

In the  
United States Court of Appeals  
for the Eighth Circuit

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Appeal No. 07-2514/2888

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**UNITED STATES OF AMERICA,**  
Plaintiff/Appellee,

vs.

**HOLLIS WAYNE FINCHER,**  
Defendant/Appellant.

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**APPELLANT'S PRINCIPAL BRIEF**

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On Appeal from the United States District Court  
For the Western District of Arkansas  
The Jimm Larry Hendren, Presiding District Court Judge

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## JURISDICTIONAL STATEMENT

This is an appeal of criminal convictions of Appellant Hollis Wayne Fincher (“Fincher”) under 18 U.S.C. §§922(o) and 924(a)(2), and 26 U.S.C. §§5841, 5861(d) and 5871. The district court had jurisdiction of the matter pursuant to 18 U.S.C. § 3231. Judgment was entered below on June 26, 2007. Notice of appeal was timely filed on the conviction on June 27, 2007. The district court later entered an order, on July 27, 2007, revoking Fincher’s in forma pauperis (“IFP”) status, and directing him to reimburse Appellee United States of America (“the Government”) for fees paid to his appointed counsel. Notice of appeal of this order was timely filed on this order on August 10, 2007. The Court of Appeals therefore has appellate jurisdiction pursuant to Rule 4(b)(1)(A), Fed.R.Civ.P., and 28 U.S.C. § 1291.

## STATEMENT OF ISSUES

1. Fincher is entitled to protection under the Second Amendment of the United States Constitution from criminal prosecution for violation of federal gun laws.<sup>1</sup>

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<sup>1</sup> The most apposite cases are United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939), U.S. v. Hale, 978 F.2d

2. Fincher is financially unable to obtain adequate representation, and is therefore eligible for IFP status, despite his former joint ownership with his spouse of a valuable homestead.<sup>2</sup>

3. Even if his conviction is upheld, Fincher should not be remanded from penal custody for resentencing below because the lower court lost jurisdiction once Fincher began serving his sentence.<sup>3</sup>

### STANDARDS OF REVIEW

1. The Second Amendment issue came before the court below on a motion in limine filed by the Government. The standard of review for orders in limine is for abuse of discretion.<sup>4</sup> An abuse of discretion is committed when an district court makes a ruling based on an error of

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1016 (8<sup>th</sup> Cir. 1992), Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007) and United States v. Emerson, 270 F.3d 203 (5<sup>th</sup> Cir. 2001).

<sup>2</sup> The most apposite cases are U.S. v. Lexin, 434 F.Supp.2d 836 (S.D.Cal. 2006); Harper v. State, 850 S.W.2d 736 (Tex.App. Amarillo 1993), U.S. v. Trevino, 679 F.Supp. 636 (S.D.Tex.1987).

<sup>3</sup> The most apposite cases are Egan v. U.S., 268 F.2d 820, 823, (8<sup>th</sup> Cir. 1959), cert. denied 80 S.Ct. 130, 361 U.S. 868, 4 L.Ed.2d 108 (U.S. Oct. 19, 1959) and United States v. Austin, 217 F.3d 595, 597 (8<sup>th</sup> Cir. 2000).

<sup>4</sup> U.S. v. Cook, 454 F.3d 938, 940 (8<sup>th</sup> Cir. 2006).

law.<sup>5</sup>

2. A district court's conclusion that a defendant is financially able to pay is reviewed for clear error.<sup>6</sup> A district court should be overturned for clear error (a) if its ruling is based on facts not supported by substantial evidence in the record; (b) if its ruling is based on an erroneous view of law; or (c) if the Court of Appeals is left with a definite and firm conviction that error was made.<sup>7</sup> Substantial evidence is "more than a scintilla but less than a preponderance."<sup>8</sup> It means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>9</sup>

3. Errors in sentencing are reviewed de novo.<sup>10</sup>

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<sup>5</sup> Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8<sup>th</sup> Cir. 2007).

<sup>6</sup> U.S. v. Parker, 439 F.3d 81, 96 (2<sup>nd</sup> Cir. 2006).

<sup>7</sup> Richardson v. Sugg, 448 F.3d 1046, 1052 (8<sup>th</sup> Cir. 2006).

<sup>8</sup> Anderson v. U.S. Bancorp, 484 F.3d 1027, 1034 (8<sup>th</sup> Cir. 2007).

<sup>9</sup> Shipley v. Arkansas Blue Cross and Blue Shield, 333 F.3d 898, 901 (8<sup>th</sup> Cir. 2003).

<sup>10</sup> U.S. v. Sadler, 234 F.3d 368, 373 (8<sup>th</sup> Cir. 2000).

## STATEMENT OF THE CASE

Fincher was arrested by Appellee, United States of America (“the Government”), on November 9, 2006, on a charge of possession of a machine gun in violation of 18 U.S.C. §922(o), which indictment was later amended to include possession of a short-barreled shotgun.<sup>11</sup> At his initial appearance, Fincher executed a document entitled “Financial Affidavit In Support Of Request For Attorney Or Other Court Services Without Payment Of Fee” (“Financial Affidavit”).<sup>12</sup> Fincher indicated that he owned a home and 120 acres in Fayetteville, Arkansas (the “Property”), and gave the value of the Property as “unknown.” No information as to liens against the Property was given.

The Financial Affidavit is part of the paperwork required under the Court's Criminal Justice Act Plan (the “Plan”), which is a “plan for furnishing representation for any person financially unable to obtain adequate representation” under 18 U.S.C. §3006A. Pursuant to the Plan, legal representation is furnished at public expense to persons

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<sup>11</sup> Complaint, (Dkt. No. 1); Indictment, (Dkt. No. 8), and Amended Indictment (Dkt. No. 30).

<sup>12</sup> ER 1.

charged with felony crimes who are “financially eligible.” On the basis of the Financial Affidavit, attorney David Dunagin was appointed to represent Fincher.<sup>13</sup> Dunagin represented Fincher until December 13, 2006, when he was allowed to withdraw in favor of attorney Oscar Stilley.<sup>14</sup>

In preparation for trial, the Government filed a motion in limine seeking to limit the evidence that could be presented to the jury at trial.<sup>15</sup> Specifically it sought to preclude Fincher from arguing certain legal elements to the jury without court approval via a proper jury instruction.<sup>16</sup> Fincher responded in writing, stating he intended to offer evidence in support of his Second Amendment defense under the U.S. Supreme Court case of U.S. v. Miller. and the Eighth Circuit Court of Appeals case of U.S. v. Hale.<sup>17</sup> At hearing on the issue, the trial court stated:

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<sup>13</sup> CJA 20 (Dkt. No. 4).

<sup>14</sup> E.g., Motion to Withdraw as Attorney (Dkt. No. 17).

<sup>15</sup> Mot. in Limine (Dkt. No. 19).

<sup>16</sup> Id., p. 1.

<sup>17</sup> Resp. to Mot. in Limine (Dkt. No. 29).

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 has 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.<sup>18</sup>

Fincher's case was tried to a jury on January 12, 2007. At that time, he tried to offer the testimony the trial court had said “would be permissible.” Judge Hendren, however, reversed himself, and refused to allow the evidence.<sup>19</sup> Fincher was then convicted of both charges of a two-count Indictment, possession of a machine gun, in violation of 18 U.S.C. §§922(o) and 924(a)(2), and possession of a sawed off shotgun not registered, in violation of 26 U.S.C. §§5841, 5861(d) and 5871.<sup>20</sup> The jury did not get to consider any evidence which, if believed, would have offered Fincher refuge in the Second Amendment.

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<sup>18</sup> Tr. of Hearing, Jan. 9, 2007, 76:18-77:3 (emphasis added), ER 2 to ER 3.

<sup>19</sup> Id., 498:19-22, ER 4.

<sup>20</sup> Jury Verdict (Dkt. No. 35).

On March 8, 2007, at Fincher's request, Stilley was allowed to withdraw and another attorney, Shannon Blatt (“Blatt”), was appointed to represent Fincher.<sup>21</sup> A Presentence Investigation Report, (“PIR”), was prepared in connection with Fincher's sentencing. In the section entitled “Financial Condition: Ability to Pay,” the PIR stated that Fincher had “recently transferred” the Property 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 was sentenced to concurrent terms of 78 months imprisonment on each count of conviction, and a fine of \$1,000.<sup>22</sup> On July 27, 2007, the court entered an order revoking his IFP status, and ordering him to repay some \$14,000 to the U.S. Treasury expended in his defense.<sup>23</sup>

## STATEMENT OF THE FACTS

### 1. Facts Relevant to Fincher’s conviction.

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<sup>21</sup> Dkt. No. 42 and 43.

<sup>22</sup> Judgment (Dkt. No. 50).

<sup>23</sup> Order, July 27, 2007, (Dkt. No. 65), at 8-15, ER 48 to ER 69.

The following facts are substantially undisputed by the Government. Fincher has lived his life in the country outside Black Oak, Arkansas.<sup>24</sup> He is a founding member of the Washington County Militia (“WCA”),<sup>25</sup> consisting of a company size formation of light infantry. Its founders, private citizens all, conceived its organization under their understanding of the laws of the State of Arkansas and the United States of America.<sup>26</sup> From its initial formation on July 4, 1994,<sup>27</sup> it held monthly drills for many years.<sup>28</sup> More recently it began mustering less often, but still does so several times a year.<sup>29</sup> Furthermore its officer corps meets once a week on administrative, legal and similar matters.<sup>30</sup>

During drill, the WCA conducts military and weapons training.

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<sup>24</sup> Trial Tr., Jan. 10, 2007, 423:7, ER 5.

<sup>25</sup> Id., 423:13, ER 5, 441:10-12, ER 6.

<sup>26</sup> Id., 423:16-17, ER 5.

<sup>27</sup> Id., 441:6-9, ER 6.

<sup>28</sup> Id., 426:18-24, ER 7.

<sup>29</sup> Id., 19-24, ER 7 to ER 8.

<sup>30</sup> Id., 443-444, ER 9.

Its training includes indoor and outdoor classes on firearms safety and proficiency, including “extensive” training in the use of otherwise prohibited machine guns and short-barreled shotguns.<sup>31</sup> It does not allow any alcohol at drill, and it has written rules for safety and administration.<sup>32</sup> The point of the extensive training was to make the militia company as effectively militarily as possible, to ensure its members attain a basic level of skill and “efficiency” sufficient to contribute to the common defense in a time of state emergency.<sup>33</sup> The WCA believes it would be “derelict” to neglect machine gun training in its drill regimen. As Fincher testified:

To go out and meet any capable adversary – and when these were available, it would be derelict of duty – it would be an act – it could almost be considered an act against your country to not use common, available, effective, proven, battle-proven military arms. You would be derelict to not use them.<sup>34</sup>

The WCA believes it is necessary to drill regularly because it does not

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<sup>31</sup> Id., 425, ER 10.

<sup>32</sup> Id., 432, ER 11.

<sup>33</sup> Id., 425:13-426:1, 9-12, ER 7, ER 10.

<sup>34</sup> Id., 426:4-8, ER 9.

view itself as a “sedentary” or technical militia, but as an organized, active paramilitary unit with a hierarchy and membership schooled, trained and intended for active military service in time of need.<sup>35</sup>

The WCA, while not constituted by agents of the State of Arkansas, has never hid from government officials its existence, activities or willingness to serve. The WCA itself expressly known in publicly recorded documents sent to the Arkansas governor’s office, the U.S. Bureau of Alcohol Firearms and Tobacco, the U.S. attorney, the state police and the local sheriff, among others.<sup>36</sup> It formally announced itself from its inception to both in writing<sup>37</sup> as well as in personal visits by police and two different county sheriffs both at the WCA armory and at state and county offices.<sup>38</sup> The WCA disclosed to all these officials it was training with machine guns, and displayed to many of them the weapons and invited them to inspect the weapon vault in the WCA

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<sup>35</sup> Id., 426, ER 10.

<sup>36</sup> Def. Exhibits 1-A through 1-C, ER 12 to ER 33. See also Trial Tr., Jan. 10, 2007, 429, ER 34.

<sup>37</sup> Id.

<sup>38</sup> Id.

armory.<sup>39</sup> It even reported their activities to the local news media. In fact, these disclosures were made because the WCA views itself under the direct control and authority of local, county and state officials.<sup>40</sup>

The WCA is very particular about the machine guns and short-barreled shotguns with which it chose to arm itself.<sup>41</sup> From the outset it picked “battle-proven” arms of “standard military utility,”<sup>42</sup> that would have a wide variety of infantry uses, were easy and cheap to produce and maintain, and had standard ammunition that would be readily available and inexpensive to obtain.<sup>43</sup> Its selections for automatic weapons were the Browning machine gun and the Sten sub-machine gun.<sup>44</sup> It chose a short-barreled shotgun for its variety of other uses in close combat by relatively unskilled riflemen and support troops.<sup>45</sup>

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<sup>39</sup> Id., 432:25-435:25, ER 35 to ER 38.

<sup>40</sup> Id., 439:24-440:12, 447:11-15, ER 39 to ER 41.

<sup>41</sup> Id., 436-439. ER 42 to ER 45.

<sup>42</sup> Id., 436:8-20, ER 42.

<sup>43</sup> Id., 436-439, ER 42 to ER 45.

<sup>44</sup> Id.

<sup>45</sup> Id.

Despite the fact that WCA had been organized and in training for 12 years, and despite the fact the WCA had disclosed its activities for just as long (its agencies had long been, in their terms, “familiar” with Fincher), the Government decided for, reasons that were never made clear, that in the fall of 2006 it was finally time to prosecute Fincher.<sup>46</sup> It arrested him in November 2006 – twelve years after he helped found the WCA – for his possession of machine guns and short-barreled shotguns, and this prosecution ensued. The foregoing facts are basically undisputed by the Government, just as Fincher does not dispute that he was in possession of the guns, and he had no license issued by the Government for him to do so. What is disputed is whether, as a matter of law, his possession of these weapons has some reasonable relationship to the maintenance of a well-regulated militia.

**2. Facts relevant to Fincher’s financial ability to obtain counsel.**

Fincher completed after his arrest a standard form Financial Affidavit, which is used for determining IFP eligibility.<sup>47</sup> He stated “he

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<sup>46</sup> Id., 234:22-235:13, ER 46 to ER 47.

<sup>47</sup> Financial Affidavit, ER 1.

had no money.”<sup>48</sup> Fincher’s did disclose, however, that he and his wife jointly owned a “home and 120 acres,”<sup>49</sup> and admitted the value was “unknown.”<sup>50</sup> He was therefore given IFP status and appointed counsel.

After a July 3, 2007, post-sentencing hearing on Fincher’s IFP status, Judge Hendren commissioned appraiser Tom Reed to prepare an estimate of value of the homestead property.<sup>51</sup> Reed valued the fee interest at \$455,000.<sup>52</sup> His opinion of value, Reed said, was based in part on what the appraiser called his “extraordinary assumption” that legal access exists to the property for ingress and egress.<sup>53</sup> Fincher’s

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<sup>48</sup> Order, 8, ER 55.

<sup>49</sup> Quitclaim Deed referred to in Order, 7/27/2007, 4, fn. 2. ER 70 to ER 72.

<sup>50</sup> ER 1.

<sup>51</sup> Order, 5, ER 52, and Order, 7/03/2007 (Dkt. No. 61).

<sup>52</sup> See ER 75.

<sup>53</sup> See copy of appraisal report, p.6., which undersigned obtained from Judge Hendren’s chambers on August 6, 2007. ER 73 to ER 141. Fincher steadfastly objects to the appraisal report being considered as evidence. It was not served on Fincher, it lacks all foundation, and the appraiser has not been subject to ANY cross-examination regarding his opinion of value. But even if the report is

only supposed access to the land was along a “jeep trail” that would need, according to the appraisal, “substantial improvement” to be of any use.<sup>54</sup> More important, Reed found no evidence in the county land title records of legal access.<sup>55</sup> Indeed, a search of the land title records by a title company later revealed access to be “uninsurable.”<sup>56</sup> Fincher’s deed, moreover, which the district court reviewed, shows Fincher’s interest was “subject to” a joint-tenancy interest.

Later, Fincher transferred his homestead interest to his children. Their family attorney, Jack Butt,<sup>57</sup> sought the Government’s permission

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considered, the “extraordinary assumption” of access for ingress and egress is false, and it therefore bears absolutely no factual merit in the circumstances.

<sup>54</sup> Order, 9, ER 56.

<sup>55</sup> Id.

<sup>56</sup> Easement Report of Title Agent Christy May, dated August 9, 2007. ER 143. Like the appraisal report, this was never entered in the record below – but just as he never had a chance to challenge Reed on cross-examination, Fincher never had a chance to offer any counter evidence. The Court of Appeals is therefore asked to consider what would have been offered in the record, if Fincher had been afforded the opportunity.

<sup>57</sup> Id., at 13, ER 60.

to make the transfer.<sup>58</sup> He disclosed the purpose of the quitclaim deed to transfer all but a life estate to the couples' daughters, which was to keep the family farm in ownership "by the family." The U.S. Attorney responded, stating "even though final sentencing has been passed on to Mr. Fincher, this contemplated transfer, so long as he honestly represents it to properly inquiring authorities, is not prohibited or illegal."<sup>59</sup> In reliance, Fincher therefore delivered the quitclaim deed to his daughters on February 12, 2007.<sup>60</sup>

Consequently, Fincher's only asset as of March 8, 2007, was a life estate in his and Linda Fincher's homestead. It consists of only 120 acres of dry-land farm, with a house and shed that are in such an advanced state of decrepitude they "provide minimal, if any, contributory value to the land."<sup>61</sup> The life estate, according to the

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<sup>58</sup> Id. (Unlike much of the other documentation upon which the trial court relied, the Butt letter was actually entered into the record pursuant to the rules of evidence.)

<sup>59</sup> Letter from Butt to Plumlee dated 2/08/2007, ER 144 to ER 146.

<sup>60</sup> ER 70 to ER 72.

<sup>61</sup> Reed appraisal report, 12, ER 85.

appraiser Reed, is worth \$39,000,<sup>62</sup> and Fincher's half of that is only \$19,500.

A life estate in land without a documented easement for ingress and egress.<sup>63</sup> is not something that can be sold or hypothecated to raise funds for a defense. Fincher has not had employment since the 1980s.<sup>64</sup> Thus, even if he had an interest that could be mortgaged, he has no income to repay a loan to obtain counsel.

### SUMMARY OF THE ARGUMENT

The Second Amendment, according to the holding in U.S. v. Hale, provides an affirmative defense to a federal criminal charge for the illegal possession of a firearm. It protects the right to bear arms where reasonably related to the maintenance of a well regulated militia. Moreover, as was held in U.S. v. Emerson, and Parker v. District of Columbia, the Second Amendment protects individual rights of citizens to keep and bear arms, not just collective rights of states. In this case, Fincher, as an active member of an paramilitary organization whose

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<sup>62</sup> ER 75.

<sup>63</sup> Reed appraisal report, 6, 10, ER 79, ER 83.

<sup>64</sup> ER 1.

mission it is to train, equip and mobilize the militia for call-up in time of need, is therefore entitled to Second Amendment protection. As a result, the trial court erred by refusing to either dismiss the charges as a matter of law, or to at least allow Fincher to present evidence that his possession of machine guns and short-barreled shotguns was reasonably related to his membership in a well-regulated militia.

Furthermore, Fincher is entitled to IFP status because his only asset is a life estate in a homestead. In order to be eligible for appointed counsel, the accused need show only that he is financially unable to retain private counsel. Fincher is financially unable to retain private counsel because he has no income and no assets he could sell to obtain cash. The trial court therefore erred when it revoked his IFP designation, and ordered him to pay the cost of his defense.

Finally, the trial court's request to re-sentence should be rejected. Once a convicted person begins serving his sentence, the trial court loses jurisdiction to re-sentence, absent fraud on the court. Fincher did not misrepresent his financial status, and therefore cannot be considered to have committed fraud on the court or anyone else.

Fincher should therefore not be re-sentenced because the trial court had a true picture of his financial status at sentencing.

## ARGUMENT

1. **The trial court should have allowed Fincher to present evidence to the jury in his defense that his possession of machine guns and short-barreled shotguns was reasonably related to the maintenance of a well-regulated militia.**
  - A. **The Second Amendment protects the right to bear arms when it is reasonably related to the maintenance of a well-regulated militia.**

Violation of U.S. firearms statutes is privileged under certain circumstances by the Second Amendment of the United States Constitution.<sup>65</sup> As the Eighth Circuit Court of Appeals established long ago, moreover, the Second Amendment does not concern itself with hunting deer or shooting at clay pigeons. Rather, the framers intended it to protect military-grade small-arms in the hands of civilians. As the Court held emphatically in the 2004 case of Lippman:

In a line of cases starting with United States v. Synnes, 438 F.2d 764, 772 (8<sup>th</sup> Cir.1971), we have held that the Second

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<sup>65</sup> United States v. Miller, 307 U.S. 174, 178-79, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) (construing U.S. Const. art. II).

Amendment protects the right to bear arms when it is reasonably related to the maintenance of a well regulated militia. ... [I]n connection with the right to bear arms, and the Supreme Court held in Miller that the Second Amendment protects the right to bear arms in “some reasonable relationship to the preservation or efficiency of a well-regulated militia.”<sup>66</sup>

It was held in the most apposite case in the Circuit, Hale, that the circumstances which fall within the Second Amendment’s ambit are “best determined from the facts of each individual case.”<sup>67</sup> To find refuge in the Second Amendment, one must prove that his or her possession of an otherwise prohibited firearm is reasonably related to the maintenance of a well-regulated state militia. Mere membership in the “technical” or “sedentary” militia or nominal membership in a non-governmental militia, alone, is “not sufficient.”<sup>68</sup> It is equally inadequate to prove simply that the weapon in question was susceptible to military use. “Rather, the claimant of Second Amendment protection

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<sup>66</sup> United States v. Lippman, 339 F.3d 1039, 1044-45 (8<sup>th</sup> Cir. 2004) (string citation omitted).

<sup>67</sup> Hale, 978 F.2d at 1020.

<sup>68</sup> Id. (citing United States v. Oakes, 564 F.2d 384, 387 (10<sup>th</sup> Cir. 1977), cert. denied, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978)); and United States v. Warin, 530 F.2d 103 (6<sup>th</sup> Cir. 1976), cert. denied, 426 U.S. 948, 96 S.Ct. 3168, 49 L.Ed.2d 1185 (1976).

must prove that his or her possession of the weapon was reasonably related to a well regulated militia.”<sup>69</sup>

**B. Fincher’s membership in the WCA served to make him better trained, equipped and able to serve in the militia upon mobilization.**

In this case, the Government never disputed that Fincher’s use of the firearms at issue were in direct connection with his enrollment in “voluntary company” of infantry designating itself as the Washington County Militia. The civilian paramilitary organization was formed and is maintained by use of regular administrative meetings and training drills. It’s officers carefully selected and obtained standard arms with which to train its members in their use for future military defense. The WCA was not engendered to provide for civil defense. It was founded pursuant to the law of the state of Arkansas that provide for military defense, in particular Article 11, § 2, Ark. Const.:

Volunteer Companies of Infantry, Cavalry or Artillery may be formed in such manner and with such restrictions as may be provided by law.<sup>70</sup>

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<sup>69</sup> Id.

<sup>70</sup> See Defendant’s proffered Exhibits 1A-C, ER 12 to ER 33.

Arkansas law defines the “unorganized” militia as:

[A] able-bodied male residents of the state between the ages of seventeen (17) and forty-five (45) years who are, or intend to become, citizens of the United States, unless exempt by law, **together with all other acceptable volunteers**, waiving necessary requirements.<sup>71</sup>

The Governor may “direct the members of the unorganized militia to present themselves for and submit to registration at such time and place and in such manner as may be prescribed by regulations.”<sup>72</sup>

Thus, the WCA is a constitutional “volunteer company” of the “unorganized militia” of Arkansas, subject to call-up by the Governor of Arkansas in the event of need. Its activities consist of organizing, arming and training its members in techniques that further their potential usefulness. The WCA’s formal and regular training with military grade arms serves this function by making its member more capable of immediate service.

In short, the activities of the WCA are directly related – and solely dedicated – to the preservation of a well-regulated force of Arkansas

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<sup>71</sup> Ark. Code Ann. § 12-61-101(b) (emphasis added).

<sup>72</sup> Ark. Code Ann. § 12-61-103.

militiamen and women. Consequently, its active membership are protected from prosecution under federal gun laws by the Second Amendment.<sup>73</sup> Fincher, as an “acceptable volunteer” member of the unorganized militia of Arkansas serving in the WCA is a beneficiary of that protection. His possession of firearms is therefore not subject to criminal prosecution under 18 U.S.C. §§922(o) and 924(a)(2), or 26 U.S.C. §§5841, 5861(d) and 5871.

The upshot is that the Government’s complaint and indictment are illegal and ought to be ordered dismissed. At the very least, if there is any dispute over the foregoing facts, those facts ought to be submitted to the jury for resolution under a proper Second Amendment instruction. Yet, the trial court refused both. Instead, despite Fincher’s detailed and undisputed testimony to the effect set forth above, it ruled that he could not qualify for the Hale defense as a matter of law. It therefore barred him in limine from submitting any evidence or argument to the jury in support of his affirmative defense.<sup>74</sup>

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<sup>73</sup> Hale, 978 F.2d at 1020.

<sup>74</sup> Trial Tr., 486:9-487:3, ER 147 to ER 148.

The trial court ruled that a mere showing of membership in the technical or sedentary militia is an insufficient showing to fall within the Second Amendment ambit.

The error of this ruling is made clear by reflecting on the specific language the Court chose to use in Hale:

“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. Oakes, 564 F.2d at 387. Membership in a hypothetical or “sedentary” militia is likewise **insufficient**. See Warin, 530 F.2d 103.<sup>75</sup>

The only modifier of “militia” in this holding is “well regulated.” It does not require it to be “organized” as Arkansas law defines that term<sup>76</sup>, or even state sponsored. All that it required is “**some** reasonable relationship to the preservation or efficiency of a well-regulated militia.”<sup>77</sup> Thus Fincher does not claim to benefit from the Second Amendment because he fits within the statutory definition the

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<sup>75</sup> Hale, 978 F.2d at 1020 (emphasis added).

<sup>76</sup> Ark. Code Ann. § 12-61-101(a).

<sup>77</sup> Lippman, 369 F.3d at 1044 (emphasis added).

“unorganized militia” under Arkansas law.<sup>78</sup> Rather, it is his actual activities in the WCA which satisfy the Hale test -- by showing that his possession of weapons and his active membership and regular training in the WCA has “some reasonable relationship to the preservation or efficiency of a well-regulated militia.”<sup>79</sup>

This conclusion is further supported by analogizing the test of a “reasonable relationship” to the familiar “traditional rationality test” used in the due process context. Under such analysis, a reasonable relationship between a government regulation and a government interest is one that is simply “rationally related” to a particular end.<sup>80</sup> This test allows for “wide latitude,” and holds that “rational distinctions may be made with substantially less than mathematical exactitude.”<sup>81</sup> Applying such a standard to this case shows a reasonable relationship<sup>82</sup>

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<sup>78</sup> Ark. Code Ann. § 12-61-101(b) (emphasis added).

<sup>79</sup> Lippman, 369 F.3d at 1044 (emphasis added).

<sup>80</sup> Rimmer v. Colt Industries Operating Corp., 656 F.2d 323, 329 (8<sup>th</sup> Cir. 1981) (citing In City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976)).

<sup>81</sup> Id.

<sup>82</sup> Miller, 307 U.S. at 178-79.

between (a) Fincher's possession of machine guns and short-barreled shotguns conjoined with his training with the very same weapons in the WCA, and (b) a well-regulated Arkansas state militia. Fincher is better prepared and available for service upon call up than he would be if he were not WCA registered, armed and trained. It may be that the level of his preparedness cannot be measured with "mathematical exactitude," but clearly, as a matter of law, it cannot be said that there is no reasonable relationship between Fincher's preparations with the WCA and a well-regulated militia. As a result, the rule of Hale applies, and the case should have been dismissed as a matter of law, or the factual questions given rise to by these circumstances should have been put to the jury.

The district court's decision to the contrary stems from a misreading of the applicable law, and is, therefore, an abuse of discretion.<sup>83</sup> Its refusal to allow the question to be posed for this is prejudicial error that should be reversed.

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<sup>83</sup> Greyhound Lines, Inc., 485 F.3d at 1035.

**C. The Second Amendment protects individual rights of citizens to keep and bear arms, not just collective rights of states.**

The Eighth Circuit panel in Hale held that the defendant had not alleged the threshold factual elements to satisfy the Second Amendment, and thus never reached the question of whether the Second Amendment protects an individual right, or a “collective” right “to keep and bear arms.” As it stated: “Whether the “right to bear arms” for militia purposes is “individual” or “collective” in nature is irrelevant where, as here, the individual's possession of arms is not related to the preservation or efficiency of a militia.”<sup>84</sup> Thus, for this Circuit, Miller remains the controlling U.S. Supreme Court decision construing the Second Amendment.

In Miller, the Supreme Court’s willingness to grant standing and address the merits of the case demonstrates its view that the right to bear arms guaranteed by the Second Amendment is a right of individuals rather than a collective right. As Circuit Judge Kozinski noted in his dissent from denial of rehearing en banc in Silveira:

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<sup>84</sup> Hale, 978 F.2d at 1020.

United States v. Miller, 307 U.S. 174, 83 L. Ed. 1206, 59 S. Ct. 816 (1939), did *not* hold that the defendants lacked standing to raise a Second Amendment defense, even though the government argued the collective rights theory in its brief. *See* Kleinfeld Dissent at 6011-12; *see also* Brannon P. Denning & Glenn H. Reynolds, Telling Miller's Tale: A Reply to David Yassky, 65 Law & Contemp. Probs. 113, 117-18 (2002). The Supreme Court reached the "Second Amendment claim and rejected it on the merits after finding no evidence that Miller's weapon--a sawed-off shotgun--was reasonably susceptible to militia use. *See Miller*, 307 U.S. at 178. We are bound not only by the outcome of Miller but also by its rationale. If Miller's claim was dead on arrival because it was raised by a person rather than a state, why would the Court have bothered discussing whether a sawed-off shotgun was suitable for militia use?<sup>85</sup>

If the right were collective, then no individual could have standing to challenge any law restricting firearm possession or use. But, as Judge Kozinski and Judge Kleinfeld both noted in Siveira, – despite Government argument in their briefs in Miller attempting to persuade the Court that Miller lacked standing – that argument was rejected, and the Miller Court reached the merits of the Second Amendment claim.

The Miller Court then clearly defined the militia contemplated by the Second Amendment:

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies

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<sup>85</sup> Silveira v. Lockyer, 328 F.3d 567, 569 (9<sup>th</sup> Cir. 2003).

and States, and the writings of approved commentators. These show plainly enough that **the Militia comprised all males physically capable of acting in concert for the common defense.** “A body of citizens enrolled for military discipline.” And further, that ordinarily when called for service **these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.**<sup>86</sup>

As Judge Kleinfeld noted in his dissent in Silveira, 328 F.3d at 578, “enrolled,’ for purposes of militia service, means something more like being registered for the draft, listed in the computer rolls for potential jury service, or enrolled by social security number for payment of taxes, than showing up at an armory for signup and training.”

The Miller definition of the militia is consistent with both Arkansas law<sup>87</sup> and the Militia Act of 1792 which defined the “militia” as: “each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years” (though, of course, that racial limitation has long since been removed, as is shown below). That 1792 statute defined the militia very broadly and without regard to whether

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<sup>86</sup> Miller, 307 U.S. at 179 (emphasis added).

<sup>87</sup> Ark. Code Ann. § 12-61-101(b).

the citizens were in any state or federal military service.<sup>88</sup>

The Militia Act of 1792 was contemporaneous with the enactment of the Bill of Rights, including the Second Amendment.<sup>89</sup> As the Miller Court acknowledged, such contemporaneous statutory definitions of the militia inform the interpretation of the term “militia” in the Second Amendment. The Miller Court cited to several other historic statutory definitions of the term “militia” all of which broadly defining it to include all male citizens. For example, the Miller Court noted that:

The American Colonies In The 17th Century,” Osgood, Vol. 1, ch. XIII, affirms in reference to the early system of defense in New England --

“In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence.”<sup>90</sup>

To this day the federal militia statute remains in effect, though it has

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<sup>88</sup> The full text of the Militia Act of 1792 may be found in the Appendix to Circuit Judge Kleinfeld’s dissent in Silveira, 328 F.3d 567. However, the most pertinent part is included at note 62.

<sup>89</sup> Congress voted to send the Bill of Rights to the states in September 1791, and it was ratified by the states on December 15, 1791. The Militia Act was enacted in 1792.

<sup>90</sup> Miller, 307 U.S. at 179-180.

been subsequently altered to expand its coverage, recognizing adult males of **all** races rather than just whites as being part of the militia.<sup>91</sup> The current version also includes non-citizens, and also women who are currently members of the National Guard, as part of the militia. It also makes a distinction between the “organized” militia, the National Guard, and the “unorganized” militia, consisting of the great mass of able bodied males among the population. Thus, even with the advent of a modern select militia in the form of the National Guard, that statute still defines a far broader body of militia not just consistent with, but far more inclusive than at the time of the writing of the Bill of Rights.

Yet, as with any other provision in the Bill of Rights, the scope of the meaning of that term within the Second Amendment, once established at the time of its enactment, and so interpreted by the Supreme Court, is independent of any modern change or pronouncement in statute. Congress could no more change and narrow the scope of the Second Amendment by redefining the militia in statute to mean only the members of the National Guard while in actual service, than it could change and narrow the scope of the First Amendment by decreeing, in a

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<sup>91</sup> 10 U.S.C. § 311. Militia: composition and classes.

statute, that “speech” was defined only as the published works of recognized members of the Washington press corps who were currently admitted access to White House press conferences. As no intervening Supreme Court decision has altered the holding in Miller, the lower courts should proceed on the basis that a militia is a body of citizens, comprised at least of all males physically capable of acting in concert for the common defense.

In addition to it being clear, from the Miller decision as well as the definitions of the militia contemporaneous to the enactment of the Bill of Rights, that the militia is the great body of the people capable of bearing arms, it is important to note that the militia clause in the Second Amendment is not the operative clause. Instead the militia clause, reading “[a] well regulated Militia, being necessary to the security of a free State, ...” is an explanatory or illustrative clause. The operative clause is the second clause, which reads “the right of the people to keep and bear Arms, shall not be infringed.” The explanatory clause serves a similar purpose as is seen in the Constitution’s Article 1, Section 8, Clause 8 Copyright Clause, which grants Congress the power

“[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” The operative clause there is the power to reserve exclusive rights, in general, to all writings and discoveries, not merely to those that Congress finds to promote progress or to be “useful.”

The operative clause in the Second Amendment that “the right of the people to keep and bear arms shall not be infringed” is as much a command as the First Amendment’s “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The inclusion of an explanatory or purpose clause in the Second Amendment does not limit the operative command clause any more than an explanatory clause in the First Amendment, such as “freedom of conscience, freedom of speech, of the press, and free assembly of the people, being necessary to the operation of free representative government, ...” would limit the scope of the First

Amendment's prohibition on Congress abridging those rights. The inclusion of such an explanatory clause could not, for instance, limit the scope of the protected speech to only expressly political speech. What would be at issue in such a hypothetical situation is what is "speech," not what explanation was given for its protection. Thus, the prohibition on the infringement of the right of the people to keep and bear arms is independent of the particular policy reasons expressed by the Founding generation for that prohibition.

What matters most is what they meant by "the right of the people to keep and bear arms." That the purpose of the Second Amendment was to prevent the disarming of the people in general, and thus secured an individual right to bear arms, was understood by all of the recognized great commentators on the Constitution from the time of its enactment on up until the 20<sup>th</sup> Century. As William Rawle's A View of the Constitution, published in 1829, explained:

The prohibition [in the Second Amendment] is general. No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this

amendment may be appealed to as a restraint on both.<sup>92</sup>

Likewise, Supreme Court Justice Joseph Story wrote:

The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.”<sup>93</sup>

It should come as no surprise that, as early as 1875, the federal government adopted the litigating position that the Second Amendment secures an individual right to keep and bear arms.<sup>94</sup> It is only in the

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<sup>92</sup> William Rawle, A View of the Constitution of the United States, 125-26 (2d. ed 1829) (quoted in 5 the Founder’s Constitution 214 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

<sup>93</sup> 3 Joseph Story, Commentaries on the Constitution § 1890 (1833) (quoted in 5 the Founder’s Constitution 214 (Philip B. Kurland & Ralph Lerner, eds., Liberty Fund 1987)).

<sup>94</sup> United States v. Cruikshank, 92 U.S. 542, 92 U.S. 542, 23 L.Ed. 588 (1875).

20<sup>th</sup> Century, that there arose a differing view among some modern legal scholars.

The Fifth Circuit, however, was the first federal appellate court since the Miller decision to undergo an exhaustive analysis of the text and history of the Second Amendment, concluding, as did the 19<sup>th</sup> Century scholars, that the Framers of the Bill of Rights intended to, and did, guarantee in the Second Amendment an individual right to keep and bear arms that was broader than actual militia service.<sup>95</sup>

The states, meanwhile, adopted the “individual rights” view long ago.<sup>96</sup> And there has been a modern trend among legal scholars that strongly favors the individual rights model, even with some scholars who’s

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<sup>95</sup> United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

<sup>96</sup> State v. Nickerson, 247 P.2d 188 (1952); In re Brickey, 70 P. 609 (Idaho 1902); State v. Chandler, 5 La. Ann. 489 (1850); Nunn v. State, 1 Kelly 243 (Ga. 1846); see also Kasler v. Lockyer, 97 Cal.Rptr.2d 334 (Cal. 2000) (Brown, J., concurring); contra State v. Buzzard, 4 Pike 18 (Ark. 1842); Sandidge v. United States, 520 A.2d 1057 (D.C. 1987); Burton v. Sills, 248 A.2d 521 (N.J. 1968); Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976); Harris v. State, 432 P.2d 929 (Nev. 1967); see also State v. Dawson, 159 S.E.2d 1 (N.C. 1968) (Second Amendment secures collective as well as individual rights).

personal policy preferences run the other direction.<sup>97</sup> In fact, the U.S. government has itself recently endorsed this view in the scholarly memorandum opinion for the Attorney General which concluded that “The Second Amendment secures a right of individuals generally, not a right of States or a right restricted to persons serving in militias.”<sup>98</sup>

Most recently, the Court of Appeals for the District of Columbia has held that the Second Amendment protects and secures an individual

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<sup>97</sup> See, e.g. William Van Alstyne, The Second Amendment and the Personal Right to Arms, 43 Duke L. J. 1236 (1994); Akhil Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L. J. 1193 (1992); Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L. J. 637 (1989); Don Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L.Rev. 204 (1983); Eugene Volokh, The Commonplace Second Amendment, 73 N.Y.U.L. Rev. 793 (1998). See also Opposition to Petition for Certiorari in United States v. Emerson, No. 01-8780, at 19 n.3, and Appendix A thereto, Memorandum From The Attorney General To All United States Attorneys, Re: United States v. Emerson, <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf> (Nov. 9, 2001).

<sup>98</sup> See Steven Bradbury, Howard Nielson, Jr., and Kevin Marshall, Whether the Second Amendment Secures an Individual Right, <http://www.usdoj.gov/olc/secondamendment2.pdf> (August 2004) (site last visited November 7, 2007). See also Opposition to Petition for Certiorari in United States v. Emerson, No.01-8780, at 19 n.3, and Appendix A thereto, Memorandum From The Attorney General To All United States Attorneys, Re: United States v. Emerson, <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8272.resp.html> (site last visited November 7, 2007).

right of the people to keep and bear arms.<sup>99</sup> The court in Parker v. District of Columbia rejected the District of Columbia's argument that the term "the people" meant only "some subset of individuals such as 'the organized militia' or 'the people who are engaged in militia service,' or perhaps not any individuals at all -- e.g., 'the states.'<sup>100</sup> The Parker court noted that "[t]hese strained interpretations of 'the people' simply cannot be squared with the uniform construction of our other Bill of Rights provisions. Indeed, the Supreme Court has recently endorsed a uniform reading of 'the people' across the Bill of Rights."<sup>101</sup>

The Parker court further observed that:

It has never been doubted that these provisions were designed to protect the interests of **individuals** against government intrusion, interference, or usurpation. We also note that the Tenth Amendment--"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people"--indicates that the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the

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<sup>99</sup> Parker v. District of Columbia, 375 U.S. App. D.C. 140, 478 F.3d 370 (D.C. Cir. 2007).

<sup>100</sup> Id. at 382.

<sup>101</sup> Id., citing United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).

states," on the other. The natural reading of "the right of the people" in the Second Amendment would accord with usage elsewhere in the Bill of Rights.<sup>102</sup>

The phrase "the people" in the operative clause of the Second Amendment has the same meaning as "the people" elsewhere in the Bill of Rights, and it is thus a protection of an individual right of the people as much as the right to be secure from unreasonable searches and seizures, to have a public trial before a jury of one's peers, or any other right of the people that preserves both public and private liberty.

To insist that the right secured by the Second Amendment must serve either an entirely public or "civil" purpose, such as formal service in a militia, or an entirely private purpose such as self-defense against private criminals, is to insist on a false choice not required by either the text or the history of the Amendment. As the Parker court observed, the right to keep and bear arms performs both a private and public purpose that are interrelated:

The pre-existing right to keep and bear arms was premised on the commonplace assumption that individuals would use them for ... private purposes, in addition to whatever militia service they would be obligated to perform for the state. The premise that private arms would be used for self-defense accords with

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<sup>102</sup> Id. (emphasis in original).

Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation. The right of self-preservation, in turn, was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government.<sup>103</sup>

The Parker court's analysis complements that of Judge Kleinfeld's Silveira dissent discussing the sordid history of the black codes and the need of blacks in the south to defend themselves against the predations of the Klan with the tacit blessings of the state. As Judge Kleinfeld noted, the keeping and bearing of arms "are for personal defense as well as resistance to tyranny. The two are not always separable."<sup>104</sup>

Perhaps the best single statement of the central, grave purpose of the Second Amendment as a last resort to resist the tyranny of evil men was given voice by Circuit Judge Kozinski in his Silveira dissent:

[T]he simple truth -- born of experience -- is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process. In the North, by contrast, blacks exercised their right to bear arms

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<sup>103</sup> Id. at 383 (citations omitted).

<sup>104</sup> Silveira, 328 F.3d 576-577.

to defend against racial mob violence. As Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to resist ... A revolt by Nat Turner and a few dozen other armed blacks could be put down without much difficulty; one by four million armed blacks would have meant big trouble.

All too many of the other great tragedies of history -- Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few -- were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the Militia Act required here. If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

My excellent colleagues have forgotten these bitter lessons of history. The prospect of tyranny may not grab the headlines the way vivid stories of gun crime routinely do. But few saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed -- where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Fortunately, the Framers were wise enough to entrench the right of the people to keep and bear arms within our constitutional structure. The purpose and importance of that right was still fresh

in their minds.<sup>105</sup>

The right of the people to keep and bear arms, both for their personal defense and as a last resort to resist tyranny, is as important today as it was when the Bill of Rights was drafted. The history of the 20<sup>th</sup> Century alone bears witness to the need of people still to have the means to resist a tyrannical and murderous government when all peaceful means have failed.<sup>106</sup> It was to secure that crucial means of self-preservation and resistance that the Second Amendment was written and inserted among the other provisions of the Bill of Rights. All of those provisions in the Bill of Rights act together to form a multifaceted shield of liberty to secure the life and liberty of all people

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<sup>105</sup> Silveira, 328 F.3d 569-570 (Kozinski dissenting) (internal citations omitted).

<sup>106</sup> And that ultimate means to resist by use of small arms is still most relevant even in the age of modern military power. As the sad experience of the U.S. military occupation of Iraq shows, relatively poorly armed, unsophisticated irregular and guerrilla forces, using “Fourth Generation Warfare” tactics may very effectively resist even the most well equipped and technologically advanced armies. Also, as Judge Kozinski noted in his Silveira dissent, the lightly armed Jewish resisters in the Warsaw Ghetto uprising of April 19, 1943, were able to put up a stiff resistance against the forces of the well equipped and highly trained German Wehrmacht, including crack Nazi Waffen-SS troops sent in to exterminate them. ([http://en.wikipedia.org/wiki/Warsaw\\_Ghetto\\_Uprising](http://en.wikipedia.org/wiki/Warsaw_Ghetto_Uprising)).

against the sadly all-too real threat of tyranny. Each one of them has a vital role to play in securing liberty, whether it is to curtail the “insidious encroachment by men of zeal, well-meaning but without understanding,” as Justice Brandeis once observed, or an attempt by a power-mad individual or group to seize the reigns of power and institute a military government hostile to, and outside of the rule of law, during some great crisis, whether real or fabricated, as occurred all too often during the 20<sup>th</sup> Century in other advanced nations, and is still occurring today. For the prevention of tyranny, the Second Amendment may well be the last resort, but the Founders considered it a necessary one. This is implicit in the Supreme Court’s interpretation of the Second Amendment in Miller, and with the holding in that case.

As a result, the Court should hold that the Second Amendment protects Fincher’s individual right in this case. At the very least, the trial court should have allowed him to present evidence of his affirmative defense to the jury. Indeed -- given that the Government does not dispute the facts -- the Court should hold as a matter of law that Fincher cannot be convicted of any of either of the crimes charged

in the amended indictment.

**2. Fincher is entitled to IFP status because his only asset is a life estate in a homestead.**

**A. Fincher's financial affidavit was truthful fair and accurate.**

Fincher does not dispute the vast majority of the facts set forth in the section of the district court's July 27, 2007, order entitled "the evidence regarding Fincher's financial status."<sup>107</sup> Yet, both the material facts and the inferences drawn from those facts are either substantially inaccurate, grossly unfair – or both.

The court below found that with respect to his financial resources, Fincher is a liar and a perjurer. The Court based its finding on Fincher's Financial Affidavit, which he signed early in the case. On initial processing, Fincher filled-out a standard form Financial Affidavit used for determining IFP eligibility.<sup>108</sup> He "wanted an attorney and he had no money."<sup>109</sup> Yet, Fincher and his wife jointly owned a "home and

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<sup>107</sup> Order, July 27, 2007, (Dkt. No. 65), at 8-15, ER 48 to ER 69.

<sup>108</sup> Financial Affidavit, ER 1.

<sup>109</sup> Order, 8, ER 55.

120 acres,”<sup>110</sup> which Fincher disclosed under a listing in the form for “Property.” He listed the value as “unknown.”<sup>111</sup> The trial court, however, found the homestead was worth some half a million dollars,<sup>112</sup> and, contrary to the “unknown” representation, Fincher “actually had a very accurate notion of the value of the Property when he signed the Financial Affidavit”. Thus, the district court found that Fincher lied when he signed the form listing the value of the family’s homestead as “unknown.”

This condemning conclusion was based on the value placed on Finchers’ homestead by an expert witness the trial court hired **after** its July 3, 2007, hearing on Fincher’s IFP status. Apparently unsatisfied with the evidence adduced at the hearing, Judge Hendren commissioned appraiser Tom Reed to prepare an estimate of value of the homestead property.<sup>113</sup> Reed subsequently “submitted” his appraisal report to the

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<sup>110</sup> Quitclaim Deed referred to in Order, 7/27/2007, 4, fn. 2. ER 70 to ER 72.

<sup>111</sup> ER 1.

<sup>112</sup> Order, 10, ER 57.

<sup>113</sup> Order, 5, ER 52, and Order, 7/03/2007 (Dkt. No. 61).

court, at which point it deemed the IFP question “ripe for decision.”<sup>114</sup> Reed’s appraisal report was never filed of record, however, and neither Reed nor the court served it on the parties. Based on this undisclosed document, the trial court found the value of the Finchers’ homestead is worth “nearly half a million dollars.”<sup>115</sup> Thus, it was inferred that Fincher lied. Nothing in the record, however, much less any evidence, actually supports this finding.

Beyond the fundamental mistakes in procedure upon which the trial court considered the appraisal report is the fatally flawed substance – and therefore prejudicial effect – of Reed’s appraisal. The opinion of value was based in part on what the appraiser called his “extraordinary assumption” that legal access exists to the property for ingress and egress,<sup>116</sup> which is “an assumption, directly related to a

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<sup>114</sup> Id.

<sup>115</sup> Order, 10, ER 57.

<sup>116</sup> See copy of appraisal report, p.6., attached hereto as Exhibit C, which undersigned obtained from Judge Hendren’s chambers on August 6, 2007. ER 73 to ER 141. Fincher steadfastly objects to the appraisal report being considered as evidence. It was not served on Fincher, it lacks all foundation, and the appraiser has not been subject to ANY cross-examination regarding his opinion of value. But even if the report is considered, the “extraordinary assumption” of access for

specific assignment, which, if found to be false, will alter the appraiser's opinions or conclusions."<sup>117</sup> This "extraordinary assumption" is, in fact, false. Fincher stated he had legal access along a "jeep trail" that would need, according to the appraisal, "substantial improvement" to be of any use.<sup>118</sup> More important, Reed found no evidence in the county land title records of legal access.<sup>119</sup> Indeed, a search of the land title records by a title company reveals access to be "uninsurable."<sup>120</sup> It is clear, "without need for citation of authority on the proposition," that landlocked property like the Finchers' homestead is worth little compared to land with established legal access. Thus, the "limiting condition" which

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ingress and egress is false, and it therefore bears absolutely no factual merit in the circumstances.

<sup>117</sup> The Appraisal Foundation, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE DEFINITIONS, [http://commerce.appraisalfoundation.org/html/2006 USPAP/DEFINITIONS.htm](http://commerce.appraisalfoundation.org/html/2006_USPAP/DEFINITIONS.htm) (effective July 1, 2006), "extraordinary assumption."

<sup>118</sup> Order, 9, ER 56.

<sup>119</sup> Id.

<sup>120</sup> Easement Report of Title Agent Christy May, dated August 9, 2007. ER 143 .

falsely assumes legal access to the property, makes it absolutely irrelevant under the actual facts of this case. Reasonable minds cannot differ. There is no proper basis for the factual finding in this case of the value of the interest Fincher owned in the homestead.

The district court also found that Fincher owned his family's homestead "free and clear."<sup>121</sup> It relied in this finding on a quitclaim deed executed by Fincher and his spouse on January 28, 2007.<sup>122</sup> The deed, however, shows Fincher did not own the property "free and clear." Instead it is entitled, "Quitclaim Deed (Husband **and** Wife)," and reads: "That **we** Hollis Wayne Fincher **and** Linda Fincher, husband **and** wife, hereinafter Grantors...."<sup>123</sup> Thus, Fincher owned his interest in joint-tenancy with his spouse, Linda. In other words, far from "free and clear," Fincher's interest was "subject-to" a joint-tenancy interest. The finding that Fincher's interest in the family's homestead was "free and clear" is flatly inaccurate. Yet, this inaccuracy was central to the trial

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<sup>121</sup> Id.

<sup>122</sup> Id., at 4, and fn. 2, ER 51.

<sup>123</sup> ER 70, emphasis added.

court's IFP findings, and to its proposed re-sentencing. In short, a necessary premise to the trial court's reasoning in revoking IFP status and to its proposed re-sentencing – that Fincher owned the homestead “free and clear” is factually false.

The trial court also concluded Fincher had the financial ability to obtain a private lawyer to represent him “because he did so,” referring to his former trial counsel, Oscar Stilley.<sup>124</sup> Yet, according to the contract documents relied upon by the court, he did so for nothing.<sup>125</sup> Stilley promised to represent Fincher on the nominal payment of \$10.00 per year.<sup>126</sup> In other words, Stilley agreed to work for free. Thus, while the trial court was technically correct, Fincher was able to retain private counsel, it did **not** establish Fincher was **financially** able to obtain counsel. Rather, Fincher retained Stilley only on the promise that he work, in effect, pro bono. Far from indicating a financial ability to obtain counsel, the need for such a “no-charge” arrangement supports

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<sup>124</sup> Order, 12-13, ER 60-61.

<sup>125</sup> Id.

<sup>126</sup> Id.

Fincher's financial inability to obtain counsel.

The trial court also based its IFP decision on what it deemed a fraudulent post-conviction transfer from the Finchers to their children arranged for by their family attorney, Jack Butt.<sup>127</sup> Yet, this “fraudulent” transaction was never a secret. Butt sought – and actually got – the United States’ permission to make the transfer.<sup>128</sup> He explained to the U.S. Attorney the express object of executing the quitclaim deed: to transfer all but a life estate to the couples’ daughters to keep the family farm in ownership “by the family.” In response to this inquiry, the U.S. Attorney stated that “even though final sentencing has been passed on to Mr. Fincher, this contemplated transfer, so long as he honestly represents it to properly inquiring authorities, **is not prohibited** or illegal.”<sup>129</sup> In reliance thereon, Fincher delivered the

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<sup>127</sup> Id., at 13, ER 60.

<sup>128</sup> Id. (Unlike much of the other documentation upon which the trial court relied, the Butt letter was actually entered into the record pursuant to the rules of evidence.)

<sup>129</sup> Letter from Butt to Plumlee dated 2/08/2007, ER 144 to ER 146.

quitclaim deed on February 12, 2007.<sup>130</sup> Despite the prior disclosure, however, the trial court nevertheless concluded Fincher made the transfer to prevent the homestead from being available “to pay any fine he might be sentenced to pay.”<sup>131</sup> Thus, despite Fincher’s open-handed and forthright approach, and despite the U.S. Attorneys’ express waiver of any objection, the trial court deemed the transaction “fraudulent.”<sup>132</sup> It therefore concluded Fincher lied with respect both to his IFP status, and to issues regarding his sentencing. This is an unfair inference that is not supported by any evidence in the record.

The trial court also found that when Fincher called himself “indigent,” both at a March 8, 2007, hearing on his motion to discharge his private counsel, and in a motion submitted to the court on May 9, 2007, he lied.<sup>133</sup> The trial court based this finding on the reasons already discussed. For example, in the July 27, 2007, order now at

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<sup>130</sup> ER 70 to ER 72.

<sup>131</sup> Order, 14, ER 61.

<sup>132</sup> Id., at fn. 6, ER 61.

<sup>133</sup> Id., at 14-15, ER 61-62.

issue, it concluded Fincher was not “financially unable” to hire private counsel because he had succeeded in hiring Stilley. At the hearing to discharge Stilley, however, the fact he had been hired in the first place was not regarded by the court as evidence that Fincher was in fact financially able to hire private counsel – despite Fincher’s plea of indigence. Yet, now, the trial court infers from Fincher’s hiring of Stilley that he had financial means to retain counsel. If this in fact were a fair inference, however, the district court would never have allowed for subsequent appointed counsel, Shannon Blatt.

Fincher’s subjective belief in his own indigence was and is not only reasonable, but objectively true. His only asset on March 8, 2007, was a life estate in his and Linda Fincher’s homestead. It consists of only 120 acres of dry-land farm, with a house and shed that are in such an advanced state of decrepitude they “provide minimal, if any, contributory value to the land.”<sup>134</sup> The life estate, according to the appraiser Reed, is worth only \$39,000, and Fincher’s half of that is \$19,500. A life estate is not something that can be sold or hypothecated

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<sup>134</sup> Reed appraisal report, 12, ER 85.

to raise funds for a defense. In addition, Fincher has not had employment since the 1980s.<sup>135</sup> Indigence is defined by Black's as "a poor person,"<sup>136</sup> and by Arkansas law as a person "who, at the time his or her need is determined, is without sufficient funds or assets to employ an attorney or afford other necessary expenses incidental thereto."<sup>137</sup> By these or any other reasonable measure, Fincher is indigent.

Equally important, this was true before Fincher and his spouse transferred the reversionary interest of the Finchers' homestead to their daughters. The land in question is without documentation of an easement for ingress and egress.<sup>138</sup> Anyone who buys it will need to win a quiet title action to establish access. No one will pay market value to "purchase a lawsuit," nor will a bank lend against such "unmarketable" title. The asset is not available for liquidation – even if Linda Fincher

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<sup>135</sup> ER 1.

<sup>136</sup> Black's Law Dictionary (8<sup>th</sup> ed. 2004), "indigent."

<sup>137</sup> Ark. Code Ann. § 16-87-201(3) (West 2007).

<sup>138</sup> Reed appraisal report, 6, 10, ER 79, ER 83.

were to transfer her joint interest – which she has not done.

Moreover, even if access could be established, the homestead is only 120 acres. Fincher's half is but **60** acres assuming his joint tenancy could, as a practical matter, be severed, partitioned and liquidated in time to secure funds to pay private counsel. Yet, under Arkansas law, the homestead exemption for rural property is **80** acres.<sup>139</sup> If this homestead-exempt property is excluded from the calculation, Fincher is utterly indigent. No reasonable person could conclude his unsevered, unsurveyed,<sup>140</sup> and landlocked portion of the joint-tenancy provides sufficient means to obtain the services of private trial counsel.

**B. In order to be eligible for appointed counsel, the accused need show only that he is financially unable to retain private counsel.**

The statute governing appointment of counsel does not require that a defendant be “indigent” for counsel to be appointed. Instead, the accused need only be “financially unable to obtain adequate representation.”<sup>141</sup> The “financial inability to obtain adequate

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<sup>139</sup> Ark. Code Ann. § 16-66-210(c)(1) (West 2007).

<sup>140</sup> Reed appraisal report, 10, ER 83.

<sup>141</sup> 18 USCA § 3006A(a). See also, U.S. v. O'Neil, 118 F.3d 65, 74 (2<sup>nd</sup> Cir. 1997), cert. denied, 118 S. Ct. 728, 139 L. Ed. 2d 666 (1998);

representation” has held to be a less stringent standard than actual indigency or destitution.<sup>142</sup> The burden of demonstrating financial inability is on the defendant – but any doubts as to a defendant's financial eligibility for appointment of counsel should be resolved in his favor; an erroneous determination of eligibility may be corrected at a later time.<sup>143</sup> Moreover, the burden is only by a preponderance of evidence.<sup>144</sup>

In determining whether an accused is entitled to appointed counsel, courts consider the costs in providing himself and his dependents with the necessities of life – including a home.<sup>145</sup> The court

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U.S. v. de Hernandez, 745 F.2d 1305, 1310 (10<sup>th</sup> Cir. 1984). See also, Perry v. Chief of Police of City of Marianna, Ark., 660 F.Supp. 1546, 1551 (E.D.Ark.,1987) (petitioner for habeas corpus whose only asset was his homestead found to be “indigent” for purposes of IFP).

<sup>142</sup> U.S. v. Harris, 707 F.2d 653 (2<sup>nd</sup> Cir. 1983); U. S. v. Martin-Trigona, 684 F.2d 485 (7<sup>th</sup> Cir. 1982); U.S. v. Simmers, 911 F. Supp. 483 (D. Kan. 1995); U. S. v. Gipson, 517 F. Supp. 230 (W.D. Mich. 1981).

<sup>143</sup> U.S. v. Salemme, 985 F. Supp. 197, 201 (D. Mass. 1997).

<sup>144</sup> U.S. v. Simmers, 911 F. Supp. 483, 486 (D. Kan. 1995).

<sup>145</sup> Id.

may consider whether the accused has available to him the income or assets of other persons, including his spouse – but determination of eligibility should be made without regard to the financial resources of his family or spouse unless such persons indicate their willingness to pay all or part of the cost of counsel.<sup>146</sup> The court should also consider whether a defendant with assets can liquidate such assets to retain counsel.<sup>147</sup> Finally, if the only asset available to a defendant for liquidation is homestead exempt property, a court should not consider it available to pay for private counsel.<sup>148</sup>

**C. Fincher is financially unable to retain private counsel.**

Fincher has succeeded in retaining private counsel or this brief would not have been written. Yet, he is “financially” unable to do so. Undersigned agreed to undertake this case as appellate counsel on referral from a colleague aware of the important Constitutional issues

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<sup>146</sup> Salemme, 985 F. Supp. at 201.

<sup>147</sup> Simmers, 911 F. Supp. at 486.

<sup>148</sup> Perry, 660 F.Supp. 1549, 1551; Newman v. State, 937 S.W.2d 1, 8 (Tex.Cr.App. 1996). See also, Harper v. State, 850 S.W.2d 736 (Tex.App.-Amarillo 1993); U.S. v. Trevino, 679 F.Supp. 636 (S.D.Tex.1987); Stephens v. State, 509 S.W.2d 363 (Tex.Cr.App.1974).

contested in Fincher's case. Undersigned is not admitted in the Western District of Arkansas and therefore, for a variety of reasons, declines to serve as trial counsel. The terms of payment for undersigned's fee on appeal are that undersigned will be paid only if appointed as appellate counsel. If undersigned is not appointed, then undersigned will serve pro bono. But this does not mean that Fincher is therefore "financially" able to obtain private counsel. His pro bono counsel can be compensated as appointed counsel if Fincher otherwise qualifies.<sup>149</sup>

Likewise, Fincher's ownership interest in homestead property should not preclude his IFP status. An impecunious accused should not be expected to liquidate his homestead to defend himself in a criminal prosecution. For example, in Newman, it was held that property qualifying for the homestead exemption should not be considered in indigency determination.<sup>150</sup> "[H]omesteads are exempt from forced sale" and therefore "homesteads should be given special treatment in

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<sup>149</sup> Wainwright v. Norris, 836 F.Supp. 619, 623 (E.D. Ark 1993).

<sup>150</sup> Newman v. State, 937 S.W.2d 1, 8 (Tex.Cr.App. 1996).

indigency determinations.” Such exemptions are “favorites of the law,” and statutes that protect the exemption deserve liberal construction to protect the residence for the family and prevent homelessness. Thus, homesteads “may not be considered in indigency determinations.”<sup>151</sup>

A similar decision is reported in Stephens,<sup>152</sup> where a defendant challenged the trial judge’s denial of IFP status because of the value of his homestead. The appellate court reversed, excluding consideration of the homestead in its finding that the defendant had established a prima facie case of his status as indigent. In Harper, likewise, a court of appeals reversed a trial judge’s determination that a defendant was not indigent because he held equity in his homestead exempt property.<sup>153</sup> Finally, a U.S. District Court in Texas adopted the same standard in Trevino.<sup>154</sup> Despite the defendants’ spacious home in an exclusive

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<sup>151</sup> Id.

<sup>152</sup> Stephens v. State, 509 S.W.2d 363, 364-365 (Tex.Cr.App.1974).

<sup>153</sup> Harper v. State, 850 S.W.2d 736, 739-740 (Tex.App.-Amarillo 1993).

<sup>154</sup> U.S. v. Trevino, 679 F.Supp. 636, 636 (S.D.Tex.1987).

community, a motor boat and four motor vehicles, the court awarded defendants a free appellate transcript, calling it “doubt[ful] that the law would require these Defendants to actually sell their homestead to perfect an appeal.”<sup>155</sup>

Fincher is aware of only one case where a defendant was required to mortgage or liquidate his home to obtain private counsel. In Simmers, the accused claimed he wanted to preserve his home, which was his principal asset, for his spouse in the event he was convicted.<sup>156</sup> Simmers, however, is distinguishable. First, there was no express claim, as here, of a homestead exemption, and the court never addressed it in the IFP context. Second, the home was not, as here, owned jointly by a non-accused spouse. This fundamental factor was recognized in a subsequent case, where the court declined to follow Simmers.<sup>157</sup> It stated: “if the asset is of the type, such as **jointly held real property**, where both spouses are obligated to consent to the encumbrance,

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<sup>155</sup> Id.

<sup>156</sup> Simmers, 911 F. Supp. at 486.

<sup>157</sup> U.S. v. Lexin, 434 F.Supp.2d 836, 842 (S.D.Cal. 2006).

disposition or transfer, and objection is timely interposed by one spouse, then that asset is likely **not** available to the defendant spouse for encumbrance or liquidation to satisfy attorney fees and costs.”<sup>158</sup> Thus, if, as here, the disposition of the asset requires the spouse’s express consent, then it is not to be considered in the IFP evaluation.<sup>159</sup> Under this analysis, Fincher is not financially able to retain private counsel.

3. **Fincher should not be re-sentenced because the trial court had a true picture of his financial status at sentencing, and the trial court lost jurisdiction once Fincher began serving his sentence.**
  - A. **Once a convicted person begins serving his sentence, the court loses jurisdiction to re-sentence, absent fraud on the court.**

Even if the Court of Appeals affirms Fincher’s conviction and the trial court’s order revoking his IFP status, it should not grant the trial court’s request for resentencing. A trial court may correct an illegal sentence at any time – but once the service of sentence in a criminal case begins, the power of the trial court to **change** a legal sentence

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<sup>158</sup> Id., at 843.

<sup>159</sup> Id.

ends.<sup>160</sup> Even if a trial court changes its mind about a sentence, it retains no authority to impose a harsher sentence once the prisoner has commenced service of the sentence.<sup>161</sup> Once service of the sentence has begun, the court retains only the inherent power to change it if, but only if, it was obtained through fraud or intentional misrepresentation.<sup>162</sup> Only where a sentence is the result of a defendant's express, willful, and material misrepresentation of fact that causes the court to impose a sentence other than what would have been justified had the actual facts been known, can a sentence already being served be vacated and the fraudulent defendant re-sentenced. The type of conduct upon which the exception lies, however, is narrow. Absent either an actual "fraud upon the court" or an intentional misrepresentation, this exception does not apply.

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<sup>160</sup> Egan v. U.S., 268 F.2d 820, 823, (8<sup>th</sup> Cir. 1959), cert. denied 80 S.Ct. 130, 361 U.S. 868, 4 L.Ed.2d 108 (U.S. Oct. 19, 1959). See also, United States v. Austin, 217 F.3d 595, 597 (8<sup>th</sup> Cir. 2000).

<sup>161</sup> Ward v. U. S., 508 F.2d 664, 665 (5<sup>th</sup> Cir. 1975).

<sup>162</sup> U.S. v. Bishop, 774 F.2d 771, 773-74 (7<sup>th</sup> Cir. 1985).

**B. Fincher committed no fraud on the court.**

A fact effecting sentencing, if contested by a defendant, must be proven by a preponderance of the actual evidence.<sup>163</sup> Here, for reasons described, Fincher disputes the Reed report. Yet, Fincher was given neither a chance to review it, nor “an adequate opportunity to present information to the court” regarding its content.<sup>164</sup> The appraisal report was never entered into the record, it was never even served on Fincher. Fincher was given no notice of the appraiser’s findings, no copy of his report, no opportunity to respond to those findings, and no chance at cross-examination.<sup>165</sup> Still, the trial court relied on Reed’s undisclosed,

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<sup>163</sup> U.S. v. Atkins, 250 F.3d 1203, 1211 (8<sup>th</sup> Cir. 2001).

<sup>164</sup> U.S. Sentencing Guidelines § 6A1.3(a). See also Canon 3A(4), Fed. Code Jud.Cond. (“A judge may ... obtain the advice of a disinterested expert **on the law** applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, **and** affords the parties reasonable opportunity to respond.” (Emphasis added.))

<sup>165</sup> Rule 706(a), F.R.Evi., states, with emphasis added:

The court ... may appoint expert witnesses of its own selection. .... A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness **shall be subject to cross-examination** by each party, including a

untested, and unsworn appraisal information to condemn Fincher as a perjurer. This mode of independent judicial prosecution was unfair, violated both the sentencing guidelines and Rule 706(a), Fed.R.Evi., and prejudiced Fincher's ability to defend himself against the court's allegations of fraud.<sup>166</sup>

In truth, Fincher made no misrepresentations whatsoever about the value of the homestead property. The conclusion that the Fincher's homestead land is worth nearly one-half million dollars is based on the "extraordinary" – and as it turns out false – assumption that it enjoys legal access. Yet, the appraiser admitted he could not document legal access either for ingress and egress – even though it was his task to do so. When he found he was unable to document access, however, he simply "assumed" it actually exists. This assumption is so doubtful and at the same time so significant he was required, by his own professional

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party calling the witness.

<sup>166</sup> C.F., U.S. v. Wise, 976 F.2d 393, 404-06 (8<sup>th</sup> Cir. 1992) (held: due process satisfied only because defendant was given an opportunity to voice his objections to the presentence report and to cross examine the probation officer who had prepared the report).

standards, to call it “extraordinary.”<sup>167</sup> If it turns out to be faulty, it will “alter the appraiser's opinions or conclusions.” Since Reed had the ability, opportunity, and incentive to examine the land title records of the county, the absence of all recorded evidence of any legal access raises the legal presumption that it does not exist.<sup>168</sup> The only evidence he did find of access was Fincher’s vague statement that he believed there to be some sort of access over a rarely used “jeep trail” to the back of the property.<sup>169</sup> Reed could not, however, corroborate it in writing. As a result, without documentation, Fincher’s subjective belief is irrelevant to the existence of actual legal access.<sup>170</sup> A buyer of the servient tenement would take it subject, at most, to a servitude in the

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<sup>167</sup> The Appraisal Foundation, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE DEFINITIONS, [http://commerce.appraisalfoundation.org/html/2006\\_USPAP/DEFINITIONS.htm](http://commerce.appraisalfoundation.org/html/2006_USPAP/DEFINITIONS.htm) (effective July 1, 2006), “extraordinary assumption.”

<sup>168</sup> U.S. v. Hoelscher, 914 F.2d 1527, 1542 (8<sup>th</sup> Cir. 1990).

<sup>169</sup> Reed appraisal report, 10, ER 83.

<sup>170</sup> E.g., Dixie Furniture Co. v. Arkansas Power & Light Co., 718 S.W.2d 120, 121 (Ark.App. 1986).

nature of a “jeep trail.”<sup>171</sup> Under this very limited scope, it would be impossible to conduct the “substantial improvements” the appraiser stated would be required for normal ingress and egress, and impossible to provide for utilities.

Actual examination of title to the property, moreover, shows the appraiser’s “extraordinary assumption” to be false. There is no “insurable” access to the property.<sup>172</sup> As a result, Reed’s valuation lacks all credence. The actual value of the property remains, as Fincher put it in his Financial Affidavit, “unknown.” Fincher’s Financial Affidavit was and is, therefore, true. In fact, it is more accurate than Reed’s faulty estimate of value. No one (whether Reed, Judge Hendren, or Fincher) has any basis to find the Fincher’s homestead to be worth “nearly a half-million dollars”<sup>173</sup> – at least not without a quiet title action to settle the extent and scope of the legal access – or lack thereof.<sup>174</sup> As a result,

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<sup>171</sup> Id.

<sup>172</sup> Easement Report, ER 143.

<sup>173</sup> Order, 10, ER 57.

<sup>174</sup> E.g., Bobo v. Jones, 222 S.W.3d 197 (Ark. 2006). See also, Proof of Extent of Easement of Way Created By Express Grant or Reservation, 81 Am. Jur. Proof of Facts 3d 199 (Cum supp. 2007).

Reed's opinion of value is worthless as evidence that Fincher lied to the court. There is no evidence (on the record or otherwise) of any fraud or intentional misrepresentation by Fincher. The sentencing court therefore has no authority to change his sentence. Even if it did, moreover, the facts as understood by the court at sentencing were and remain substantially and objectively true. There is therefore no substantive ground for re-sentencing, even if the trial court had power to do so.

## CONCLUSION

Fincher trained, marshalled and equipped himself through his membership in the WCA for better service as a militiaman in the event of his call-up by the Governor. His bearing of arms in this matter is therefore reasonably related to the maintenance of a well-regulated militia. The Second Amendment therefore applies, and protects Fincher's rights as individual citizen.

In addition, Fincher is entitled to IFP status because his only asset is a life estate in a homestead, which leaves him financially unable to

obtain counsel. Finally, the trial court lost jurisdiction to re-sentence, because he committed no fraud on the court.

WHEREFORE, PREMISES CONSIDERED, the Court is respectfully requested to reverse the district court, and dismiss the complaint with prejudice; or IN THE ALTERNATIVE, should the Court not decide to dismiss the case against Fincher immediately, the Court is respectfully requested to remand the case to a new trial, with instructions for the trial court to allow Fincher to submit to the jury his affirmative defense that his possession of the firearms in question is reasonably relate to a well-regulated militia;

FURTHERMORE, the Court is respectfully requested to

A. Reverse the trial court's order of July 27, 2007, revoking Fincher's in forma pauperis, status, so his defense can be funded at government expense;

B. Reverse the trial court's order of July 27, 2007, requiring Fincher to repay the Treasury for the cost of his defense;

C. Deny the trial court's request for re-sentencing on remand in the even the conviction is affirmed; and

D. Grant such other and further relief warranted in the circumstances.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of November, 2007.

SULLIVAN, TABARACCI & RHOADES, P.C.



By: \_\_\_\_\_

Quentin M. Rhoades  
For the Appellant

**CERTIFICATE OF COMPLIANCE  
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,  
AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R.App. P. 32(a)(7)(B) because, according to the word count function of WordPerfect X3, this brief contains less than **13,600** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief is prepared in a proportionally spaced typeface using WordPerfect X3 in Century Font with a 14 point font.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of November, 2007.

SULLIVAN, TABARACCI & RHOADES, P.C.



By: \_\_\_\_\_

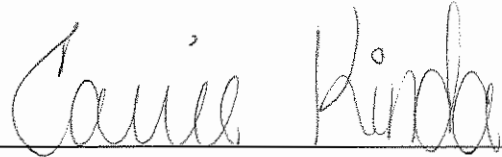
Quentin M. Rhoades  
For the Appellant

## CERTIFICATE OF SERVICE

Carrie Kinda, being duly sworn on oath says that on the 9th day of November, 2007, she served the foregoing Appellant's Principal Brief on the following:

Wendy L. Johnson  
U.S. Attorney's Office  
Western District of Arkansas  
P.O. Box 1524  
Fort Smith, AR 72902-1524

by mailing a copy thereof, enclosed in an envelope, postage prepaid and depositing the same in the post office at Missoula, Montana, to said attorneys.

A handwritten signature in cursive script that reads "Carrie Kinda". The signature is written in black ink and is positioned above a horizontal line.

Legal Assistant to Quentin M. Rhoades

# APPENDIX

## APPENDIX

### § 6A1.3. Resolution of Disputed Factors (Policy Statement):

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

### 18 U.S.C.A. § 922: Unlawful acts.

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

### 18 U.S.C.A. § 924. Penalties.

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

### 18 U.S.C.A. § 3006A. Adequate representation of defendants.

(a) Choice of plan.--Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with

APPENDIX, continued

this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

(1) Representation shall be provided for any financially eligible person who--

(A) is charged with a felony or a Class A misdemeanor.

18 U.S.C.A. § 3231: District courts.

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

26 U.S.C.A. § 5841: Registration of firearms.

Part I. General Provisions.

(a) Central registry.-- The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include --

- (1) identification of the firearm;
- (2) date of registration; and
- (3) identification and address of person entitled to possession of the firearm.

(b) By whom registered.-- Each manufacturer, importer, and maker

## APPENDIX, continued

shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered.— Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) Firearms registered on effective date of this Act.— A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) Proof of registration.— A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request.

### 26 U.S.C.A. § 5861: Prohibited Acts.

It shall be unlawful for any person— (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

### 26 U.S.C.A. § 5871. Penalties.

Any person who violates or fails to comply with any provision of this

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chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both.

8 U.S.C.A. § 1291: Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Ark. Code Ann. § 12-61-101. Division; composition.

(a) The militia shall be divided into two (2) parts: the organized, consisting of the active and inactive Army National Guard and Air National Guard; and the unorganized, consisting of all those persons of the militia not in the active or inactive Army National Guard or Air National Guard.

(b) The militia shall consist of all able-bodied male residents of the state between the ages of seventeen (17) and forty-five (45) years who are, or intend to become, citizens of the United States, unless exempt by law, together with all other acceptable volunteers, waiving necessary requirements.

Ark. Code Ann. § 12-61-103. Authorities of governor.

(a)(1) The Governor is authorized to make such rules and regulations governing the government, organization, discipline, and training of the militia as he may deem expedient.

(2) Such rules and regulations shall conform to the provisions of this

APPENDIX, continued

code and, as nearly as practicable, to those governing the armed forces of the United States.

(3) When promulgated, the rules and regulations shall have the same force and effect as the provisions of this code.

(4) Such rules and regulations shall not be repealed, altered, amended, or added to, except with the approval of the Governor.

(5) The rules and regulations in force at the time of the passage of this code shall remain in force until new rules and regulations are approved and promulgated.

(b) The Governor may, by executive order, designate National Guard commissioned officers or warrant officers or active duty officers or warrant officers serving in armed forces recruiting offices inside or outside the State of Arkansas to administer the oath of enlistment to new members of the militia.

(c) Whenever he shall deem it necessary, the Governor may direct the members of the unorganized militia to present themselves for and submit to registration at such time and place and in such manner as may be prescribed by regulations.

Ark. Code Ann. § 16-66-210: Homestead exemption.

(c)(1) The homestead outside any city, town, or village, owned and occupied as a residence, shall consist of no more than one hundred sixty (160) acres of land, with the improvements thereon, to be selected by the owner. The homestead shall not exceed in value the sum of two thousand five hundred dollars (\$2,500), but, in no event shall the homestead be reduced to less than eighty (80) acres, without regard to value.

APPENDIX, continued

Ark. Code Ann. § 16-87-201: Definitions.

For the purpose of this subchapter:

(3) "Indigent person" means a person who, at the time his or her need is determined, is without sufficient funds or assets to employ an attorney or afford other necessary expenses incidental thereto.

Article 11, § 2, Ark. Const.: Formation of volunteer companies.

Volunteer Companies of Infantry, Cavalry or Artillery may be formed in such manner and with such restrictions as may be provided by law.

Rule 4 (a)(1)(A): Appeal as of Right--When Taken.

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

Rule 706(a), Fed.R.Evi. Appointment.

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the

APPENDIX, continued

parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.