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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA

No. CR 05-334-BR

v.

DAVID BACON,

Defendant.

**GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION FOR
RECONSIDERATION OF DECEMBER
21, 2006 OPINION AND ORDER
DENYING MOTION FOR NEW TRIAL**

The United States of America, by Karin J. Immergut, United States Attorney for the District of Oregon, and Assistant United States Attorneys, Thomas H. Edmonds, and Amy E. Potter, hereby submit the following government's response to defendant's motion for reconsideration of December 21, 2006 opinion and order denying motion for new trial:

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RECONSIDERATION OF DECEMBER 21, 2006 OPINION AND ORDER DENYING
MOTION FOR NEW TRIAL**

PROCEDURAL POSTURE AND RELEVANT FACTS

On October 20, 2006, a jury convicted defendant of six counts in an amended superseding indictment, which charged defendant with five counts unlawful interstate sale of a firearm to an unlicensed dealer (counts one, three-six) and one count of making a false statement on a firearms acquisition form (count two).

Then, on October 26, 2006, defendant filed a motion for new trial (CR 68). Defendant moved, and this court reasonably interpreted, defendant's motion to be limited to claims of *Brady v. Maryland* violations. After reviewing defendant's motion, the government's response (CR 72), and defendant's reply (CR 75), the court denied defendant's motion in an opinion and order dated November 27, 2006 (CR 77). It is noteworthy that, in his submissions on his original motion (CR 68 and 75), defendant did not ask the court to grant his motion on a theory of insufficiency of evidence, nor did he cite to any authority or standards in line with that theory. *See* defendant's motion (CR 68) and defendant's reply (CR 75).

Then, in response to the court's opinion denying the motion for new trial, defendant filed a motion for reconsideration of opinion and order denying motion for new trial (CR 80). In that motion, for the first time, defendant said, "Defendant hereby asks the court to decide for itself whether, in light of all the evidence presented at trial, Scott Carrie's perjury caused the jury to convict defendant on the false statement on a BATFE 4473 form count." Defendant's motion for reconsideration at page 1. Again, however, defendant failed to cite to any authority, or to provide any standards, for the court to consider his new motion. The gravamen of defendant's motion for

reconsideration was a repetition of claims made in defendant's earlier motion. See Defendant's motion for reconsideration at pages 2-5.

Nevertheless, this court issued a second opinion and order, denying defendant's motion for reconsideration, on December 21, 2006 (CR 84). The court, explicitly, denied defendant's motion on the basis he now brings in a second motion for reconsideration. The court said:

In addition, to the extent defendant bases his motion to reconsider on an argument that the jury was misled by perjured testimony, the court concludes that argument is without foundation. Here the government presented evidence, apparently credited by the jury, that directly contradicted defendant and Osinski's version of events. Reasonable jurors could conclude from this evidence that Scott Carrie did not lie about the time he and defendant traded firearms. Accordingly, the court declines to grant the motion for reconsideration on this ground.

Court's Opinion and Order, dated December 21, 2006, at 4-5 (CR 84).

Now, defendant moves for reconsideration of the December 21 opinion and order denying motion for new trial.

ARGUMENT

This court should deny defendant's motion for reconsideration of the December 21, 2006 opinion, which denied defendant's motion for new trial a second time. As noted above, the court explicitly addressed the grounds defendant now raises in his motion for reconsideration - the factual sufficiency of evidence with regard to count two, the charge of making a false statement on a firearms acquisition form. As noted above, the court found:

In addition, to the extent defendant bases his motion to reconsider on an argument that the jury was misled by perjured testimony, the court concludes that argument is without foundation. Here the government presented evidence, apparently credited by the jury, that directly contradicted defendant and Osinski's version of

events. Reasonable jurors could conclude from this evidence that Scott Carrie did not lie about the time he and defendant traded firearms. Accordingly, the court declines to grant the motion for reconsideration on this ground.

Court's Opinion and Order, dated December 21, 2006, at 4-5 (CR 84).

Defendant, now for the first time, cites to authority for review of his motion. Despite defendant's references to certain cases, he still fails to cite the accurate standard. When considering a motion for new trial, on a theory of sufficiency of evidence, "[t]he district court need not view the evidence in a light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992) (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980) (internal quotation marks omitted)). *Alston* also said:

If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

Alston, 974 F.2d at 1211-12 (quoting *Lincoln*, 630 F.2d at 1319) (internal quotation marks omitted)). Review of a district court's consideration of this type of motion "is limited to determining whether the district court "clearly and manifestly abused its discretion." *Alston*, 974 F.2d at 1212 (quoting *Lincoln*, 630 F.2d at 1319) (internal quotation marks omitted)).

With this set of standards in mind, this court should, again, deny defendant's motion for new trial. This court has already found that defendant's argument that the jury was misled by perjured testimony is "without foundation." See court's December 21 opinion and order at pages

4-5. That finding clearly supports a conclusion that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence does not preponderate sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred. Indeed, this court should find that the evidence in the trial supported the jury's verdict and that no serious miscarriage of justice occurred in this case. Such a finding will comport with the court's previous opinion and is supported by the record of the trial in this case.

CONCLUSION

For the foregoing reasons, this court should deny defendant's motion for reconsideration of the December 21, 2006 opinion and order denying motion for new trial.

DATED this 3rd day of January, 2007.

Respectfully submitted,

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/s/ Amy Potter
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