger until the trigger is released or the ammunition is exhausted was a true machine gun. Moreover, Mr. Frederick testified that just because a firearm has one automatic feature — such as he had described the Colt pistol to have — does not make that firearm a machine gun, as the definition adopted by the panel would.

Not only did the panel in this case make a clear mistake of fact as to the meaning of "automatic" when applied to a firearm, but it made a clear mistake of law, having assumed that the current version of § 5845(b) is the version enacted by Congress in 1934. It was not. As adopted in 1934, the definition of a machine gun read, as follows:

> The term "machine gun" means any weapon which shoots, or is designed to shoot, **automatically or semiautomatically**, more than one shot, without manual reloading, by a single function of the trigger. [National Firearms Act, ch. 757, 48 Stat. 1236 (emphasis added).]

In 1968, this definition was amended by the Gun Control Act of 1968 to read, in pertinent part, as follows:

> The term "machinegun" means any weapon which shoots, is deigned to shoot, or can be readily be restored to shoot, **automatically** more than one shot, without manual reloading, by a single function of the trigger. [*See* Gun Control Act of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1213 (emphasis added).]

By this 1968 revision, Congress expressly **excluded** semiautomatic from the definition of a machinegun, thereby indicating that just because a weapon had a particular "automatic feature" — such as Mr. Frederick had described of the Colt pistol — it was not for that reason a machine gun.

In Staples, the Court was presented with the question whether a person in possession of a semiautomatic AR-15 that, under ATF tests, had fired more than one shot at the single pull, could be convicted of unlawful possession of a machine gun regardless of whether the persons in possession knew that the AR-15 had all of the characteristics of a machine gun. To reach a decision on this question, the Court was obliged to ascertain those essential characteristics as defined by § 5845(b). The Court found the answer to that question by interpreting the word "automatically" to mean a firearm that "once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." Staples, 511 U.S. at 602, n.1. In contrast, the Court defined a "semiautomatic" as a firearm that "fires only one shot with each pull of the trigger and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired." Staples, 511 U.S. at 602, n.1. In short,

with the enactment of the Gun Control Act of 1968, the meaning of "automatically" became the key to unlocking the difference between a machine gun and other weapons with "automatic features." Such had not been the case regarding the definition of a machine gun in the National Firearms Act of 1934. Thus, the panel was mistaken to have sought the meaning of "automatically" disassociated from use with firearms in 1934; instead, it should have sought out the meaning of "automatically" with respect to firearms in 1968.

Had the panel done so, it would have discovered that the Staples definition fits squarely within the meaning of "automatic" as applied to a firearm in the 1964 edition of Webster's Third International Dictionary, which reads:

> marked by use of either gas pressure or force of recoil and mechanical spring action for **ejecting** the empty cartridge case after the first shot, **loading** the next cartridge from the magazine, **firing, ejecting** the spent case, and **repeating** the above cycle **as long as the pressure on the trigger is maintained and there is ammunition in the magazine or other loading device**. [P. 148 (emphasis added.]

The panel would also have discovered that the Staples contrasting definition of "semiautomatic" was compatible with the meaning of that term, as applied to a firearm in the same dictionary:

> Employs gas pressure or force of recoil and mechanical spring action in ejecting the empty cartridge case after the first shot and in loading the next cartridge from the magazine but that requires release and another pressure of the trigger for firing each successive shot. [*Id.*, p. 2063.]

In his opening brief, Olofson brought to the panel's attention not only the definition of "automatic," as it appears in the 1964 edition of Webster's New

International Dictionary[4], but numerous other authoritative definitions that reinforced the correctness of the Staples/Fleischli definition[5], including official ATF applications of that definition in ATF Rul. 2005-5 (Aug. 18, 2004) and in its Guide to Investigating Illegal Firearms Trafficking (Oct. 1997).

By adopting a 1934 dictionary definition of "automatic" without reference to its meaning as applied to a firearm, and without acknowledging that the 1934 statutory definition of a machine gun had been amended in 1968, the panel adopted a wrong definition from a dictionary of the wrong era, keyed to the wrong law. Therefore, the panel's new definition should be rejected.

III. THE PANEL'S RULING IS PREJUDICIAL TO OLOFSON.

After reaching its erroneous definition of "automatic" at odds with controlling authority, the panel turned its attention to the related question of whether the trial court erred when it instructed the jury in the language of § 5845(b) without defining "automatically." Slip Op., pp. 10-11. The panel concluded that the trial court was "correct[]" not to have done so because the 1934 definition of "'automatically' comports with its ordinary modern meaning" — as reflected in the 2002 Webster's Third New International Dictionary and the 1989 Second edition of the Oxford English Dictionary — "that is readily accessible to laypersons and is in no sense confusing." *Id.* Again, the panel is mistaken.

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[4] *See* Brief of Appellant, p. 36.

[5] *See* Brief of Appellant, pp. 19, 36-37.

In support of its ruling, the panel cited two cases. In United States v. Castillo, 406 F.3d 806 (7th Cir. 2005), the court upheld an instruction that failed to define the term, "in furtherance of," on the ground that the phrase, like the words "wilfully" and "carries," has a "natural meaning and that meaning is accessible to lay juries." *Id.*, at 821. In Miller v. Neathery, 52 F.3d 634 (7th Cir. 1995), however, the court found fault with a jury instruction that failed to define the term, "recklessly," a word that "lawyers and lay persons alike find it difficult to ascribe a precise meaning." *Id.* at 638. The word, "automatically," as used in reference to the technical and mechanical functioning of a firearm falls into the latter category.

As evidenced in dictionaries dating back to 1930, lexicographers have recognized various meanings of "automatic." *See, e.g.,* Webster's New International Dictionary, p. 156 (1930); Webster's New International Dictionary, p. 187 (2d ed. 1934); Webster's Third New International Dictionary, p. 148 (1964); Webster's Third New International Dictionary, p. 148 (2002). And when applied to a firearm, the meaning of "automatic" has evolved over the past seven decades as have firearms themselves. For example, in the 1930 edition of Webster's New International Dictionary, "automatic" in relation to a firearm meant what would be today a semi-automatic[6]:

> firearm, gun, pistol etc. ... in which every shot except the first, the force of the recoil is used to eject the empty shell and bring a fresh cartridge into firing position. The recoil also operates the firing mechanism,

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[6] *See* Glossary of Gun Related Terms, http://www.learnaboutguns.com/2008/04/07/glossary-of-gun-related-terms/.

> except in pistols, which usually require a separate trigger-pull for each shot.

A little over 30 years later, Webster's Third New International's definition of automatic would not accommodate a pistol that required a separate trigger-pull for each shot, having limited automatic to apply only to firearms that keep on firing "as long as the pressure on the trigger is maintained." While that definition remained true in Webster's New World Dictionary (1980), its definition of "automatic" still recognized that **"popularly"** an "automatic" firearm was the "*same* as semiautomatic." *Id.*, p. 95. In short, the panel **was mistaken** when it concluded that the meaning of the word "automatic" — when applied to a firearm — "is readily accessible to laypersons and is in no sense confusing." *See* Slip. Op., p. 11.

The panel was further mistaken when it failed to conduct an "independent examination of the record" (as the court did in Miller v. Neathery, 52 F.3d at 639) to ascertain whether its definition of "automatic" was consistent with the prosecutor's theory of the case. As pointed out in Olofson's opening brief, throughout the trial — from his opening statement to his closing argument — the prosecutor insisted that, as used in § 5845(b), "automatically" meant no more and no less than this: "if you have a gun, you pull the trigger once and more than one shot is fired, that firearm is a machinegun." *See* Brief of Appellant, p. 11. *See also id.*, pp. 10-12, 22-23, 32.

Additionally, the key prosecution testimony that Olofson's AR-15 functioned as a machine gun was, in turn, based upon the same erroneous interpretation of the statutory meaning of "automatically." On direct examination of his expert witness

who tested the AR-15, the prosecutor asked whether, in his opinion, Olofson's AR-15 was a machine gun. The expert replied in the affirmative, opining that it was so because the AR-15 "fire[d] automatically," that is, "fire[d] more than one round without manual reloading by a single function of the trigger." *Id.*, p. 30.

In light of this understanding of the meaning of "automatically," the prosecutor argued to the trial court that no clarifying instruction on the definition of "automatic" was necessary because "[i]f you pull the trigger once and it fires more than one round, **no matter what the cause** it's a machine gun." *See* Brief of Appellant, p. 24 (emphasis original). This theory would label any law-abiding citizen with a malfunctioning semi-automatic firearm as being in possession of an illegal machine gun.

Even the panel's erroneous definition of "automatic" would not sustain such a claim. Rather, according to the panel, "the discharge of multiple rounds from a weapon [must be] the result of a self-acting mechanism." Slip Op., p. 10. Thus, the panel makes clear that its definition would allow for a malfunction defense whereby "the additional rounds fired resulted from a mishap rather than from a regular self-acting mechanism." *Id.* And yet this is the essence of Olofson's defense. Because the case against Olofson was tried on a theory that it did not matter whether Olofson's AR-15 fired more than one shot as a consequence of a malfunction[7] or as a

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[7] *See* Brief of Appellant, pp. 6-7. In fact, the **initial ATF test** of Olofson's AR-15 led the ATF expert to conclude that the AR-15 was **not a machine gun**, because it had "malfunctioned by 'hammer follow.'" *Id.* at 6.

result of a properly functioning self-acting mechanism, the trial court's failure to explain to the jury the meaning of automatically — even as defined by the panel — prejudiced Olofson. *A fortiori*, Olofson was prejudiced by the failure of the trial court to instruct the jury according to the definition of "automatically," as authoritatively and rightly established in Staples and Fleischli.

CONCLUSION

If the panel decision is allowed to stand, it would violate the rule that Supreme Court precedents are binding on lower federal courts, and that prior panel decisions of the Seventh Circuit are binding on other panels. It would also permit an opinion to stand which was based on clear errors of fact and law, and one which does not even support a conviction under the government's theory of the case. Lastly, it would bring the judiciary into disrepute in the eyes of law-abiding gun owners who understand that a lawful semi-automatic AR-15 rifle does not somehow transmute into an unlawful machine gun when a part breaks or the weapon malfunctions. Adoption of the panel's justification could transform any law-abiding gun owner in America into a felon-by-chance, at the discretion of ATF and the Justice Department.

For the reasons stated herein, this petition for rehearing *en banc* should be granted, the panel opinion vacated, and the appeal be restored for additional briefing and oral argument before the entire court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Petition for Rehearing *en banc* was made, this ____ day of May, 2009, to the Clerk of Court, electronically, and by FedEx overnight delivery, and to appellee by e-mail to greg.haanstad@usdoj.gov and by submitting sufficient hard copies thereof by FedEx overnight delivery, addressed to counsel for the appellee as follows:

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