

**United States Court of Appeals
For The Eighth Circuit**

No. 07-2514 & 07-2888 WA

United States of America, Appellee

v.

Hollis Wayne Fincher, Appellant

**Appeal from
United States District Court
Western District of Arkansas
Fayetteville Division**

**Honorable Jimm Larry Hendren
Chief United States District Judge**

APPELLEE'S BRIEF

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SUMMARY OF THE CASE AND STATEMENT ON ORAL ARGUMENT

The appellant, Hollis Wayne Fincher, was convicted by a jury of knowingly possessing a machine gun in violation of 18 U.S.C. §§ 922(o) and 924(a)(2) and with knowingly possessing an unregistered firearm in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. Prior to the trial, the United States filed a Motion in Limine to Preclude Fincher from Arguing Matters of Law to the Jury concerning Fincher's anticipated Second Amendment defense. The district court granted the motion in part and denied it in part, and conducted a hearing outside the presence of the jury in which it listened to Fincher's "evidence" (consisting of Fincher's proffered testimony) in order to determine whether such testimony amounted to "evidence" appropriate for a jury's consideration. After hearing the proffered testimony, the district court concluded that even if a jury were to believe Fincher's testimony in its entirety, such evidence was insufficient, as a matter of law, to establish that Fincher's possession of the weapons was reasonably related to preservation or efficiency of a well-regulated militia as he would be required to do under well-established Supreme Court and Eighth Circuit precedent interpreting the Second Amendment. Accordingly, Fincher was not allowed to testify before the jury.

Fincher was subsequently sentenced at the bottom of the advisory guidelines to 78 months imprisonment, two years supervised release, a \$1,000 fine, and a \$200 special assessment. The fine was a substantial departure below the advisory guideline fine range. After the sentencing hearing, information came to the court's attention that Fincher misrepresented his true financial status. As a result, the district court filed an Order requesting that this Court remand the case back to it so that it may re-sentence Fincher in accordance with the true facts concerning his financial condition. Fincher appeals his conviction and sentence on Second Amendment grounds, arguing that the district court abused its discretion by not allowing Fincher to testify before the jury. Fincher also contends that he should be granted *in forma pauperis* status on appeal and that the district court lacks jurisdiction to re-sentence him. The United States submits that the district court did not abuse its discretion with respect to any of its evidentiary rulings, that Fincher is not entitled to *in forma pauperis* status on appeal, and that remand for re-sentencing is appropriate under the circumstances of this case. The United States further submits that the facts and legal arguments are adequately presented in the briefs, exhibits and record. The United States waives oral argument.

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STATEMENT OF THE ISSUES

I. The District Court did not Abuse its Discretion When it Partially Granted the Government's Motion in Limine to Preclude Defendant From Arguing Matters of law to the Jury.

United States v. Miller, 307 U.S. 174, 178 (1939)

United States v. Peck, 161 F.3d 1171, 1174 (8th Cir. 1998)

Robinson v. Potter, 453 F.3d 990, 995 (8th Cir. 2006)

II. The District Court did not Abuse its Discretion When it Determined That Fincher's Proffered Testimony was not Appropriate for the Jury's Consideration. Moreover, to the Extent That Fincher Otherwise Challenges his Convictions on Second Amendment Grounds in the Instant Appeal, Such Arguments are Without Merit.

United States v. Miller, 307 U.S. 174, 178 (1939)

United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992)

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IV. The Circumstances of This Case Support the District Court's Request for a Remand for Re-sentencing.

United States v. Tjaden, 473 F.3d 877 (8th Cir.2007)

Koon v. United States, 518 U.S. 81, 113 (1996)

United States v. Bishop, 774 F.2d 771, 776 (7th Cir.1985)

STATEMENT OF THE CASE

On November 15, 2006, the appellant, Hollis Wayne Fincher (hereinafter “Fincher”) was named in a two count Indictment filed by a grand jury in the Western District of Arkansas. (Docket Entry #1) Count One of the Indictment charged Fincher with knowingly possessing a machine gun in violation of 18 §§ U.S.C. 922(o) and 924(a)(2). Count Two charged Fincher with knowingly possessing an unregistered firearm in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. On November 20, 2006, Fincher appeared for arraignment and pled not guilty. (Docket Entry #9)

On December 29, 2006, the United States filed a “Motion in Limine to Preclude Defendant from Arguing Matters of Law to the Jury.” (Docket Entry #19) On January 9, 2007, the district court held a hearing on the Motion in Limine and granted it in part and denied it in part. On January 10, 2007, Fincher’s trial commenced. After the Government rested, the district court heard proffered testimony of Fincher which he desired to submit to the jury in support of his Second Amendment defense. The district court determined that Fincher’s proposed testimony was inappropriate for a jury’s consideration and did not allow him to testify before the jury. On January 12, 2007, Fincher was convicted by the jury on both counts.

On June 22, 2007, the district court sentenced Fincher to 78 months imprisonment on each count of conviction (to run concurrently), two years supervised release, a \$1,000 fine, and a \$200 special assessment. (Docket Entries #47-50; AT, pp. 750-752) The district court subsequently received information which led it to believe that Fincher misrepresented his financial status. On July 3, 2007, Fincher appeared for an *in forma pauperis* hearing. On July 27, 2007, the district court issued an Order in connection with the *in forma pauperis* hearing in which it determined that, contrary to its prior determinations, Fincher actually had not been financially unable to obtain counsel at any time throughout the proceedings and that the previous appointments of court-compensated attorneys for Fincher had been improvidently made. As a result of that determination, the district court took the unusual step of submitting its July 27, 2007 Order to this Court, recommending that this Court refuse to grant Fincher *in forma pauperis* status on appeal, and requesting this Court to remand the matter back to district court for re-sentencing. On August 27, 2007, this Court filed an Order which stated that “The district court’s request to remand the case for re-sentencing will be taken with the case for consideration by the panel to which this case is submitted for disposition on the merits” and that “No further action will be taken concerning

appellant's IFP status as he is represented by retained counsel.” (Docket Entry #73)

The appellant subsequently filed the instant appeal.

STATEMENT OF THE FACTS

Preliminary Proceedings:

The appellant, Hollis Wayne Fincher (hereinafter “Fincher”) is a “Lieutenant Commander” of the “Militia of Washington County, Arkansas” (hereinafter, the “MWC”). The MWC was founded by Fincher in 1994 and its headquarters is located near Fincher’s hometown of Black Oak, Arkansas. The MWC’s website (www.arkansasmilitia.com) indicates that the MWC musters once per week and that it is open to “all defenders of liberty.” Fincher’s appeal brief states that drills are held several times per year and that, during drill, the MWC “conducts military and weapons training.” (Appellant’s Brief at p. 8) The MWC is not registered as a militia or sanctioned in any fashion by the Office of the Governor of the State of Arkansas. (Appeal Transcript, hereinafter “AT,” pp. 465-466)

Fincher was indicted after a March 2006 newspaper article containing an account of Fincher being in possession of illegal, unregistered machine guns came to the attention of Special Agent Wade Vittitow of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”). (AT, p. 235) An investigation commenced which resulted in a search warrant being obtained and executed at Fincher’s residence on November 8, 2006. (AT, p. 236) Pursuant to the warrant,

several machine guns and an unregistered sawed-off shotgun were seized from gun cabinets in Fincher's residence. (AT, pp. 236-247) On November 9, 2006, Fincher was arrested pursuant to a federal Complaint. (Docket Entry #1) At his initial appearance on that date (Docket Entry #2), Fincher executed a document entitled "Financial Affidavit In Support Of Request For Attorney Or Other Court Services Without Payment Of Fee." In the Financial Affidavit, Fincher indicated that he owned a home and 120 acres near Fayetteville, Arkansas (hereinafter "the Property"), and gave the value of the Property as "unknown."

On November 15, 2006, Fincher was named in a two count Indictment filed by a grand jury in the Western District of Arkansas. (Docket Entry #1) Count One of the Indictment charged Fincher with knowingly possessing a machine gun in violation of 18 U.S.C. §§ 922(o) and 924(a)(2). Count Two charged Fincher with knowingly possessing an unregistered firearm in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. On November 20, 2006, Fincher appeared for arraignment before the Honorable Beverly Stites-Jones, United States Magistrate Judge, and pled not guilty. (Docket Entry #9)

Government’s Motion in Limine to Preclude Defendant from Arguing Matters of Law to the Jury:

On December 29, 2006, the United States filed a “Motion in Limine to Preclude Defendant from Arguing Matters of Law to the Jury.” (Docket Entry #19) On January 9, 2006, one day before Fincher’s jury trial began, the Honorable Jimm Larry Hendren, Chief United States District Judge for the Western District of Arkansas, held a hearing concerning the Government’s Motion in Limine. At the hearing, the Assistant United States Attorney (hereinafter AUSA) explained that “[t]he Government felt this motion was necessary in light of the nature of this trial and the issues that would be brought before the Court, and filed this in an effort to seek a ruling that the jury, in fact, would hear only the facts of the case and not be asked to make rulings of matters of law and matters of Constitutional law.” (AT, p. 48) The AUSA further explained that the Government expected the defendant to attempt to raise before the jury Second Amendment cases and issues which the Government believed amounted to legal argument and asked:

That the Court grant our Motion in Limine, and that based on the evidence presented to the jury, the evidence would be fact only and that it would be a factual basis that would help the trier of fact determine the elements of the offense as the Court instructs, and that all other arguments, if they are matters of law, constitutional law as it pertains to the Second Amendment in the commerce clause, any interstate nexus are matters within the province of the Court. (AT, pp. 57-58)

In response to the arguments of the AUSA and defense counsel (Fincher was represented prior to and during trial by Oscar Stilley), the district court stated as follows:

Now, by reason of the examples, it would seem to me that if the Defendant takes the position under Miller that he does have evidence to show that his possession - and I understand - from what's been said, I don't think there's any question about his possession. I think Mr. Fincher admits possession of the articles in question. But if he intends to take the position showing that the possession of it had some reasonable relationship to the preservation or efficiency of a well-regulated militia, that he would have to do that. And I don't think there's any bar by saying, well, because of the presumption of innocence and the fact he doesn't have to prove anything, he doesn't have to assert it, I think he clearly does. Otherwise, there's no way that the Court can require the Government to meet that and basically prove the nonexistence of something that's not asserted or concerning which no evidence has been offered. Now I don't know to what extent you have evidence to offer in that regard. I think to the extent that you do, I think it's appropriate under Miller for it to be presented. But I think that if the evidence would consist of attorneys assertions, that's not evidence. As you know, attorneys can't testify, and I'll instruct this jury, as I do in all jury cases, that the statements, questions, and arguments of the attorneys are not evidence. And they're not, as you attorneys know that. And so I will not, obviously, permit these contentions of relationships, reasonable relationships to the preservation or efficiency of a well-regulated militia, to come through attorneys' assertions . . . I think to the extent if you're saying "Well, Judge, I'm going to have a witness get up and provide a lecture to the jury about the Second Amendment," I'm not going to permit that because I'll instruct the jury what the Second Amendment says at the appropriate time if it's necessary to do that. And, again, I won't permit, as I've already mentioned at length, the attorney to do that, to try to present that contention to the jury by the way of arguments or in

questions. It's going to have to be evidence, which is going to be, you know, what evidence comes in, if it comes in the form of testimony or documentary evidence. (AT, pp. 72-74)

The district court then stated that it intended to take a recess before ruling on the Motion in Limine, but before doing so, the District Court continued as follows:

. . . what I'm really interested in ruling on this motion is what areas should be placed off limits. I think the attorneys have agreed, and I applaud that, that certainly they both understand the Court's function here is to determine issues of law, evidence, and procedure. That's my job. In effect, every trial is essentially a twin undertaking if you have a jury. The judge, being myself in this case, is tasked with determining issues of law, evidence and procedure. Those matters are not for the consideration of the jury . . . The other part of the trial, obviously, is the determination of disputed facts, and that's what a jury does. And what we want to be sure is that the jury hears, and what's presented to it, is the evidence that relates to those disputed facts. It's not necessary for the jury to try to hear and/or decide evidence, law, and procedure issues, because those are issues that the Court is obliged to decide . . . So I'm confident with that part of my order, with the agreement of the parties, that that part of my order is going to be, obviously, that the matters of law, evidence, and procedure will be left to the Court, and they will not be presented to the jury. Now, that's the general proposition. The more specific proposition - and I've already addressed the one, I think - with the language in Miller, that if it is the case that a Defendant is asserting - and I think that's what I'm hearing here - is asserting that the possession in question should not be criminalized by reason of the Second Amendment through the concept that it had some reasonable relationship to the preservation or efficiency of a well-regulated militia. I think that if there is evidence - evidence, now - to be presented to a jury to decide whether that's fact or not, then it will be permissible for the Defendant to present that, but not through attorneys' arguments or otherwise. (AT, pp. 75-77)

Following a recess, the district court proceeded to grant in part and deny in part the Government's Motion in Limine, explaining its ruling as follows:

Overriding the motion, I think, is the contention by the Government that the Defendant should not try to make arguments to the jury concerning law or evidence, or procedure for that matter, and the argument is that these areas of concern are quintessentially within the province of the judge and not matters to be addressed to the jury. Starting with the last first, the attorneys, I think, have both reiterated on the record their understanding that, of course, that is true, the Court is the arbiter of law, evidence, and procedure, and that the jury is to decide disputed facts after they have been told what the law is by the Court and after they have heard the evidence which the Court has determined in its rulings on the evidence are permissible for their consideration in line with the procedure that the Court has itself determined that will be followed. So I thank the attorneys for that agreement, and that's of course, consistent with what I think we were all taught in law school, so I think that part of the ruling is certainly easy, and so to that extent, that part of the motion is granted . . . Now, with respect to the other matters, I've already mentioned that in light of the teachings of the Miller case - and I think both parties agree that U.S. v. Miller is the leading case, perhaps, on this question of the regulation of machine guns. I've already mentioned my understanding of that case to be that if a defendant asserts and contends, as does the Defendant in this case, that his possession of the weapon in question was reasonably, and is reasonably, related to the - a well-regulated militia, as contemplated by the Second Amendment to the United States Constitution, that the Court cannot, and should not as a matter of limine, rule, going in, that such evidence is not properly receivable. I think that clearly it is if there is such evidence. And I've already gone on at length about the fact that it must be evidence and it must not be argument. Now, to that extent, I will deny the Motion in Limine and not direct the Defendant that he cannot seek to introduce that evidence . . . I will say I will not bar it on a Motion in Limine by reason of the Miller case that I've already talked about.

But whether it is otherwise admissible is a matter to be addressed if and when it's offered. (AT, pp. 84-86)

Trial: Defendant's Motion for Directed Verdict and Proffered Testimony:

Fincher's trial began the day after the district court issued its ruling on the Motion in Limine. After the Government rested its case, Fincher's defense counsel moved for a directed verdict (which the district court characterized as a Motion for Judgment of Acquittal). (AT pp. 401-409) The District Court denied that motion, stating as follows, outside the presence of the jury:

Now, the motion, as I perceive it, is not really an attack upon the evidence. The motion, as I perceive it, is, again, an attack on the law which exists and the Court's understanding of that law . . . The Court really needs go no further than U.S. v. Hale. Now, much was made of U.S. v. Stewart, but as I believe I've already mentioned in a previous ruling, that the decision by the Ninth Circuit in Stewart after the remand from the Supreme Court, based upon its decision in Reich, is essentially to bring the Ninth Circuit into line with every other Circuit in the United States that has considered this issue. So I think this Court is obliged, and it's appropriate since the Eighth Circuit is this Court's appellate Court, to take its position on these issues basically from the Hale case. And I've gone over that. I don't need to extend these remarks by going over it again, but simply suffice it to say that in the Eighth Circuit decision, the Court, after discussing the Miller case, again, which came out of the Eighth Circuit in 1939, the Court held that the Congress did have a reasonable basis, under the Commerce Clause, for enacting the statutes that govern the possession of machine guns and/or sawed-off shotguns. They specifically relied on Cases v. United States, since there haven't been decisions by the Supreme Court after Miller, and they stated, with approval, that - Cases states that under the Second Amendment, the federal

government can limit the keeping and bearing of arms by a single individual, as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well-regulated militia. They pointed out that the question of reasonable relationship was best determined from the facts on each individual case. Now, in that vein, they said this. One of the contentions that the defense makes is that if the evidence shows that these weapons in question are susceptible to military use, that that's enough. Well, that is simply not true. The Eighth Circuit said this in Hale: "Thus, it is not sufficient to prove that the weapon in question was susceptible to military use. Indeed, as recognized in Cases, most any lethal weapon has a potential military use." So to ask this Court to rule otherwise in the face of that clear controlling authority is just not acceptable, and the Court won't do it. I think that's clearly what the law is, and so simply proof in the record to show that the weapons in question might be susceptible to having military use does not bring the defendant within this aperture that I discussed with respect to Miller. And that's because - not because this Court says so, but that's because that's what the law in the Eighth Circuit is. (AP, pp. 411-413)

Following its denial of the Defendant's Motion for Directed Verdict, defense counsel stated his intention to put on one witness: Fincher himself. The district court then excused the jury once again for the purpose of conducting a hearing to consider Fincher's proffered testimony. The district court stated that its purpose in hearing Fincher's proposed testimony outside the presence of the jury was "to give the Court a chance to hear this testimony before it is presented to the jury so the Court can make a determination as to whether it's appropriate." (AT, p. 422)

Fincher then took the stand and proceeded to testify about the purpose of the MWC, the nature of its drill and weapons training activities, and its rationale for possessing and using automatic weapons, including machine guns. (AT, pp. 424-440) Fincher stated that between 1998 and 2002, the MWC wrote a series of declarations to the Office of the Governor of the State of Arkansas (with copies sent to various law enforcement agencies) in which the MWC declared itself a militia and “put on record with [the Governor] the operation of the militia of Washington County, Arkansas.” (AT, pp. 426-430) On cross examination, Fincher was presented with a January 4, 2007. letter from the Office of [then] Governor of the State of Arkansas Mike Huckabee, signed by Governor Huckabee, which stated that “a search of records did not reveal any record of the Militia of Washington County registered with, or sanctioned by, the Office of the Governor of the State of Arkansas. Furthermore, my office is unaware of any militia being registered with, or sanctioned by, the state of Arkansas. Sincerely Yours, Mike Huckabee.” (AT, pp. 465-466) In response to being presented with said letter, Fincher stated that “whether the governor sanctioned it or not, it’s already ordained in the constitution, so what the governor done may be derelict, it may be criminal, may be negligent, I don’t know, but the constitution of this state declares who the militia is.” (AT, p. 466)

Following Fincher's proffered testimony, the district court ruled that the proposed testimony was not appropriate for a jury's consideration. In so ruling, the district court stated as follows:

Now, with respect to the matter at hand . . . [i]t occurred to the Court that there could be a question as to whether, first of all, the matters that the Defense wished to put in front of the jury related to the responsibility of the jury, whether it would be evidence concerning material facts that are in dispute or whether it would be matters related to law, evidence, and procedure. I could not really determine that based on what I had learned and had been told prior to the time that we had this hearing; hence, the hearing . . . Now, it was based upon [the language of Miller] that the Court, in this case, considered the possibility that this defendant might, as represented by his attorney, be able to present evidence which would show that his possession of the machine guns, which are the subject of Count 1, and the sawed-off shotgun, which is the subject of Count 2, that he might be able to show, or have some evidence tending to show, that his possession or use at this time would have some reasonable relationship to the preservation or efficiency of a well-regulated militia, and it was on this basis that this hearing we have just concluded occurred. (AT, pp. 474-477)

After reciting a history of, and quoting relevant passages from, the relevant case law in the Eighth Circuit and the Supreme Court, the district court concluded:

Now, the contention, I believe, and the tenor of Mr. Fincher's testimony is, and was, that for reasons that I don't in any way criticize or denigrate, he and others of like mind felt the need to organize themselves into what they named and characterized as the Washington County Militia . . . He has presented to the Court, and would present

to the jury, evidence in the form of his declarations that would indicate he noticed the governor and other officials of his and their collective view that they had certain rights under the constitution which enabled them to keep and bear arms, and that they, as a militia, could do these things, and he advised the governor that: “Your failure to object to that declaration provides affirmation that in your capacity as head of this sovereign state, you have no objection to it.” Now, stopping there, I have some difficulties with that. I think there’s no basis or citation of authority given to support Mr. Fincher’s notion that if you send such a declaration to the governor . . . that if the governor does not immediately and forthwith disavow it, that makes the person an appointed officer in the commission . . . So it would appear that, at best, the militia in question would be one which is not an organized militia. It’s not a state militia. The governor, I think, has clearly indicated that it’s not . . . So it would seem to me that the evidence, if it were to be presented to the jury, that this militia was created the way that it was . . . to effect an organization, but I do not find that that makes the organization anything more than an unorganized and unregulated militia, by definition under case law. To bring it under the auspices of the Second Amendment, it would have to be under the auspices of the state. As I read the authorities of law, it clearly is not . . . So it’s my conclusion that if this evidence - and I think the evidence that would bear on the fact would be testimony from Mr. Fincher that he notified the governor that he was a member of the militia, and that if they didn’t - if the governor didn’t respond within a certain amount of time, that that would end the inquiry and there, in fact - it would be, in fact, a recognized militia for Second Amendment purposes. I rule that that would not be sufficient as a matter of law if the jury believed that testimony. Moreover, it has been presented that the United States is prepared to show that there is no recognized connection between the militia and the state of Arkansas . . . as I’ve already said, I think, as was stated in Hale, it’s not sufficient, even if there could be shown to have been a state-sponsored or state-connected militia. Even if that could be shown, there would be no evidence to show that the commander in chief, or any other person in charge of such a militia, would make the determination that the possession of machine guns or sawed-off shotguns . . . would then be necessary to the preservation of a well

regulated militia . . . The Court believes that [the Miller and its progeny] law is sound, but it doesn't matter whether the Court believes it's sound, or whether the Court believes it's even right or not. The Court is obliged to follow the law as mandated, as interpreted by the Court. So the ruling of the Court will be that the evidence that's presented will not be presented to the jury, and the proffer will be regarded as that, a proffer as a matter of record. (AT, pp. 483-489)

Conviction and Sentencing:

On January 12, 2007, Fincher was convicted by the jury on both counts of the Indictment. A Pre-Sentence Investigation Report (hereinafter "PSR") was prepared by the Probation Office prior to Fincher's sentencing. In the section of the PSR titled "Financial Condition: Ability to Pay," the Report stated that Fincher had "recently transferred" the property he claimed at his initial appearance (a home and 120 acres at or near Fayetteville, Arkansas) to his two daughters, jointly, by quit claim deed executed on January 29, 2007, but that his wife continued to live on the Property. On June 22, 2007, Fincher appeared for his sentencing hearing (Fincher had by this time fired attorney Oscar Stilley and was represented at sentencing by attorney Shannon Blatt). After adopting the advisory guideline range of 78-97 months imprisonment (AT, p. 749), the district court sentenced Fincher to concurrent terms of 78 months imprisonment on each count of conviction, two years supervised release, a \$1,000 fine, and a \$200 special

assessment. (Docket Entries #47-50; AT, pp. 750-752) Although 18 U.S.C. § 3571 authorized a fine of up to \$250,000, and the Guidelines suggested a fine range of \$12,500 to \$125,000, the Court - acting under the belief that Fincher had no significant assets - departed from the advisory fine guideline range of \$12,500 to \$25,000 and imposed a fine of only \$1,000. (AT, p. 751)

In Forma Pauperis Hearing and Post-Sentencing Events:

Circumstances which came into focus only after Fincher was sentenced obliged the district court to further investigate Fincher's financial condition, most particularly the value of the property and the circumstances of its conveyance. (See *United States v. Fincher*, 2007 WL 2177062 (W.D. Ark. July 27, 2007) for a thorough description of the factual circumstances relating to said investigation) An *In Forma Pauperis* evidentiary hearing was conducted on July 3, 2007, and the court thereafter obtained the services of Tom Reed, of Reed & Associates, Inc., to prepare a professional appraisal of the Property. (See AT, pp. 802-883) That appraisal placed the market value of Fincher's property at \$455,000. *United States v. Fincher*, 2007 WL 2177062 (W.D. Ark. July 27, 2007) The district court concluded that the Financial Affidavit signed by Fincher contained a material misrepresentation of fact, and that Fincher knew of the misrepresentation when he

signed the document with the intent of obtaining an appointed attorney. The district court also concluded that at the time he signed the Financial Affidavit, Fincher did not qualify for appointment of counsel. The district court made several findings relating to Fincher's case and to his sentence in the aforementioned Order issued July 27, 2007. *United States v. Fincher*, 2007 WL 2177062 (W.D. Ark. July 27, 2007)

The district court then took the unusual step of submitting that Order to this Court for its consideration, stating that

While the Court is precluded from revisiting the issue of Fincher's fine due to the pendency of his appeal, it is persuaded - based on the facts set forth in this Order - that Fincher's sentence should be vacated and he should be re-sentenced. The Court feels strongly enough about the matter that it will take the unusual course of asking the Eighth Circuit Court of Appeals to remand the matter to this court, so that it can vacate the sentence pronounced upon Fincher and re-sentence him in light of the true facts about his financial condition.

Upon receipt and review of the district court's Order, this Court directed the United States to "address that portion of Chief Judge Hendren's order asking that the case be immediately remanded for further sentencing proceedings, including vacatur of the sentence imposed in the case."

On August 13, 2007, the United States filed a response in this Court in which it stated that it agreed with and supported the district court's request to vacate Fincher's sentence and remand the matter back to the district court for re-sentencing in light of the facts discovered subsequent to Fincher's initial sentencing. (*See* Eighth Circuit General Docket for Appeal No. 07-2514) On August 27, 2007, this Court issued an Order in which it stated that:

This matter is before the court on the parties' responses to the court's July 31, 2007 order to show cause. The district court's request to remand the case for re-sentencing will be taken with the case for consideration by the panel to which this case is submitted for disposition on the merits. No further action will be taken concerning appellant's IFP status as he is represented by retained counsel.
(Docket Entry #73)

On November 14, 2007, Fincher timely filed the instant appeal.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it partially granted the Government's Motion in Limine to Preclude Defendant from Arguing Matters of Law to the Jury. To the extent that the district court granted the Motion in Limine, the district court's action was unquestionably appropriate in that it merely prevented Fincher from raising and arguing to the jury matters which related to evidentiary or procedural concerns and/or "evidence" which amounted merely to legal argument. It is undisputed that such matters are the province of the judge and not the jury, and the district court's rulings with respect to the Motion in Limine accurately and correctly ensured that only the proper type of "evidence" pertaining to factual issues would be allowed to come before the jury.

The district court also did not abuse its discretion when it determined that Fincher's proffered testimony was not appropriate for the jury's consideration. Fincher's proffered testimonial "evidence," at best, would have merely established that he was a member of an unsanctioned or "unorganized" militia. Under established Supreme Court and Eighth Circuit precedent, Fincher's proposed "evidence" was clearly insufficient, as a matter of law, to demonstrate the required "reasonable relationship to the preservation or efficiency of a well-regulated

militia.” Accordingly, it was entirely correct for the district court to prohibit Fincher from testifying before the jury given that even if Fincher’s proposed testimony were to be accepted and believed in its entirety by the jury, such “evidence” would have nevertheless been insufficient, as a matter of law, to satisfy the *Miller* “reasonable relationship” standard which remains applicable to Second Amendment defenses.

Additionally, this Court should not grant Fincher *in forma pauperis* status on appeal in light of the changed circumstances relating to Fincher’s financial situation which came to light only after Fincher was sentenced and in light of the fact that Fincher was able to retain non-court-appointed counsel to prepare and file his Appellate Brief. Moreover, the unique post-sentencing circumstances of this case warrant that this Court vacate the sentence and remand the matter back to the district court so that the district court can re-sentence Fincher in accordance with the true facts concerning his financial situation which were unknown or had been misrepresented to the district court at the time of Fincher’s sentencing in June.

ARGUMENT

I. The District Court did not Abuse its Discretion When it Partially Granted the Government's Motion in Limine to Preclude Defendant From Arguing Matters of Law to the Jury.

Standard of Review:

This Court reviews a district court's grant of a Motion in Limine for abuse of discretion. *Robinson v. Potter*, 453 F.3d 990, 995 (8th Cir. 2006) Moreover, this Court gives “great deference to the rulings of the trial court on evidentiary matters such as the admissibility of proffered testimony [and] . . . will overturn such rulings of the trial court only for abuse of discretion.” *United States v. Wilson*, 103 F.3d 1402, 1406 (8th Cir. 1997)

Discussion:

The appellant's initial contention effectively amounts to an argument that the district court abused its discretion when it partially granted the Government's Motion in Limine to Preclude the Defendant from Arguing Matters of Law Before the Jury and/or that the District Court abused its discretion when it determined that Fincher's proffered testimony was not appropriate for the jury's consideration. This contention is without merit.

The district court's exhaustively explained, thorough rulings concerning the Motion in Limine were entirely appropriate. It is a well accepted principle that the distinct roles of a judge and jury are fundamental principles of the law. "The jury has no role in deciding legal issues." *United States v. Peck*, 161 F.3d 1171, 1174 (8th Cir. 1998);

[I]t is the district court's duty to instruct the jury on the law applicable to the case, and not the jury's duty to interpret the law . . . It is the function of the jury to determine the facts from the evidence and apply the law as given by the court to the facts as found by them from the evidence.

United States v. Gleason, 726 F.2d 385, 388 (8th Cir. 1984); "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia v. United States*, 53 S. Ct. 698, 699, 289 U.S. 466, 469, 77 L. Ed. 1321 (1933).

Fincher's prevailing argument throughout the course of the proceedings has been that his possession of the machine guns and the sawed-off shotgun were protected by the Second Amendment due to (as Fincher claims) the fact that he possessed those firearms only in connection with his service in and with a "militia" - the Militia of Washington County. The Supreme Court's long ago established, still-standing interpretation of the Second Amendment mandates that in order for

Fincher to prevail in his argument, he is required to demonstrate that his possession of the weapons had “some reasonable relationship to the preservation or efficiency of a well regulated militia.” *United States v. Miller*, 307 U.S. 174, 178 (1939) (finding no Second Amendment protection against regulation of possession of a sawed-off shotgun in the absence of evidence that the possession of the weapon "has some reasonable relationship to the preservation or efficiency of a well regulated militia").

In the instant case, the district court partially granted the Government’s Motion in Limine to Preclude the Defendant from Arguing Matters of Law to the Jury. A fair reading of the district court’s extensive commentary and rulings on the matter clearly indicates that the district court’s partial granting of the Motion in Limine only precluded Fincher from offering “evidence” to the jury in the form of legal argument (through such means as attorney arguments or a witness’s “lecture” on the Second Amendment). The district court’s rulings relating to its partial denial of the Motion in Limine clearly indicate that it was taking the position that if Fincher could present the court with some sort of tangible factual evidence - other than legal argument - that would have the effect of demonstrating that his possession of the weapons was reasonably related to the preservation or

efficiency of a well-regulated militia, that he would be allowed to present such evidence to the jury.

In fact, when the district court ruled on the Motion in Limine, it was not sure what kind of “evidence” Fincher might be able to provide in support of his claim. Accordingly, the district court granted the Motion in Limine in part, but also denied it in part, with the partial denial being based on the district court’s conclusion that it was only appropriate that Fincher must be allowed to present whatever evidence he had to the district court (outside the presence of the jury) so that the district court could then make a ruling as to whether such evidence was appropriate for a jury or not. Thus, the district court allowed Fincher to provide proffered testimony, which the Court listened to outside the presence of the jury in order to determine if indeed Fincher’s “evidence” sufficiently implicated disputed factual matters appropriate for a jury’s consideration rather than simply implicating matters relating to evidence, procedure, or legal argument inappropriate for the jury’s consideration.

The United States submits that the district court’s rulings in this regard were entirely correct and were absolutely fair to the appellant. Moreover, to the extent that the district court granted the Motion in Limine, the partial granting of the motion was unquestionably appropriate in that it merely prevented Fincher from

raising and arguing to the jury matters which related to evidentiary or procedural concerns and/or “evidence” which amounted merely to legal argument. It is undisputed that such matters are the province of the judge and not the jury, and the district court’s rulings with respect to the Motion in Limine accurately and correctly ensured that only the proper type of “evidence” would be allowed to come before the jury and that matters of evidence, procedure, and legal dispute would be determined by the judge. Accordingly, the district court did not abuse its discretion when it partially granted the Government’s Motion in Limine.

ARGUMENT

II. The District Court did not Abuse its Discretion When it Determined That Fincher's Proffered Testimony was not Appropriate for the Jury's Consideration. Moreover, to the Extent That Fincher Otherwise Challenges his Convictions on Second Amendment Grounds in the Instant Appeal, Such Arguments are Without Merit.

Standard of Review:

This Court gives “great deference to the rulings of the trial court on evidentiary matters such as the admissibility of proffered testimony [and] . . . will overturn such rulings of the trial court only for abuse of discretion.” *United States v. Wilson*, 103 F.3d 1402, 1406 (8th Cir. 1997)

Discussion:

Fincher's arguments, taken in their entirety, can be construed as raising the argument that the district court abused its discretion when it determined that Fincher's proffered testimony was inappropriate for the jury's consideration. In connection with this argument, Fincher further re-asserts that his possession of the weapons was protected by the Second Amendment. These arguments are without merit.

The district court did not abuse its discretion when, after listening to Fincher's proffered testimony, it determined that Fincher should not be allowed to

provide such testimony to the jury, and Fincher's Second Amendment arguments are otherwise unavailing.

The Second Amendment provides that: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. As the district court consistently reiterated throughout the proceedings of this case, however, in order for Fincher to prevail in his argument that his possession of machine guns and a sawed-off shotgun was protected by the Second Amendment, he was required, pursuant to *Miller*, to demonstrate that his possession of the weapons had "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178. The Supreme Court has consistently refused to revisit this standard in the 68 years which have elapsed since *Miller* was delivered in 1939. Moreover, the unfortunate truth insofar as Fincher's argument is concerned is that "**no** federal court has found **any** individual's possession of a military weapon to be 'reasonably related to a well regulated militia'" under the *Miller* standard. *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) (emphasis added); *see also, i.e. United States v. Cole*, 276 F. Supp. 2d 146, 150 (D.D.C. 2003) (noting this same fact; *quoting Hale*)

In *Hale*, this Court further concluded that “‘technical’ membership in a state militia (e.g., membership in an ‘unorganized’ state militia) or membership in a non-governmental military organization is not sufficient to satisfy the ‘reasonable relationship’ test.” *Hale*, 978 F.2d at 1020. Additionally, “[m]embership in a hypothetical or ‘sedentary’ militia is likewise insufficient.” *Id.* Further, a mere “allegation . . . that [the] weapons are susceptible to military use is insufficient to establish such a relationship.” *Id.* Accordingly, because “Hale introduced no evidence and made no claim of even the most tenuous relationship between his possession of the weapons and the preservation of a well regulated militia,” this Court rejected Hale’s Second Amendment argument. *Id.* See also, *i.e.* *United States v. Lippman*, 369 F.3d 1039, 1044 (8th Cir. 2004) (“Since Lippman has not shown that his firearm possession was reasonably related to a well regulated militia, his Second Amendment argument cannot succeed.”); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (concluding that the defendant's possession of a 9 millimeter submachine gun did not satisfy the *Miller* standard; finding “absolutely no evidence that a submachine gun in the hands of an individual ‘sedentary militia’ m[e]mber would have any, much less a ‘reasonable relationship,’ to the maintenance or efficiency of a well-regulated militia.” and

holding therefore that “defendant has no private right to keep and bear arms under the Second Amendment.”)

The United States submits that the instant case is similar to *United States v. Bournes*, 105 F. Supp. 2d 736 (E.D. Mich. 2000). In *Bournes*, the defendant, charged with illegal possession of machine guns, alleged that he was an active member of a private militia, the “Michigan Militia Corps Wolverines” and further asserted that, if given the opportunity, he could present evidence that his possession of the machine guns in question was reasonably related to the preservation and efficiency of the “well-regulated” militia of which he is a member. *Id.* at 743-44. The district court in *Bournes* found Bournes’ arguments unavailing, noting “at the outset that Defendant has failed to suggest what sort of evidence he might offer to show that his possession of the particular two machine guns listed in the indictment was reasonably related to the preservation and efficiency of the ‘Michigan Militia Corps Wolverines.’” *Id.* at 744, quoting *Hale*, the *Bournes* court first noted that “[a] mere allegation that these weapons are susceptible to military use is insufficient to establish such a relationship.” *Id.* (internal quotation and citation omitted) and further stated that:

Rather, Defendant must show that he possessed machine guns “in preparation for a military career,” and not “simply on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia which the Second Amendment

was designed to foster as necessary to the security of a free state.” *Id.* (citing *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942))

Moreover, the district court in Bournes further held that:

[i]n any event, even assuming Defendant could overcome this substantial evidentiary obstacle, [Bournes] still would confront the additional burden of establishing his membership in a “well regulated Militia” of the sort contemplated by the Second Amendment. Although Defendant points to his position in the private “Michigan Militia Corps Wolverines,” the courts have uniformly held that Second Amendment protection does not extend to such private or “unorganized” militias. *Bournes*, 105 F. Supp. 2d at 743.

Accordingly, the Court rejected “Defendant's appeal to *Miller* and the ‘well regulated Militia’ language of the Second Amendment . . .” *Id.*

In the instant case, Fincher’s proffered testimony established merely that Fincher and his MWC had sent several declaration letters to the Governor’s office (and various law enforcement agencies) proclaiming the MWC to be a “militia.” As the Governor’s letter establishes, the MWC has never been registered or sanctioned as a militia by the State of Arkansas. This fact is not now disputed and was not disputed during trial during or after Fincher’s proffered testimony. Accordingly, Fincher’s testimonial evidence, at best, would have merely established that he was a member of an unsanctioned or “unorganized” militia. Under *Hale*, such evidence is clearly insufficient, as a matter of law, to demonstrate the required “reasonable relationship to the preservation or efficiency

of a well-regulated militia.” As was the case in *Hale* (and in *Bournes*), other than going to show that Fincher was a member of an “unorganized” state militia, Fincher’s proffered testimony contained “no evidence and made no claim of even the most tenuous relationship between his possession of the weapons and the preservation of a well regulated militia.” Accordingly, it was entirely correct for the district court to conclude that, as a matter of law, Fincher’s proposed testimony, even if it were to be accepted and believed in its entirety by the jury, would nevertheless be insufficient to satisfy the Miller “reasonable relationship” test. Therefore, the only non-erroneous conclusion for the district court to make after hearing Fincher’s proposed testimony was that his “evidence” was not appropriate for a jury’s consideration. Accordingly, the district court did not abuse its discretion when it determined that Fincher’s proposed testimony was not appropriate for consideration by the jury, and Fincher’s remaining Second Amendment arguments are otherwise unavailing and should be rejected.

ARGUMENT

III. Fincher is not Entitled to be Granted in Forma Pauperis Status on Appeal

Standard of Review:

Counsel must be appointed under the Criminal Justice Act (18 U.S.C. § 3006A *et seq.*) if the court is satisfied after “appropriate inquiry” that the defendant is “financially unable to obtain counsel.” *United States v. Brockman*, 183 F.3d 891, 897 (8th Cir. 1999) (*citing* 18 U.S.C. § 3006A(b)). When requesting the appointment of counsel, the burden is on the defendant to show that he is “financially unable” to afford representation. *Id.* A district court's assessment of a defendant's ability to afford representation is reviewed for clear error. *Id.* However, it is within the Appeals Court’s discretion to determine whether appointment of counsel *on appeal* is required by 18 U.S.C. § 3006. *Davis v. Runnels*, 2007 WL 2504438, *2 (N.D. Cal. August 31, 2007); *United States v. Fincher*, 2007 WL 2177062, *9 (W.D. Ark. July 27, 2007)

Discussion:

With respect to Fincher’s financial circumstances, it is the position of the United States that Fincher is not entitled to be granted *in forma pauperis* status and/or to be appointed counsel under the Criminal Justice Act at no cost to Fincher on appeal. In support of its position, the United States relies upon the facts

ascertained by the district court subsequent to Fincher's sentencing hearing, as set forth in detail by the district court in *United States v. Fincher*, 2007 WL 2177062 (W.D. Ark. July 27, 2007). After conducting a hearing concerning Fincher's *in forma pauperis* status on the basis of new information brought to the district court's attention subsequent to the sentencing hearing, the district court concluded that:

The facts and circumstances outlined in this Order persuade the Court that Fincher is not entitled to appointed counsel on appeal, although it is not within this Court's jurisdiction to make a decision on that issue. The Court will, therefore, direct that a copy of this Order be forwarded to the Eighth Circuit Court of Appeals, for its consideration of whether Fincher is entitled to appointed counsel to prosecute his appeal in light of the findings herein. *Id.* at *9

In summation, the district court concluded that "Fincher is not now, nor has he ever been at any time material to this proceeding, financially unable to obtain counsel to represent him in this proceeding and that appointments of counsel for him were improvidently made." *Id.* at *10 The United States submits that the facts and circumstances outlined by the district court in its July 27, 2007 Order support the district court's conclusion and further notes that this Court has, in fact, already indicated that "[n]o further action will be taken concerning appellant's IFP status as he is represented by retained counsel." (Docket Entry #73; Eighth Circuit Order dated August 27, 2007) Accordingly, the United States supports and agrees with

the district court's recommendation that this Court decline to grant *in forma pauperis* status to Fincher on appeal.

ARGUMENT

IV. The Circumstances of This Case Support the District Court's Request for a Remand for Re-sentencing.

The district court made several findings relating to Fincher's financial status in its Order of July 27, 2007. The district court submitted its Order to this Court, stating that:

While the Court is precluded from revisiting the issue of Fincher's fine due to the pendency of his appeal, it is persuaded - based on the facts set forth in this Order - that Fincher's sentence should be vacated and he should be re-sentenced. The Court feels strongly enough about the matter that it will take the unusual course of asking the Eighth Circuit Court of Appeals to remand the matter to this Court, so that it can vacate the sentence pronounced upon Fincher and re-sentence him in light of the true facts about his financial condition. *Id.* at *9

On August 13, 2007, the United States filed a response in this Court in which it stated that it agreed with and supported the district court's request to vacate Fincher's sentence and remand the matter back to the district court for re-sentencing in light of the facts discovered subsequent to Fincher's initial sentencing. The United States does not believe that any relevant circumstances have changed since August 13, 2007, and therefore re-alleges and re-submits the arguments and authorities contained in its August 13, 2007, response pertaining to this issue.

Although unusual, the unique circumstances of this case, wherein the accurate facts concerning Fincher's true financial condition were not discovered until after Fincher was sentenced dictate that the district court should be given the opportunity to pronounce a sentence that reflects the true facts about Fincher's financial state. This is true because the district court's initial sentence granted a significant downward variance as to Fincher's fine on the basis of its erroneous perception that he was unable to pay a fine within the Guidelines range. This Court has repeatedly held that a sentence may be unreasonable if it is outside of the range justified by the facts of the case. *See, e.g., United States v. Tjaden*, 473 F.3d 877 (8th Cir. 2007). Additionally, *vacatur* at this point would promote a central tenet of guidelines sentencing, the reduction of sentencing disparities. "The goal of the Sentencing Guidelines is . . . to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *Koon v. United States*, 518 U.S. 81, 113 (1996). The goal of guidelines sentencing is thwarted when the court bases a sentence on inaccurate information about a defendant's financial situation. Additionally, the justice system is damaged when it is deceived by a defendant such as Fincher. As stated in *United States v. Bishop*, 774 F.2d 771, 776 (7th Cir. 1985), a "defendant's action in intentionally deceiving the court strikes at the very heart and foundation

of the American system of justice.” The system demands honesty from every participant, and it has not had that from Fincher with regard to his financial situation. Accordingly, the United States supports the district court’s request that this Court vacate Fincher’s sentence and remand this matter back to the district court for re-sentencing.

CONCLUSION

The United States respectfully submits that the district court did not abuse its discretion when it partially granted the Government's Motion in Limine or when it prohibited Fincher from testifying before the jury. The United States further submits that Fincher should not be granted *in forma pauperis* status on appeal. Additionally, the United States joins in the district court's request that this Court vacate Fincher's sentence and remand the matter to the district court for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wendy L. Johnson, Assistant U.S. Attorney for the Western District of Arkansas, hereby certify that two (2) true and correct copies of the foregoing Brief of Appellant and cd containing Brief were mailed this 19th day of December, 2007, to:

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Attorney at Law
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Wendy L. Johnson
Assistant U.S. Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that the diskette containing brief, enclosed herein, has been scanned for viruses and that to the best of my knowledge the diskette is virus free.

I further certify that Word Perfect X3 software was used to prepare this brief.

I further certify that this brief complies with the type-volume limitations as set forth in FRAP 32(a)(7)(C). There are 49 pages, containing 10,075 words, using Times New Roman 14 point, in the brief.

Dated this 19th day of December, 2007.

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