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5 ATTORNEY FOR PLAINTIFFS

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF OREGON**

8 UNITED STATES OF AMERICA,

9
10 Plaintiff,

11 vs.

12 DAVID BACON,

13 Defendant.
14

Case No. CR 05-333-BR

DEFENDANT’S MOTION FOR
RECONSIDERATION OF
DECEMBER 21, 2006 OPINION AND
ORDER DENYING MOTION FOR
NEW TRIAL

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16 **Background Statement is Inaccurate**

17 In its December 21, 2006 Opinion and Order the Court says that David Bacon was
18 charged with two counts of illegal transfers of firearms in violation of 18 USC §922(a)(5)
19 and §924(a)(1)(D) and three counts of knowingly making false statements on records
20 required to be made by federal law in violation of 18 USC §924(a)(1)(A). The Court also
21 says he was convicted on the above-described charges. *See* December 21, 2006 Opinion and
22 Order pages 2 and 3.

23 In fact, David Bacon was charged with and convicted on five counts of illegal transfers of
24 firearms and one count of knowingly making a false statement on a record required to be
25 made by federal law. *See* Jury Instructions – Docket Number 66 – and Verdict – Docket
26 Number 67.

Court's Reliance on *Oviatt v. Pearce* Misplaced

The Court relied on *Oviatt v. Pearce*, 954 F2d 1470, 1473 (9th Cir 1992) for the proposition that the Court is powerless to “substitute its own judgment about the factual premises that underlie the jury’s verdict.”

What the *Oviatt* court said was:

“This court may not ‘weigh the evidence or substitute its judgment for that of the jury,’ but rather must determine whether the verdict is supported by substantial evidence.” *The Jeanery*, 849 F2d at 1151; *see Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F2d 1001, 1014 (9th Cir 1985)(JNOV ‘is proper when the jury verdict is not supported by substantial evidence.’), *cert. denied*, 474 US 1059, 106 SCt 802, 88 LEd 2d 778 (1986).”

The Ninth Circuit thereby recognized that a jury verdict can be set aside by the trial court and by the court of appeals.

More importantly, however, is the fact that *Oviatt* is inapplicable here. *Oviatt* was a civil case. The Multnomah County Sheriff did not ask the Ninth Circuit to overturn an order denying a motion for new trial pursuant to Federal Criminal Rule of Procedure 33 (FCrRP 33).

David Bacon’s motion here is based on FCrRP 33. The Ninth Circuit has ruled that the trial court can and should make an independent determination on the adequacy of the evidence against the defendant when deciding a FCrRP 33 motion for new trial.

Daniel Kellington was an Oregon attorney accused and convicted of obstruction of justice. He moved for judgment of acquittal and for new trial. His motion for judgment of acquittal was granted by Judge Hogan. The government appealed. The court of appeals reversed Judge Hogan and remanded the case for sentencing.

On remand, Judge Hogan granted Kellington’s motion for new trial. The government appealed. The court of appeals affirmed Judge Hogan’s granting of the motion for new trial. *US v. Kellington*, 217 F3d 1084 (9th Cir 2000). The court of appeals explained that motions for new trial are different from motions for judgments of acquittal and so are the standards

1 used when deciding them. The court held:

2 ““A district court’s power to grant a motion for new trial is much broader than its
3 power to grant a motion for judgment of acquittal. The district court need not view
4 the evidence in the light most favorable to the verdict; it may weight the evidence and
in so doing evaluate for itself the credibility of the witnesses.””

5 *Id.*, 217 F3d at 1095, quoting *US v. Alston*, 974 F2d 1206, 1211 (9th Cir 1992).

6 This Court was wrong — and abused its discretion — when it refused to make its own
7 credibility determination on the question of when David Bacon transferred the firearm to
8 Scott Carrie on July 24, 2005.

9 For additional authority for the proposition that this Court is empowered to make its own
10 determination of facts when deciding a motion for new trial pursuant to FCrRP 33, see also
11 *US v. Ferguson*, 246 F3d 129 (2nd Cir 2001) and *US v. Washington*, 184 F3d 653 (7th Cir
12 1999) (which contains a survey of appellate opinions on the subject at page 658 of its
13 opinion).

14 Dated this 26th day of December 2006. JAMES E. LEUENBERGER PC

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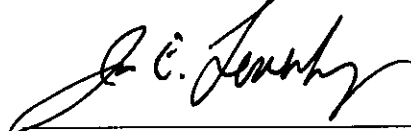
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