JURISDICTIONAL STATEMENT

This Court and the District Court have and had jurisdiction in this matter relating to Appellant/Defendant Dario Giambro (hereinafter "Appellant" or "Giambro"), as this was a criminal prosecution for possession of a firearm, specifically a Marble "Game-Getter", so-called, .22LR/44 caliber rifle, bearing serial number 9432, which was allegedly not registered to Giambro in the National Firearms Registration and Transfer Record (hereinafter "NFRTR"), in violation of 26 U.S.C. Sections 5861(d), 5841, 5845(a) and 5871.

On December 28, 2007[1], after trial, Giambro was sentenced to a term of incarceration of five months (credit for time served) and a fine in the amount of $50,000 by Judge Singal of the United States District Court, District of Maine.

Subsequently, on December 31, 2007, this appeal was timely filed.

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[1] The original Judgment and Commitment, dated December 28, 2007, was superceded by an Amended Judgment, dated January 8, 2008, which corrected a typographical error on the original (the original had noted that Mr. Giambro had pleaded guilty when, in fact, he had been convicted after a jury trial).

STATEMENT OF ISSUES

1. Whether it was error for the District Court to have excluded Appellant's expert witness, Eric Larson, from trial pursuant to Evidence Rules 702, 703 and 403 when Mr. Larson identified incompleteness and inaccuracies with the National Firearm Registration and Transfer Record through a statistical audit and analysis of NFRTR records, which rendered the reliability of the NFRTR subject to doubt?
2. Whether it was error for the District Court to have permitted the Government to rely upon the NFRTR in proving that the Appellant's subject firearm had not been registered, despite the incompleteness and inaccuracy of the NFRTR, pursuant to Fed. R. Evid. 803(10)?
3. Whether it was error for the District Court to have denied Appellant's motions for judgment of acquittal where the Government failed to present any evidence whatsoever respecting Appellant's knowledge that the subject firearm maintained characteristics which compelled its registration?

STATEMENT OF THE CASE

On April 25, 2007, Giambro was indicted by one-count Indictment for violation of 26 U.S.C. Sections 5861(d), 5841, 5845(a) and 5871 [Docket entry 1].

On June 21, 2007, after the Court's conduct of a competency hearing, Giambro was arraigned. Giambro pled not guilty to the Indictment [Docket entry 27].

On July 19, 2007, Giambro filed a motion *in limine*, supported by exhibits and the testimony of witness Eric Larson, [Docket entries 42, 43, 44 and 45] challenging the Government's reliance upon the NFRTR as incomplete and inaccurate, and therefore insufficiently reliable, pursuant to Fed. R. Evid. 803(10).

On August 27, 2007, the Government filed a parallel motion *in limine* seeking to exclude the testimony of Mr. Larson from trial [Docket entry 61].

On September 24, 2007, an evidentiary hearing was held on the aforesaid motions *in limine*. [Docket entry 73] After hearing, the Court excluded from trial the testimony of Mr. Larson and permitted the Government to rely upon the NFRTR [Docket entries 74].

On September 25, 2007, a jury trial was had.

Both at the conclusion of the Government's principal case, and after the closure of evidence, Giambro moved for a judgment of acquittal, pursuant to Fed. R. Crim. Pro. 29, on the principal grounds that the Government failed to present

any evidence whatsoever respecting Giambro's knowledge that the subject "Game-Getter" maintained characteristics which compelled its registration [Docket entries 78 and 80].

The trial court denied Giambro's motion for judgment of acquittal [Docket entry 81].

Later on that same date, September 25, 2007, Giambro was convicted [Docket entry 82].

On December 28, 2007[2], Giambro was sentenced to a term of incarceration of five months (credit for time served, which credit required Giambro to serve no additional time beyond the date of sentencing) and a fine in the amount of $50,000 by Judge Singal of the United States District Court, District of Maine [Docket entry 116].

On December 31, 2007, this appeal was timely filed [Docket entry 117].

[2] *See* note 1, *supra,* respecting the basis for the Amended Judgment, dated January 8, 2008.

STATEMENT OF THE FACTS

This case arises out of a shooting incident which occurred at Giambro's residence in Auburn, Maine on February 10, 2006. The facts of that incident are not central to this prosecution, and are being summarized in footnote below for the Court's background information.[3]

In execution of a search warrant on the evening of February 10, 2006 (as well as over the next morning) by the Auburn Police Department, 204 firearms were found at the home of Giambro, an admitted gun collector.

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[3] On that date, an individual (Richard McClain) came to the Giambro residence in the dead of night, unannounced and uninvited, ostensibly to pick up certain property stored there (which he claimed was his but as to which the ownership was the subject of some dispute.) Prior the night in question, McClain had been involved in unpleasantness with Giambro's son, Antonio: McClain claimed that he was owed monies by Antonio; of recent, Antonio had ceased communications with McClain. There was a growing hostility between these two men.

McClain was confronted immediately upon his arrival by Giambro's wife who asked him to leave and to contact Antonio. Rather than leaving as instructed, McClain "broke" open a locked garage door (McClain claimed the door was closed but unlocked) and began rifling through property stored there. Giambro's wife confronted him there, for the second time, and (again) asked him to leave repeatedly. McClain again refused to leave. Thereupon, Giambro came and confronted McClain outside the Giambro garage. There were a number of pushes back and forth between Giambro and McClain. McClain indisputably got the better of the confrontation and pushed Giambro down upon a piece of metal engine assembly on the ground, potentially causing him grave injury.

At that point, Giambro defensively discharged his firearm: A warning shot into the garage away from McClain. When McClain continued the confrontation, Giambro discharged a second warning shot into the ground. This shot apparently ricocheted off the frozen earth and struck McClain.

On the night in question McClain was a felon (pursuant to a Florida adjudication) with a history of assaultive behavior. McClain had told Giambro's son when they were still friends that he had assaulted a man with a club (or stick) in Florida and for that reason had served a prison term in Florida. McClain admitted at deposition that he did so to appear "tough." That information had been conveyed to Giambro prior to the night in question.

Aggravated felony charges was initially filed against Giambro in Maine state court (Androscoggin County Superior Court). *State v. Giambro*, CR-06-219 (Androscoggin Superior).

Ultimately, due to the fact that the case presented a viable self-defense (or defense of others) defense[4], the charges against Giambro were dismissed and Giambro received a complete discharge from state criminal prosecution.

Notwithstanding the foregoing, given the circumstances of the case and the numerosity of firearms obtained from the Giambro residence, this matter was referred to the Joint Violent Crime Taskforce, and referred to the prosecuting Assistant United States Attorney.

One (1) of the 204 firearms found at the Giambro residence – a certain Marble "Game-Getter", so-called, .22LR/44 caliber rifle, bearing serial number 9432 (manufactured between 1908 and 1914) -- was determined to be a firearm subject to NFRTR registration pursuant to of 26 U.S.C. Sections 5861(d), 5841, 5845(a) and 5871. That firearm, as well as a second firearm later determined to be *not* subject to registration, was seized.

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[4] Additionally, Giambro made a voluntary payment towards McClain's personal injuries occasioned by the shooting in satisfaction of McClain's potential (civil) personal injury claim, which was deemed to constitute an "accord and satisfaction" of the case to the satisfaction of the Androscoggin County District Attorney's Office

On April 25, 2007 -- presumably because Giambro had received a complete discharge from the state Superior Court and was in possession of a large number of firearms[5] – Giambro was indicted for violation of 26 U.S.C. Sections 5861(d), 5841, 5845(a) and 5871.

Giambro maintained that he had obtained the subject firearm from his father decades prior. Giambro asserted that he had no knowledge that the "Game-Getter" maintained characteristics that compelled its registration. However, Giambro recalled that a small piece of paper had been in the gun's case at the time of the Police's execution of the subject search warrant on February 10, 2006, which might have been a proof of registration if the "Game-Getter" needed to be registered. That small piece of paper was lost when the Auburn Police officers searched and seized his firearms and was not returned to him when the balance of firearms were returned to him months later.[6]

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[5] The "Game-Getter" was clearly an antique, curio weapon (of almost one-hundred years' age) which had, as best anyone knows, never been fired. The Government's motivation for its pursuit of this prosecution can only be seen in the context of the events of February 10, 2006, as detailed immediately above.

[6] Giambro did not testify at trial.

SUMMARY OF THE ARGUMENT

Stripped to its essence, this prosecution asserts that Giambro was aware of his obligation to register his "Game-Getter" with the NFRTR, failed to so register and that that failure was demonstrable through a search of the NFRTR's records.

It is axiomatic that this prosecution can be no better than the NFRTR search and records upon which it is predicated. That is to say: If and to the extent that the NFRTR is not a reliable authority respecting the fact of registration (or non-registration), this prosecution is not viable.

For that reason, Giambro directly challenged the viability of the NFRTR as a prosecution tool.

By motion *in limine* filed July 18, 2007, Giambro asserted that the NFRTR was incomplete and inaccurate and, therefore, not sufficiently reliable for the Government to rely upon in its prosecution.

At evidentiary hearing, Giambro presented a witness, Eric Larson -- who had undertaken a statistical analysis of the NFRTR and who had reviewed public and other audit records of the NFRTR -- together with supporting exhibits. Mr. Larson and the accompanying exhibits detailed inaccuracies, both statistical and anecdotal, with the NFRTR.

The District Court rejected Giambro's assertion that the NFRTR was incomplete and inaccurate and, therefore, not sufficiently reliable for the

Government to rely upon in its prosecution: Relying upon Rules 702, 703 and 403, the District Court excluded the testimony of Mr. Larson from trial and denied Giambro's motion *in limine.*

Both the trial court's excluding of Mr. Larson from trial and its sustaining of the NFRTR as a viable prosecution device were error.

Trial proceeded. The Government presented evidence at trial that Giambro could distinguish his "Game-Getter" from his other 203 firearms.

Additionally, the parties stipulated that the "Game-Getter" maintained characteristics which required its registration with the NFRTR.

However, the Government presented no evidence at trial that Giambro could recognize that the "Game-Getter" had characteristics which subjected it to the registration requirement.

Accordingly, at the close of the Government's case, Giambro moved for a directed verdict of acquittal on the grounds that the Government had failed to sustain its burden respecting Giambro's actual knowledge that the characteristics of the "Game-Getter" were such that that firearm required registration.

Despite viewing the evidence as presenting a "close case", the District Court rejected Giambro's motion for judgment of acquittal.

In light of the nature and extent of the Government's proof at trial, that motion should have been granted and the trial court's denial of same constituted error.

ARGUMENT

I. **THE DISTRICT COURT ERRED IN ITS DISPOSITION OF GIAMBRO'S MOTION *IN LIMINE* BY BOTH (A) SUBSEQUENTLY PRECLUDING FROM TRIAL THE TESTIMONY OF GIAMBRO'S EXPERT, ERIC LARSON, AND BY (B) REFUSING TO EXCLUDE TESTIMONY RESPECTING THE ABSENCE OF ANY REGISTRATION RECORDS FROM THE NFRTR RELATING TO THE SUBJECT "GAME-GETTER".**

Stripped to its essence, this prosecution asserted that (a) Giambro was in possession of a certain Marble "Game-Getter", so-called, .22LR/44 caliber rifle, bearing serial number 9432; (b) that he was aware that the characteristics of the said "Game-Getter" were such that that firearm had to be registered and (c) that a search of the National Firearms Registration and Transfer Record (the "NFRTR") established that the firearm had not, in fact, been registered.[7]

Immediately prior to trial, Giambro brought a motion *in limine,* asserting that the NFRTR was incomplete and unreliable, and was therefore not trustworthy under F.R.E. 803(10). A testimonial hearing was had on that motion. During that hearing, Giambro offered the testimony of Eric Larson, who had undertaken a

[7] A factual issue existed whether Giambro had, in fact, been aware of the characteristics which compelled the "Game-Getter"'s registration with the NFRTR.

statistical (and historic) evaluation of the NFRTR. Transcript of Hearing on Motion *In Limine,* September 24, 2007, hereinafter [Tr. *In Limine*] at 11-102.

At the conclusion of hearing on the *in limine* motion, the District Court excluded the testimony of Mr. Larson from trial pursuant to the Government's motion and Rules of Evidence 702, 703 and 403. The District Court refused to exclude evidence of the NFRTR from trial.

This Court reviews the District Court's findings of fact for clear error. *United States v. Fiasconaro*, 315 F.3d 28, 34 (1st Cir. 2002); *United States v. Martinez-Molina*, 64 F.3d 719, 726 (1st Cir.1995).

A. The Court Erred By Precluding From Trial the Testimony of Giambro's Expert, Eric Larson.

Viewed in the foregoing light, the testimony of Mr. Larson was entirely admissible and the District Court's exclusion of same error.

Mr. Larsen testified at *in limine* hearing, in summary, that he had conducted a number of statistic analyses of the completeness and accuracy of the NFRTR as a private aside to his work with the United States Government Accountability Office[8]; that his work with the USGAO involved analyzing statistical databases and administrative records [Tr. *In Limine* at 14], including statistical records

[8] Notwithstanding the foregoing, Mr. Larson stated that his opinions were his and did not necessarily reflect the official positions of the USGAO. [Tr. *In Limine* at 14].

(principally in the area of immigration) "considerably more complicated" that the NFRTR, *id*.; that he had applied the prevailing statistical rules and auditing standards (so-called "generally accepted government auditing standards" or GAGAS) to his statistical analysis of the NFRTR [Tr. *In Limine* at 16, 17] and that he applied those standards to his specialized knowledge of the class of firearms represented by the subject "Game-Getter" [Tr. *In Limine* at 19-21].[9]

Mr. Larson testified to his opinion that the NFRTR was both incomplete and inaccurate, by a variety of objective, statistical measures. [Tr. *In Limine* at 24 *et seq.*]. Mr. Larson offered and referenced a number of "reports" [*In limine* hearing exhibits 17-19, 17A, 18A-C, 19A, 21 and 23] and transcripts of testimony both in Congressional hearings and otherwise [*In Limine* hearing exhibits 6, 8, 12A and 22] detailing the nature and extent of the incompleteness and inaccuracy. Additionally, Mr. Larson offered a number of anecdotal events which further evidenced the incompleteness and inaccuracy of the NFRTR [Tr. *In Limine passim*].

After the conclusion of the evidentiary *in limine* hearing, the District Court excluded the testimony of Mr. Larson from trial pursuant to Rules of Evidence 702, 703 and 403 on the grounds that Mr. Larson's evidence was not based on

[9] The general subject matter of Mr. Larson's testimony respecting the subject motion *in limine* – the incompleteness and inaccuracy of the NFRTR – was also the subject matter of presentations to Congress. [Tr. *In Limine* at 21 *et seq.*].

"sufficient facts or data", that Mr. Larson had failed to "apply the [appropriate] principles and methods to the facts of the case" to be admissible pursuant to Rule 702 [Tr. *In Limine* at 110-116] and had relied "unduly" upon anecdotal evidence, pursuant to *United States v. Sebaggala*, 256 F.3d 59 (1st Cir. 2001)[10] [Tr. *In Limine* at 112-116].[11]

The exclusion of Mr. Larson was an inappropriate application of Rules 702 and 703, and was error.

Rule 702 requires that an expert's opinion "both rests on a reliable foundation and is relevant to the task at hand", *Daubert v. Merrill Dow Pharms.*,

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[10] Parenthetically, it is respectfully submitted that the District Court misapplied *Sebaggala* to this case. *Sebaggala* involved the proffering of a purported "linguistics" expert to testify on the linguistic and cultural traits of an African tribe which would, according to the defendant in that case, have aided the jury in assessing the defendant's ability to understand certain bureaucratic forms at the heart of a perjury/false swearing prosecution. In that case, this Court rejected the expert on the grounds that the expert was not necessary.

> *Sebaggala*, at 66: "One of the criteria for the admission of expert testimony under Rule 702 is whether a lay person can be expected to decide the issue intelligently without an expert's help. *See United States v. Salimonu*, 182 F.3d 63, 73-74 (1st Cir. 1999); *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995); *see also Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998). Here, common sense supports the district court's determination that jurors would understand, without the aid of expert testimony, that an individual whose primary language is other than English might have difficulty comprehending bureaucratic forms."

The analysis of *Sebaggala* has no relevance to this case.

[11] Although the District Court stated that it was excluding the Larson testimony on the separate and independent basis of Rule 403 insofar as it would "mislead" the jury [Tr. *In Limine* at 109, 110], the Court provided no explanation of its decision in that regard.

Inc., 509 U.S.579 (1993); *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147-49 (1999) (applying *Daubert* to all expert testimony); *United States v. Vargas,* 471 F. 3d 255, 261 (1st Cir. 2006).

Rule 703 dictates that the facts or data upon which an expert bases an opinion be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, "[t]he rationale for this aspect of Rule 703 [being] that experts in the field can be presumed to know what evidence is sufficiently trustworthy and probative to merit reliance." 29 Charles A. Wright and Victor J. Gold, *Federal Practice and Procedure* § 6273, at 311 (1997).

Rules 702 and 703 require that the trial judge act as an independent "gatekeeper" to ensure that the foregoing standards are met. *See Daubert, supra,* 509 U.S. at 595-96; *United States v. Cory,* 207 F. 3d 84 (1st Cir. 2000).

Indisputably, applied statistics represents an objective and scientifically-precise (and measurable) science. Likewise, indisputably, Mr. Larson identified measurable (objectively-quantifiable) incompleteness/ inaccuracies with the NFRTR. Therefore, the requirements of *Daubert* and *Kumho* were met.

The question informing the trial court's decision on admissibility of the Larson testimony after the satisfaction of the *Daubert* and *Kumho* threshold, thus becomes one of *degree* -- whether the objectively-identified incompleteness and inaccuracy is so statistically meaningful as to be legally relevant – and the NFRTR

therefore incomplete or inaccurate enough to be meaningfully incomplete or inaccurate.

The extent to which such measurable incompleteness and inaccuracy, demonstrated through an objective and scientifically-precise statistical process, rise to the level where a reasonable doubt existed respecting Giambro's guilt is necessarily a jury question.

The Court erred by denying Giambro the ability to present the Larson testimony to the jury.

B. The Court Erred By Refusing to Exclude Testimony Respecting the Results of the Government's Search of the NFRTR, Pursuant to Rule 803(10).

Leaving aside the challenge to the reliability of the NFRTR presented through the testimony of Mr. Larson, discussed immediately above, the reliability of the NFRTR has been questioned in a number of contents, entirely independent from this case. As cited by Giambro in his memorandum in support of his motion *in limine* – and as detailed by Mr. Larson at hearing --, on numerous occasions since 1998, Congressional audits of the NFRTR have revealed the NFRTR to be significantly unreliable. Memorandum at 3, 4.

The question of Rule 803 admissibility is a mixed question of law and fact. Accordingly, this Court's ultimate determination regarding the admissibility of

records relating to the NFRTR is made *de novo. United States v. Proctor*, 148 F. 3d 39, 41 (1st Cir. 1998).

Notable for this Court's purposes in its consideration of this appeal, an exhaustive *academic* study of the deficiencies with the NFRTR has very recently been completed.[12] That study has revealed that a significant risk of due process violations arises from the "interaction of the inaccuracies of the NFRTR and the Federal Rules of Evidence". *Id.* That exhaustive study has expressly criticized the District Court's evaluation of the NFRTR in this case[13], as well as numerous Court of Appeals decisions predicated upon the assumption that the NFRTR is accurate.[14]

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[12] Prince, *Violating Due Process: Convictions Based on the National Firearms Registration and Transfer Record when its "Files are Missing"* (unpubl.), available on www.princelaw.com/violatingdueprocess.pdf. Copies of the referenced unpublished article have been made separately available to the Court of Appeals by the undersigned.

[13] As argued by its author: By asserting that the NFRTR is inaccurate, the defendant asserts that any evidence of the nonexistence of his/her registration is inadmissible. Federal Rule of Evidence, Rule 803(10), provides that there exists an exception to the hearsay rule in situations only of accurate records. While the Government is likely to offer a certificate of nonexistence of a NFRTR record to show, under 803(10), that neither the defendant's name nor the firearm's serial number exist in the NFRTR, such certificates are based on a search of the NFRTR but fail to acknowledge the numerous Treasury Department and Justice Department Inspector General reports and Congressional Hearings, which depict the NFRTR to be inaccurate.

The hearsay exception (803(10)) contains the principle that, "Evidence that is otherwise admissible under an exception to the hearsay rule is admissible primarily because evidence of that kind is generally trustworthy, but if, in a particular instance, the circumstances indicate a lack of trustworthiness, the evidence should be excluded." Nonetheless, Judge Singal [in the instant case], held that defendant Giambro failed to meet this standard because he could not show that the NFRTR was inaccurate as it pertained to him. This holding lacks any form of commonsense, since one cannot show an absence of a record, but for the record not existing. While Judge Singal based his decision on *U.S. v. Rith* [164 F.3d 1323 (10th Cir. 1999)], which declared, in relation to a Sixth Amendment challenge, that the defendant had failed to allege any "defect in the NFRTR as it pertain[ed] to him. General claims of unreliability, particularly those

Evidence admitted pursuant to Rule 803(10) must meet a threshold standard of reliability. *See United States v. Ventura-Melendez,* 275 F.3d 9 (1st Cir. 2001). For the reasons discussed in the context of the September 24, 2007 motion *in limine* hearing, the NFRTR did not (and does not) meet that threshold standard.

Accordingly, the District Court's failure to exclude evidence of the NFRTR from trial was error.

II. THE DISTRICT COURT ERRED IN ITS DENIAL OF GIAMBRO'S MOTION FOR A JUDGMENT OF ACQUITTAL.

At the conclusion of the Government's case-in-chief – and renewed again after the closure of evidence – Giambro moved for a judgment of acquittal, pursuant to Rule 29 [Docket entries 78 and 80].

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that rely upon outdated information, are not sufficient to raise a constitutional deficiency," the court failed to accept the evidence of the inaccuracies in the NFRTR.

[14] *See, United States v. Rith,* 164 F.3d 1323 (10th Cir. 1999); *United States v. Harrison,* No. 95-1678, 1996 U.S. App. LEXIS 13225 (2d Cir. 1996); *United States v. Shaffer,* 1993 U.S. App. LEXIS 1461 (9th Cir. 1993); *United States v. Rigsby,* 943 F.2d 631 (6th Cir. 1991); *United States v. Sullivan,* 919 F.2d 1403 (10th Cir. 1990)*; United States v. Metzger,* 778 F.2d 1195, 1202 (6th Cir. 1985); *United States v. Combs,* 762 F.2d 1343, 1348 (9th Cir. 1985); *United States v. Toner,* 728 F.2d 115, 120 (2d Cir. 1984); *United States v. Beason,* 690 F.2d 439, 445 (5th Cir. 1982); *United States v. Moschetta,* 673 F.2d 96 (5th Cir. 1982).

That motion was predicated upon the Government's failure, at trial, to present any evidence that Giambro was aware that the characteristics of the "Game-Getter" subjected it to the registration requirement[15] [Tr. at 111-112].

Giambro's awareness that the characteristics of the "Game-Getter" subjected it to the registration requirement was an essential element of the offense charged. This element was properly identified to the jury prior to the commencement of the evidentiary portion of the trial [Tr. at 12, 13] and in the Court's closing [Tr. at 170]: "Third [element of the offense]: The defendant knew the firearm was a weapon with a combined shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading."

This element is fundamentally distinct from whether the "Game-Getter" was actually subject to the registration requirement (which the parties stipulated the firearm to be).

The testimony presented at trial germane to Giambro's knowledge that the characteristics of the "Game-Getter" subjected it to the registration requirement may be summarized as follows:

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[15] The parties stipulated that the characteristics of the "Game-Getter" subjected it to the NFRTR registration requirement, but not that Giambro was aware of that fact.

1. On February 10, 2006, Detective Chad Syphers of the Auburn Police Department [during the execution of a search warrant] found a "large number" of firearms in the Giambro residence. [Tr. at 40, 41, testimony of Detective Syphers]. Among those firearms was the subject "Game-Getter". [Tr. at 41-44, testimony of Detective Syphers].

2. Detective Syphers knew from prior experience that the "Game-Getter" had characteristics (principally, barrel length) which required its registration. [Tr. at 44, 45, testimony of Detective Syphers].

3. When retrieved from Giambro's home by the Auburn Police Department, the "Game-Getter" was in its original box. [Tr. at 47, testimony of Detective Syphers].

4. The parties stipulated that the "Game-Getter" had characteristics which required its registration in the NFRTR, pursuant to 26 U.S.C. Section 5845(e) [Tr. at 60, 61].

5. The subject "Game-Getter" did not appear within the NFRTR records as having been registered. [Tr. at 58-109 *passim*; specifically 72, lines 3-7].

6. On December 22, 2006, Giambro was present at the Auburn Police Department to retrieve the various firearms seized on February 10,

2006. [Tr. at 109]. The various firearms were "placed out in front of him". *Id.*

7. At that time, Giambro stated that "they weren't all there". *Id.*

8. Giambro stated that two were missing, including the subject "Game-Getter". [Tr. at 110].

That testimony does not even colorably establish that Giambro had knowledge that the characteristics of the "Game-Getter" compelled its registration.[16] Specifically, the foregoing evidence is absent any evidence whatsoever that Giambro had any knowledge of the particular barrel-length or discharge/re-loading features of the weapon.

The Government predicated its objection to Giambro's motion for judgment of acquittal on the fact that Giambro recognized that the "Game-Getter" was missing on December 22, 2006 [Tr. at 180] when he retrieved the balance of his firearms seized from his residence on February 10, 2006: When the balance of his firearms were retrieved, Giambro noticed that the "Game-Getter" (and another firearm, presumably the .22 likewise seized under a suspicion of being subject to NFRTR but later determined to be entirely legal [*see* Tr. at 48]) were not present among the firearms produced.

[16] The District Court characterized the motion as a "close case" [Tr. at 181, line 5].

This fact, of course, means only that Giambro could *recognize/distinguish* the "Game-Getter" from his other firearms. That does not mean that he could recognize that the "Game-Getter" had characteristics which subjected it to the registration requirement, *to wit:* being a weapon with a combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which a single discharge can be made from either barrel without manually loading. [Tr. at 60, 61, *stipulation*]. The Government offered no evidence of any of the following:

i. that the firearm had ever been taken out of its box by Giambro (other than it had apparently at least once been viewed by him, perhaps in the box, from which Giambro obtained an appreciation of what the "Game-Getter" looked like);

ii. that it ever been fired or discharged by Giambro (from either or both barrels);

iii. that Giambro had ever measured its barrel lengths;

iv. that Giambro was aware of from what points on a firearm a barrel is measured by (from the internal chamber or from the edge of the exterior casing);

v. that Giambro could "eyeball" or estimate the distances represented by 12 and 18 inches, respectively;

vi. that Giambro recognized or could appreciate the difference between a shotgun and a rifle barrel (other than the disingenuous suggestion that the jury could “infer” that Giambro “was a collector”, given the large number of firearms obtained from his premises[17]); or

vii. that Giambro had ever loaded the “Game-Getter”, manually or otherwise.

A motion for a judgment of acquittal under Fed. R. Crim. Pro. 29 should be granted where “after assaying all the evidence in the light most amiable to the government, and taking all reasonable inferences in its favor, a rational fact-finder could [not] find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime." *United States v. O'Brien*, 14 F.3d 703, 706 (1st Cir.1994); *United States v. Dwinells,* 508 F. 3d 63 (1st Cir. 2007); *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir.1997) (the trial court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction”, viewing all of the evidence in the light most favorable to the verdict in determining whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt). This Court reviews a trial court's Rule 29 determination *de novo*, applying the foregoing standard. *See*

[17] The precise number of firearms taken from the Giambro premises was not stated to the jury. [Tr. at 40-42]

United States v. Moran, 312 F.3d 480, 487 (1st Cir.2002); *United States v. Diaz*, 300 F.3d 66, 77 (1st Cir. 2002).

Giambro certainly concedes – as he must -- that when a record is fairly susceptible of two competing scenarios, the choice between those scenarios is for the jury. *See United States v. Cruz-Arroyo*, 461 F.3d 69, 74 (1st Cir.2006); *United States v. Fenton*, 367 F.3d 14, 18 (1st Cir.2004); *see also United States v. Guerrero-Guerrero*, 776 F.2d 1071, 1075 (1st Cir.1985) (Breyer, J.) (explaining that jurors are "free to choose among varying interpretations of the evidence, as long as the interpretation they choose is reasonable") and that, ultimately, the test is whether the evidence, taken in its entirety, supports the judgment of conviction; if it does, "[the government] need not rule out other hypotheses more congenial to a finding of innocence." *United States v. Gifford*, 17 F.3d 462, 467 (1st Cir.1994); *United States v. Carroll, supra*.

However, here, the record offered forth no competing scenarios: Given the *complete absence* of any evidence whatsoever respecting Giambro's knowledge of the characteristics of the "Game-Getter", no reasonable jury could have found the evidence adequate to ground a conviction of Giambro, even taking all the evidence, direct and circumstantial, in the light most hospitable to the verdict and resolving all evidentiary conflicts in favor of the verdict.

As discussed above, there simply *was no evidence* presented at trial that Giambro could recognize that the "Game-Getter" had characteristics which subjected it to the registration requirement. *See supra.*

By reason of the foregoing, the District Court should have granted Giambro's motion for a directed verdict at the conclusion of the case, and its failure to do so constitutes error.

CONCLUSION

For the foregoing reasons, the conviction should be reversed and the Indictment dismissed or, alternatively, this matter should be remanded back to the District Court for further proceedings consistent with the foregoing.

Dated at Lewiston, Maine, this 14th day of February, 2008.

Respectfully submitted,

_____

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Dario Giambro

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Certificate of Compliance with type volume limitation, typeface requirements and typestyle requirements

1. This brief complies with the type volume limitation of Fed.R.App.P. 32 (a)(7)(B) because this brief contains (5,555) words, including footnotes and endnotes, and has less than 30 pages, excluding parts of the brief exempted by Fed.R.App. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

CERTIFICATE OF SERVICE

I, David J. Van Dyke, Esq., Attorney for the Defendant-Appellant Dario Giambro, in the within matter, certify that I have on this delivered a copy of Appellant's Brief by mailing said copy via U.S. mail, postage pre-paid to the following

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DATED: March 14, 2008

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ADDENDUM

1. Indictment, dated April 25, 2007

2. Order on Motions *In Limine*, dated August 17, 2007

3. Judgment, dated December 28, 2007

4. Amended Judgment, dated January 8, 2008