

**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

MOTION FOR ARREST OF JUDGMENT

Comes now Defendant H. Wayne Fincher and for his motion for arrest of judgment and states:

1. The indictment fails to charge an offense, for the following reasons.
2. The indictment fails to plead jurisdiction, in that the indictment contains not a hint of accusation of any interstate commerce.
3. The indictment does not charge an offense, in that the law allegedly changed thus criminalizing machine guns without any act of Congress. The case of *U.S. v. Stewart*, 451 F.3d 1071, (C.A.9, June 30, 2006) allegedly made the act illegal, whereas previously any rational lawyer reading the caselaw of the 9th Circuit before that date, and reading the original *Stewart* decision, would say that the simple possession of homemade machine guns cannot possibly constitute a federal offense.
4. The indictment did not charge the elements of the statute.

18 U.S.C. § 922(o) says:

(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)

5. The indictment does not allege that the guns were not possessed 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. The indictment further failed to accuse the defendant of not lawfully possessing the machine guns before the date the subsection took effect.

6. The indictment did not charge that the Defendant possessed the guns outside the protections of the 2nd Amendment. This proves that the grand jury did not consider or at least did not find any activity outside the protections of the 2nd Amendment. Regardless of any other consideration, the grand jury right must include reasoned consideration of whether a particular act was protected by the constitution. Otherwise the 4th Amendment right to a grand jury indictment is meaningless.

7. *Hale* as well as the Court's statements at trial acknowledges the Defendant to be innocent if his possession was "reasonably related to a well regulated militia." The lack of any allegation that the possession was not "reasonably related to a well regulated militia" is therefore necessarily fatal to the validity of the indictment. Without a grand jury allegation that the possession was not constitutionally protected, there is no proof the grand jury considered the question and protected the Defendant as required by the 4th Amendment.

8. The court does not have jurisdiction due to the lack of any interstate commerce, and the lack of any other federal jurisdictional nexus.

9. Defendant files his brief contemporaneously herewith and incorporates same in this motion

as if set forth word for word.

WHEREFORE, Defendant prays an arrest of the judgment for such reasons whether or not stated herein as the Court finds just, an order compelling the government to produce the findings and conclusions of Congress to the effect that the Defendant's possession of machine guns constituted interstate commerce as that term is used in the commerce clause of the US Constitution (whatever they rely upon); for an order compelling the government to fully and fairly respond to every question posed in the brief filed contemporaneously herewith; and for all such other and further relief as may be appropriate whether or not specifically prayed.

Respectfully submitted,

By: /s/ Oscar Stilley
Oscar Stilley, Attorney at Law
701 S. 21st Street
Fort Smith, AR 72901
(479)573-0726
Attorney for Defendant

CERTIFICATE OF SERVICE

I, Oscar Stilley, by my signature above certify that I have this January 24, 2007 served the following by ECF:

Wendy L. Johnson
U.S. Attorney's Office
P.O. Box 1524
414 Parker Avenue
Fort Smith, AR 72902