

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

vs.

CRIMINAL CASE NO. 5:06-cr-50064-JLH-1

HOLLIS WAYNE FINCHER

DEFENDANT

**RESPONSE TO MOTION IN LIMINE TO PRECLUDE DEFENDANT FROM  
ARGUING MATTERS OF LAW TO THE JURY [DOCKET #19]**

Comes now Defendant and for his response to motion in limine states:

The government requested for the Court the following:

The United States asks this Court to admonish counsel for the defendant that no references of matters **outside the province of the jury** should be made **without prior approval of this Court**. Any such improper arguments, if allowed, would unfairly prejudice the United States.

(Emphases added)

It would seem to undersigned counsel that the Court's expert and professional and courteous admonition given Friday, January 5, 2007, in a telephone conference with court reporter present, would satisfy the government's request. Counsel for the Defendant had no intention of referencing matters outside the "province of the jury," in the presence of the jury. Furthermore, it would not in undersigned counsel's mind make any sense to ask the Court for approval to make improper statements in the presence of the jury.

This is not to say that there would not be gray areas, where the government might have a non-frivolous objection as to the precise limits of the "province of the jury." Likewise, the Defendant might have objections to debatable evidence offered by the government. This would not be cause to attempt to place a prior restraint on either party beforehand, without the question being asked and

without a reasonable basis for believing that one party or another would intentionally disobey the orders of the Court.

In the case of a dispute about the propriety of any questions or statements to the jury, undersigned counsel would merely request direct and unambiguous rulings. Defendant has no intention of disobeying the Court's orders. However, unless a ruling is made that clearly forbids a certain question, or an entire line of questioning, or other evidence that the Defendant might wish to present to the jury, Defendant would have no way of obtaining appellate review of the disputed matter.

This should not be misconstrued as an inclination to try to evade the Court's orders, it is not. If a bench conference is necessary for the Court to delineate the breadth of a particular ruling, that is perfectly acceptable. However, undersigned counsel must have clear and definite rulings in order to preserve arguments for appeal, in the event that an appeal becomes necessary.

The Court has indicated an inclination to hear the Defendant's position on *U.S. v. Hale*, 978 F.2d 1016 (8th Cir. 1992). The Defendant's position is that it is not possible to reconcile this case with 1) *United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) 2) General principles of criminal law, 3) The government's paltry few statements in this case setting forth the government's positions with respect to law pertinent to this case, 4) Subsequent cases including particularly but not limited to *United States v. Lopez*, 514 U.S. 549, 580 (1995); and 5) The rest of the body of law on the many subjects superficially addressed in *Hale*. For example, in *Hale* the court said:

[14] **The Supreme Court has not addressed a Second Amendment issue since the Miller decision.** *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), cert. denied, 319 U.S. 770, 63 S.Ct. 1431, 87 L.Ed. 1718 (1943) remains one of the most illuminating circuit opinions

on the subject of "military" weapons and the Second Amendment. *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." *Id.* at 922. After carefully examining the principles and implications of the then recent *Miller* decision, the First Circuit concluded that the existence of any "reasonable relationship to the preservation of a well regulated militia" was best determined from the facts of each individual case. *Id.* 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.<sup>[fn4]</sup> *Id.* **Rather, the claimant of Second Amendment protection must prove that his or her possession of the weapon was reasonably related to a well regulated militia.** See *id.* at 923. Where such a claimant presented no evidence either that he was a member of a military organization or that his use of the weapon was "in preparation for a military career", the Second Amendment did not protect the possession of the weapon. *Id.*  
(Emphases added)

Defendant claims that the caselaw is so mixed up and confused that it defies rational and consistent interpretation or application. Unfortunately, the government has not filed any brief in this case to try to sort our or make sense of the case precedents. Defendant has been charged with the role of playing defense, for better or for worse, and chooses not to confuse his position with that of the offense.

Presumably the government that there is at least some possible coherence to the constitutional provisions, statutes, regulations, and cases with respect to the regulation of guns, by the state of Arkansas and the United States. Therefore, the following questions and defense positions are presented for the consideration and response of the government.

1. *Hale* acknowledges the Defendant to be innocent if his possession was "reasonably related to a well regulated militia." The government in its jury instructions says:

There is no burden upon a defendant to prove that he is innocent. Accordingly, the fact that the defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict.

How does the government propose to make these pronouncements of legal principles consistent?

The entitlement to possess arms is granted by the constitution. The presumption of innocence and the right not to testify is granted by the constitution and acknowledged in the jury instructions. Presumably the presumption of innocence and right not to testify is too well established to require citation to authority, but if the government wishes to disagree then your Defendant will see what he can find.

2. If the Second Amendment “right of the people” has been demoted to an affirmative defense, where is the pattern jury instruction for the 8<sup>th</sup> Circuit? For any Circuit? In any commercial or published collection or compilation of jury instructions whatsoever? Are we expected to simply argue and get the best instruction we can get, for the government or the Defendant respectively?

3. *U.S. v. Hale* says:

[15] Since the Miller decision, no federal court has found any individual's possession of a military weapon to be "reasonably related to a well regulated militia."

Does the government contend that no person in the last 68 years has properly possessed a gun for the purposes of a well regulated militia? Or does the government contend that it never makes mistakes, and thus any person charged with a gun offense is irrebuttably presumed to be possessing the arm for “non - 2<sup>nd</sup> Amendment purposes?” If so what is the purpose of a trial in the first place?

4. *U.S. v. Hale* also says:

[16] Applying these principles to the present case, we conclude that Hale's possession of the weapons in question was not reasonably related to the preservation of a well regulated militia. The *allegation* by Hale that these weapons are susceptible to military use is insufficient to establish such a relationship. 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.  
(Emphases added)

Was Hale's case wanting because it was a mere allegation, because he introduced no evidence, because he made no claim, or some combination thereof? In any case how can we sort this out from the teachings of Hale even if we are to conclude that Hale is still good law?

5. Is the Defendant required to introduce evidence? What about a claim? Can he make a claim **or** introduce evidence? Does he have to have a claim plus evidence? Does he have to get preapproval for his allegations, claims, evidence, or some part thereof, and if so why?

6. Does the government agree that this Defendant is entitled to "make claims" and "introduce evidence" either through government witnesses or his own?

7. Does the government agree that a coherent presentation of evidence regarding a 2<sup>nd</sup> Amendment defense, if any, would require at least that the jury see the 27 words that make up the 2<sup>nd</sup> amendment?

#### AMENDMENT II.

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.

8. Does the government agree that a coherent presentation of evidence regarding the commerce clause would require at least that the jury see the 16 words that make up the commerce clause?

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

9. If the government contends that the jury should not see these words, does the government also contend that persons who have memorized these passages are not proper jurors?

10. Does the government deny that these passages might under some circumstances be admissible?

11. *U.S. v. Hale* also cites to *Miller* and says:

[8] In *Miller*, the Supreme Court upheld a conviction under the National Firearms Act for transporting a sawed-off shotgun in interstate commerce. In so doing, the Court rejected the argument that the Second Amendment protected the possession of that weapon:

**In the absence of any evidence** tending to show that the possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment ***or*** that its use could contribute to the common defense.

(Emphases added)

Since *Miller* involved an appeal with a dead defendant, with no appearance for the Appellee, can we assume that the US Supreme Court would have allowed a living defendant to have put on evidence is part of ordinary military equipment?

12. Since *Miller* uses the disjunctive and suggests that the possibility that a particular arm "could contribute to the common defense" is part of the test, is it not fair to allow testimony on these subjects, with a corollary jury instruction?

13. Does the government agree that *Miller* is the Supreme Court's most recent statement on the 2<sup>nd</sup> Amendment? If so, does the government also agree that *Miller* is still good law? If not, what authority does the government point to for the theory that the circuit courts can overturn precedent cases of the US Supreme Court?

14. The *Hale* court said: [12] Considering this history, **we cannot conclude that the Second Amendment protects the individual possession of military weapons.** (Emphasis added) Does the

government likewise urge the Court to find that the 2<sup>nd</sup> Amendment does not protect any privately owned arm?

15. If the government argues that the 2<sup>nd</sup> Amendment protects some but not all privately owned arms, what would be the basis for such a claim, and how would a citizen determine which is which?

16. The concurrence in *Hale* wrote:

[25] BEAM, Circuit Judge, concurring specially.

[26] I concur in the result reached in Judge John R. Gibson's opinion in this matter. I agree completely with the portions dealing with Hale's hearsay and confrontation contentions. **I also agree that Hale's possession of the particular weapons at issue in this case is not protected by the Second Amendment.** I disagree, however, that *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942); *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976); *United States v. Oakes*, 564 F.2d 384 (10th Cir. 1977) and *United States v. Nelson*, 859 F.2d 1318 (8th Cir. 1988) properly interpret the Constitution or the Supreme Court's holding in *United States v. Miller*, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) **insofar as they say that Congress has the power to prohibit an individual from possessing any type of firearm**, even when kept for lawful purposes. Judge Gibson's opinion seems to adopt that premise and with that holding, I disagree.  
(Emphases added)

How was the Defendant supposed to know which arms were protected by the 2<sup>nd</sup> Amendment and which were not?

17. Does the government agree that the rule of lenity applies so that the Defendant should not be punished for violation of the "law" when the "law," even by circuit courts and judges, is not distinct and knowable?

18. Whether or not the government agrees with the rule of lenity, does the government agree that a good faith instruction would be appropriate if the evidence shows that the Defendant believed he was complying with all valid laws of the United States?

19. In footnote 2 of *Hale* the Court said:

[fn2] Where a party is represented by counsel, our court policy is to refuse to consider pro se briefs. However, as the issue raised here **questions our jurisdiction**, which **we must independently ascertain**, we consider Hale's argument.  
(Emphasis added)

Does the government argue or contend that the jurisdictional element was anything more or less than the claim that the Congress has no power to make laws, and the Executive branch has no power to enforce laws, unless the law is promulgated pursuant to some power delegated to Congress by the US Constitution? If so what other jurisdictional claims would the government say were presented by Hale?

20. Does the government contend that the laws alleged in the indictment are premised upon any grant of authority other than the commerce clause, Article 1 Section 8, Paragraph 3 of the Constitution of the United States? If so what?

21. In the concurrence of *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995) one may find the following:

I write separately, however, to record my doubt that the case in fact presents any issue of remedies or of remedial discretion at all. A court does not - in the nature of things it can not - give a "remedy" for an unconstitutional statute, since an unconstitutional statute is not in itself a cognizable "wrong." (If it were, every citizen would have standing to challenge every law.) In fact, **what a court does with regard to an unconstitutional law is simply to ignore it.** It decides the case "disregarding the [unconstitutional] law," **Marbury v. Madison**, 1 Cranch 137, 178 (1803) (emphasis added), because a law repugnant to the Constitution **"is void, and is as no law,"** *Ex parte Siebold*, 100 U.S. 371, 376 (1880). Thus, if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy. Or if a plaintiff seeks to enjoin acts, harmful to him, about to be taken by a government officer under an unconstitutional regulatory statute, "the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Massachusetts v. Mellon*, 262 U.S. 447, 488-489 (1923) (emphasis added). In such cases, it makes sense to speak of "remedial discretion."  
(Emphasis added)

Does the government agree that the court should ignore unconstitutional laws?

22. Does the government agree with the Supreme Court in *Marbury v. Madison* that laws repugnant to the constitution are void, and no laws at all?

23. Does the government contend that an individual such as the Defendant can be convicted and imprisoned for an unconstitutional act of Congress?

24. Since Hale presented his jurisdictional theories pro se, does the government agree that the Defendant in this case has the legal right to present the same theories expertly, through counsel, during trial, by witnesses called by the government or the defense or both? If not why not?

25. *United States v. Lopez*, 514 U.S. 549, 580 (1995) the Court said:

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. As THE CHIEF JUSTICE explains, unlike the earlier cases to come before the Court **here neither the actors nor their conduct have a commercial character**, and neither the purposes nor the design of the statute have an evident commercial nexus. See ante, at 559-561. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.  
(Emphasis added)

Does the government dispute the contention that the interstate commerce nexus, or lack thereof, was the jurisdictional claim raised in Hale's pro se brief?

26. Does the government agree that *Lopez* conflicts with *Hale*? If so how can the two cases be reconciled?

27. Does the government agree that a later Supreme Court decision (*Lopez*) must be given precedence over an older conflicting opinion from a circuit?

28. Does the government dispute the right of the Defendant to attempt to elicit evidence and testimony to construe 18 U.S.C. § 922(o) such that it neither transgresses the US Constitution and

Arkansas state law? If not what does the government make of 18 U.S.C. § 927. Effect on State law, which provides:

Effect on State law

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to **occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter**, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

(Emphasis added)

29. Does the government deny that the Defendant is entitled to ask proper questions concerning the relationship between 18 U.S.C. § 922(o) and provisions of state law that might make his conduct harmonize with federal and state law?

30. If the government contends that 18 U.S.C. § 922(o) is a valid exercise of the power to regulate commerce, where does this element appear in the jury instructions?

31. Does the government disagree with the Defendant's claim that Congress placed no interstate nexus test on 18 U.S.C. § 922(o), either in the text or in any Congressional findings or legislative history? If such disagreement is made, what such legislative text or findings are available, and can the Defendant see them?

32. Does the government disagree with Defendant's contention that the Congress promptly made amendments to 18 U.S.C. § 922 (q), concerning guns in school zones, promptly after the *Lopez* decision?

33. If the Congress needed to declare on paper, in English words set forth in acts passed pursuant to the rules of that august body, its interstate nexus for regulating guns in school zones, what logical basis would the government claim for saying that 18 U.S.C. § 922 needs no such defined and

legislative interstate or other jurisdictional nexus?

34. Does the government claim that there is an exception to the doctrine of limited powers, such that Congress can regulate guns in a plenary manner, checked only by the political process? If so when did this exception come into being and how?

35. If the government makes such claim, what differentiates machine guns or short barrel shotguns from any other article, tangible or intangible?

36. If the government claims that there are no limits on Congress' power to regulate the simple, non-commercial, purely intrastate possession of guns, upon what principled theory does the commerce clause matter? It would appear that if guns can be regulated without consideration of the commerce clause or any other delegation of power, then Congress has no limitations, period. If the government can rebut this theory the Defendant would like to hear said rebuttal.

37. How does the government define the term "infringe," as that term is used in the 2<sup>nd</sup> Amendment?

38. Does the government agree that the statute, indictment, proof at trial, verdict, and judgment of conviction must line up in every material respect, with respect to the elements of the crime charged?

39. If the government agrees that an "interstate commerce nexus" is the jurisdictional basis for haling the Defendant into this Court, where are the jury instructions on this jurisdictional element? Does the government agree with the text of Defendant's commerce clause instruction, if interstate commerce is an element of the crime?

40. Does the government request that this Court grant a directed verdict as to the jurisdictional nexus?

41. Does the government request a directed verdict as to the element set forth in the statute, namely whether or not the Defendant is:

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to -

(A) **a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof;** or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(Emphasis added)

In other words, does the government feel so insecure of its ability to prove this element of the that it would ask the Court to deprive the Defendant of a jury determination of this element of the “offense?”

WHEREFORE, premises considered, the Defendant submits this response to the motion in limine, and prays that the motion in limine be denied as moot, denied as satisfied, or denied for such other reason as the Court deems appropriate, and for all such other and further relief as may be appropriate whether or not specifically prayed.

Respectfully submitted,

By: /s/ Oscar Stilley  
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**CERTIFICATE OF SERVICE**

I, Oscar Stilley, by my signature above certify that I have this January 8, 2007 served the following by ECF:

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