

**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

DEFENDANT'S JURY INSTRUCTIONS

Comes now Hollis Wayne Fincher and proposes the following jury instructions.

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 2, 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

STATEMENT WITH RESPECT TO AGREED INSTRUCTIONS

Defense counsel has conferred with government counsel and concluded that the most efficient method of proceeding is to agree on that which is agreed, and thus to only trouble the Court with extra paper where a dispute exists.

The Defendant, reserving his right to further object or to propose more proper instructions or modifications to the instructions of either party, having been provided with a copy of the government's instructions, sets forth a list of instructions proposed by the government, and further indicates if the instruction is deemed agreed, partly agreed, or objected to. Defendant herewith submits substantive instructions for both counts of the indictment and for entrapment.

8th Cir. No. 1.01

GENERAL NATURE OF CASE; NATURE OF INDICTMENT; BURDEN OF PROOF; PRESUMPTION OF INNOCENCE; DUTY OF JURY;

This instruction is agreed in principle. The word “charge” should be pluralized, but the treatment of the second count should be consistent with the treatment of the first count.

8th Cir. 1.02 ELEMENTS OF THE OFFENSE (PRELIMINARY)

Not agreed. Defendant does not agree that the elements of each offense are correctly stated. Defendant submits that this instruction is unnecessary.

1.03 EVIDENCE; LIMITATIONS

Agreed.

[no number] Direct v. circumstantial evidence

Agreed.

1.05 CREDIBILITY OF THE WITNESS

Agreed.

1.08 CONDUCT OF THE JURY

Agreed.

1.09 PRELIMINARY INSTRUCTIONS BEFORE OPENING STATEMENTS “OUTLINE OF TRIAL”

Agreed.

3.01 INTRODUCTION

Agreed except that the last sentence should be stricken.

3.02; D&B 18.10 MODIFIED DUTY OF JURY

Agreed except as to the last sentence of the first paragraph. Defendant contends that this sentence should be stricken, in which case the instruction is agreeable to the Defendant.

3.03 EVIDENCE; LIMITATIONS

Agreed.

3.04 CREDIBILITY OF WITNESSES

Agreed.

3.06 DESCRIPTION OF CHARGES; INDICTMENT NOT EVIDENCE; PRESUMPTION OF INNOCENCE; BURDEN OF PROOF (SINGLE DEFENDANT, MULTIPLE COUNTS)

Agreed.

3.11 REASONABLE DOUBT

Agreed.

4.10 OPINION EVIDENCE, EXPERT WITNESS

Agreed.

6.26.5861 ELEMENTS OF OFFENSE - FIREARMS – POSSESSION OF MACHINE GUN (18 U.S.C.) 922(o)

Not agreed, Defendant submits a different instruction.

6.26.5861 ELEMENTS OF OFFENSE - FIREARMS – POSSESSION OF AN UNREGISTERED FIREARM¹ (18 U.S.C.) 922(o)

Not agreed, Defendant submits a different instruction.

D&B 13.05 INDICTMENT, “ON OR ABOUT”

Agreed.

7.03 “KNOWINGLY” DEFINED

Agreed if the second sentence of the instruction is stricken. Otherwise disagreed.

7.05 PROOF OF INTENT OR KNOWLEDGE

Agreed.

[no number] “FIREARM DEFINITION”

Disagreed.

8.02 POSSESSION: ACTUAL, CONSTRUCTIVE, SOLE, JOINT

Agreed.

¹ The government’s instruction uses “machine gun” in the title of instructions on both counts, doubtless an oversight. This would have to be the instruction for Count 2 involving a short barreled shotgun.

**3.12 ELECTION OF FOREPERSON; DUTY TO DELIBERATE;
PUNISHMENT NOT A FACTOR; COMMUNICATIONS WITH COURT;
CAUTIONARY; VERDICT FORM**

Agreed.

2.05 WIRETAP OR OTHER TAPE-RECORDED EVIDENCE

Agreed if the language “These conversations were legally recorded, and” is stricken.

2.06 TRANSCRIPT OF TAPE-RECORDED CONVERSATION

Agreed.

4.05a CREDIBILITY - COOPERATING WITNESS

Agreed.

4.06 TESTIMONY OF INFORMER

Agreed.

2.08 DEFENDANT’S PRIOR SIMILAR ACTS

Disagreed. Defendant will object to the presentation of evidence of acts not charged in the indictment. Defendant contends that this instruction will be altogether unnecessary.

ADDITIONAL INSTRUCTIONS

Entrapment.

DEFENDANT’S PROPOSED INSTRUCTION NO. ____

18 USC 922 (o) POSSESSION OF PROHIBITED MACHINE GUNS

The crime of possession of a prohibited machine gun, as charged in Count 1 of the Indictment, has four elements, which are:

One, the defendant knew that he had in his possession a machine gun capable of operating as designed, which design permitted the gun to discharge more than a single round (bullet) with a single pull of the trigger, and that such possession was not 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; and

Two, the machine gun could not reasonably contribute to the common defense of the United States or the State of Arkansas, as a military arm, as a military arm protected by the 2nd Amendment of the US Constitution and Article 2 § 5 of the Arkansas Constitution, and whose only reasonable and probable use was therefore for criminal purposes;

Three, the machine gun was not registered to the defendant in the National Firearms Registration and Transfer Record, nor possessed by the accused prior to January 1, 1987; and

Four, the machine gun, in the condition specifically described in this jury instruction, was trafficked in interstate commerce. “Interstate commerce” for purposes of this instruction includes any sale, barter, or other transaction for commercial profit between a seller in one State and a buyer in;

A) Any place outside of that State, or

B) Any place within any possession of the United States (not including the Canal Zone) or the District of Columbia,

EXCEPT

Such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

Five, the machine gun was 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;

18 USC 922 (o) (no 8th Circuit pattern instruction)

DEFENDANT’S PROPOSED INSTRUCTION NO. _____

8th Cir. 6.26.5861 FIREARMS--POSSESSION OF UNREGISTERED SHORT BARRELED SHOTGUN (26 U.S.C. § 5861(d))

The crime of possession of an unregistered short barreled shotgun, as charged in Count 2 of the Indictment, has four elements, which are:

One, the defendant knew he had in his possession a shotgun having a barrel or barrels less than 18 inches in length, and that such possession was not 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;

Two, the design and operation of the shotgun was such that it could not reasonably contribute to the common defense of the United States or the State of Arkansas, as a military arm protected by the 2nd Amendment of the US Constitution and Article 2 § 5 of the Arkansas Constitution, and whose only reasonable and probable use was therefore for criminal purposes;

Three, the short barreled shotgun was not registered to the defendant in the National Firearms Registration and Transfer Record;

Four, the short barreled shotgun, in the specific condition described

in this jury instruction, was trafficked in interstate commerce.

“Interstate commerce” for purposes of this instruction includes any sale, barter, or other transaction for commercial profit between any place in one State and;

A) Any place outside of that State, or

B) Any place within any possession of the United States (not including the Canal Zone) or the District of Columbia,

EXCEPT

Such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

8th Cir. 6.26.5861 (modified)

DEFENDANT’S PROPOSED INSTRUCTION NO. _____

8th Cir. 9.01 ENTRAPMENT

One of the issues in this case is whether the defendant was entrapped, because he informed various government officials and agencies of the types of guns in his possession and expressed his belief that he had a legal right to possess such guns. It is uncontested that these government officials never responded to say that the private ownership of such guns contravened any valid law of the United States. If the defendant was entrapped, he must be found not guilty. The Government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped.

If the defendant before contact with the governor of the State of Arkansas, the Bureau of Alcohol, Tobacco, and Firearms (BATF) did not have any intent or disposition to commit the crime charged and was induced or persuaded by the words, actions, or inaction of these agencies, or their officer(s) or agent(s) to willfully commit that crime, knowing same to be contrary to a valid and constitutional law of the United States, then he was entrapped. On the other hand, if the defendant before contact with the above described entities and parties did have an intent or disposition to willfully and intentionally commit the crime

charged, then he was not entrapped, even though the above described entities or parties provided a favorable opportunity to commit the crime or made committing the crime easier or even participated in acts essential to the crime.

8th Cir. 9.01 (modified)

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DEFENDANT

VERDICT FORM

We, the jury, on the charges in the indictment of Hollis Wayne Fincher, for our verdict say:

1. We find the accused, Hollis Wayne Fincher, as to Count 1.

(Not Guilty) or (Guilty) [circle one]

2. We find the accused, Hollis Wayne Fincher, as to Count 2.

(Not Guilty) or (Guilty) [circle one]

[complete the following only in the event of a guilty verdict on one or both counts]

3. We find that the number of guns possessed knowingly in violation of the laws of the United States, charged by the grand jury in their indictment, is

_____ (here fix the number of such guns unanimously found and

determined to by the jury to have been possessed by the accused)