IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAY AUBREY ISAAC HOLLIS Individually and as Trustee of the JAY AUBREY ISAAC HOLLIS REVOCABLE LIVING TRUST, Plaintiff, v. ERIC H. HOLDER, JR., Attorney General of the United States; B. TODD JONES, Director of the Bureau of Alcohol Tobacco Firearm and Explosives, Defendants.	)	Case No.3:14-cv-03872-M

PLAINTIFF'S SUR-REPLY TO DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Exhibit "A"

INTRODUCTION

Mr. Hollis submits this sur-reply to rebut several new arguments made in Defendants' reply brief and discuss this Court's recent decision in *Mance v. Holder*, 2015 WL 567302 (N.D.Tex. 2015). Defendants misread both Mr. Hollis's complaint and numerous sections of *District of Columbia v. Heller*, 554 U.S. 570 (2008) as will be shown below. While Mr. Hollis makes a facial challenge to the offending statutes, Mr. Hollis clearly also makes an as-applied challenge in his complaint.[1] Defendants' obfuscation is an implicit concession that the challenged statutes are unconstitutional *as-applied* to Mr. Hollis. Defendants make no argument defending its laws if this Court were to apply strict scrutiny. As such, they apparently concede that if strict scrutiny is applied, their laws are unconstitutional either facially or as-applied to Mr. Hollis.

After making a mere passing argument with regard to Mr. Hollis' standing, Defendants attempt to bolster their attack. While Mr. Hollis contends this argument has no merit, even if this Court were to entertain the Defendants' argument regarding the necessity of Texas being a defendant, Mr. Hollis should simply be allowed to revise his complaint and name the State of Texas as an additional Defendant. However, it is unnecessary as Mr. Hollis clearly has standing as shown in his response. As Mr. Hollis makes both a facial and as-applied challenge to the offending statutes, this Court at a minimum should apply strict scrutiny as illustrated by *Mance* and Defendants misread numerous provisions of his complaint and *Heller* to argue otherwise.

PERUTA SUPPORTS APPLYING A CATEGORICAL APPROACH

Defendants suggest that "Plaintiff apparently relies on the dissenting opinion from *Heller II* to suggest that neither intermediate nor strict scrutiny are appropriate in the Second Amendment context, Pl. Br. at 14, that reliance is misplaced, given the Fifth and D.C. Circuit's

[1] *See* Complaint ¶¶ 56, 62.

contrary holdings…" This is inaccurate. Mr. Hollis relies on *Heller, Moore v. Madigan*, 708 F. 3d 901 (7th Cir. 2013) and the Ninth Circuit's decision in *Peruta v. County of San Diego*, 742 F. 3d 1144 (9th Cir. 2014). In *Peruta* the Ninth Circuit found that it was not necessary to apply a level of scrutiny because San Diego County's handgun carry regulation amounted to a complete ban. ("Because our analysis paralleled the analysis in Heller itself, we did not apply a particular standard of heightened scrutiny"). *Id.* at 1175. *See also Moore,* 702 F.3d at 941 (declining to subject the "most restrictive gun law of any of the 50 states" to an "analysis ... based on degrees of scrutiny").

The Ninth Circuit applied this approach despite its holding in *United States v. Chovan*, 735 F. 3d 1127 (9th Cir. 2013) where it adopted the same two-step analytical tool as this Circuit did in *National Rifle Association, Inc. v. ATF,* 700 F.3d 185 (5th Cir. 2012). ("We adopt the two-step Second Amendment inquiry undertaken by the Third Circuit in *Marzzarella*, 614 F.3d at 89, and the Fourth Circuit in *Chester*, 628 F.3d at 680, among other circuits.") *Chovan* at 1136. This Court should apply the same approach to this complete ban on a class of arms. However if this Court is inclined to apply a level of scrutiny, this Court's recent decision in *Mance v. Holder* supports applying strict scrutiny.

***MANCE V. HOLDER* SUPPORTS THE APPLICATION OF STRICT SCRUTINY**

It is a bit surprising that Defendants do not refer to the recent case of *Mance v. Holder,* 2015 WL 567302, (N.D. Tex. Feb. 11, 2015), decided by this District's Fort Worth Division on February 11, 2015. In *Mance*, the plaintiffs, a Federal Firearms Licensee, a husband and wife, and the Committee for the Right to Keep and Bear Arms, challenged the federal interstate handgun transfer ban which had been law since the Gun Control Act of 1968. The interstate handgun transfer ban essentially prohibited individuals from "transporting into or receiving in

their state of residency any firearm acquired outside of that state…" but that ban did not apply to long arms (rifles and shotguns). *Mance,* 2015 WL 567302, at *1. As in this case, the Defendants attempted to thwart the *Mance* plaintiffs from their day in court, raising a number of identical arguments regarding standing. Also, as in this case, the *Mance* plaintiffs challenged the offending statutes both facially and as-applied.

With regard to standing, Defendants again state that Texas law bars possession of a machinegun, and therefore, since Texas is not a party, then a favorable ruling on the federal laws will not redress Plaintiff's claims. [#27, p.3]. Texas law does not prohibit machineguns as long as they are properly registered with the BATFE. If Defendants' position is literally that no civilian in Texas may own a machinegun it should make Texas aware of that interpretation. Defendants argued that the plaintiffs in *Mance* (the Hansons) could not show redressability either. In *Mance,* the injury to the Hansons was "their inability to purchase and take possession of handguns directly from an FFL at the time they desire due to their residence." *Id*. at *4. Defendants conceded that the Hansons "may have an injury in that they can't get the handgun exactly there. But that's not traceable to the law because the law would allow them to get the handgun as long as they got it from a dealer in their home state." *Id.* The court disagreed and held that the Hansons did have standing because "[b]ut for the federal interstate handgun transfer ban, Mance and the Hansons would have been able to complete their desired transaction." *Id*. The same is true for Mr. Hollis. But for the federal machinegun ban, he would be able to own a post May 19, 1986 machinegun, and yes, even in Texas. As such, Mr. Hollis' injury may be redressed by a favorable ruling.

Mance likewise deals with and forecloses Defendants' reliance on "longstanding" restrictions. Interestingly, the defendants in *Mance* (the same defendants here) listed the earliest

known analogues of the residency restrictions on handgun purchasing or possession to be from 1909. The *Mance* court held that those restrictions "… do not date back quite far enough to be considered longstanding." *Id*. at *7. Defendants in the instant case raise state analogues on machinegun possession from the late 1920s and early 1930s,[2] but do not make the connection that the *federal* ban on machineguns was only made law in 1986. Regardless, *Mance* held that 1909 analogues were not longstanding. Certainly, later analogues would be even less longstanding.

Most importantly, the *Mance* court applied strict scrutiny to the interstate handgun transfer ban. *Id*. at *8.

> A law that burdens the core of the Second Amendment guarantee-for example, 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home'-would trigger strict scrutiny.[] *NRA*, 700 F.3d at 205 (quoting *Heller*, 554 U.S. at 635) (internal citation omitted). At its core, the Second Amendment protects *law-abiding, responsible* citizens. *Id.* at 206. Instead of limiting the federal interstate handgun transfer ban to a discrete class of people, it prevents all legally responsible and qualified individuals from directly acquiring handguns from FFLs in every state other than their state of residency and the District of Columbia.[7] *See Ezell*, 651 F.3d at 708 ("Here ... the plaintiffs are the 'law abiding, responsible citizens' whose Second Amendment rights are entitled to full solicitude under *Heller*.").

Mance at *8.

It is important to put into context how the Defendants argued *Mance*. For instance, in *Mance*, "[d]efendants argue that Congress focused on handguns, as opposed to rifles and shotguns, because [t]he evidence before [Congress] overwhelmingly demonstrated that the handgun is the type of firearm that is principally used in the commission of serious crime." *Id*. at *9. (internal quotations omitted). As discussed in Plaintiff's response, that handguns are far more likely to be the chosen firearm for criminals to commit crimes with is true. However, in *Hollis*, Defendants rely on the following: "The only thing that has changed about the machine

[2] Defendants App.119 through App.154.

gun situation since the 1968 act . . . is that machine guns have become a far more serious law enforcement problem."[3] But Defendants fail to put forth a scintilla of evidence that machineguns are used in crime that rise to the level of handgun crime and fail to justify the current ban on machineguns.

At least in *Mance* though, Defendants supported their position with statistics from 1968 utilized to justify the interstate handgun ban, but failed to:

> provide reasonably *current* figures to show the federal interstate handgun sale ban is narrowly tailored. Strict scrutiny is a demanding standard that requires Defendants to show the governmental interest to be compelling and the associated regulation narrowly tailored to serve that interest. To be narrowly tailored, the curtailment of constitutional rights must be actually necessary to the solution.

Id. at *10. (italics in original). Defendants did not even attempt to make a showing on statistical usage of unregistered or unlawful machineguns, except to rely on statements from juvenile offenders in a 1991 study that "35% of juvenile inmates reported that they had owned a military-style automatic or semi-automatic rifle just prior to confinement." Def. Reply Brief, p. 16. This is laughable as it conflates semi-automatic firearms with machineguns which are not the same, but funnier still is that the Defendants mistake the anecdotal tales of 'juvenile inmates' for meaningful empirical evidence. Unless that study could somehow objectively confirm the juvenile inmates' statements, it proves nothing.

To put it bluntly, Defendants cannot support their position with <u>any</u> factual data regarding machineguns with respect to law abiding citizens. It cannot be done and there is no justification for § 922(o)'s prohibition with regard to a law abiding citizen and especially in light of the already onerous 1934 NFA registration requirements which criminals or those with criminal intent are already not inclined to follow and thus would not think twice about illegally converting a semi-automatic rifle into a fully automatic one.

[3] Defendants' Memorandum in Support [#14, p.4]; App. 118.

HELLER* DID NOT OVERTURN *UNITED STATES V. MILLER

Defendants argue *Heller* overruled *United States v. Miller*, 307 U.S. (1939). This proposition finds absolutely no support in *Heller*. The best support Defendants can muster is the passage "we may as well consider at this point (for we will have to consider eventually) what types of weapons Miller permits. Read in isolation, *Miller*'s phrase 'part of ordinary military equipment' could mean that only those weapons useful in warfare are protected". *Heller* at 624. This dicta does not in any way overturn *Miller*.[4] As covered in the response, *Heller* expands upon *Miller* and found that weapons which have personal self-defense value are protected regardless of whether they have military value.[5]

Furthermore, the *Miller* and *Heller* Courts covered two completely different fact patterns so the *Heller* Court likely could not have been able to overturn *Miller* even had it wanted to. The matter before the *Heller* Court was whether Washington D.C.'s complete ban on handguns for lawful self-defense was constitutional. It would have made little sense for the Court to determine the constitutionality of the N.F.A.'s restrictions on short barrel shotguns. *Heller* is simply referencing *Miller* and essentially states that the Court was going to pick up where *Miller* left off. That is the only rational interpretation of *Heller*'s discussion of *Miller*. The Supreme Court does not overturn itself with vagaries and dicta. It does so explicitly so that the matter is not open to debate. This is done to give clear guidance to the lower courts.

Moreover, just as Defendants' misread Heller's dangerous and unusual language, they misread Heller's discussion of M-16s. The *Heller* Court made it very clear it was simply ruling

[4] "While *stare decisis* is not an inexorable command particularly when we are interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Dickerson v. U.S.*, 530 U.S. 428, 443 (2000) (quotations and internal citations omitted). This justification was not discussed in *Heller*, and cannot be implied in *Heller*'s holding.

[5] In fact, the handgun before the Court was a .22 caliber handgun unsuited for military use.

on the matter before it and was not attempting to clarify the entire scope of the Second Amendment right. "One should not expect it [the Heller decision] to clarify the entire field, any more than *Reynolds v. United States*, 98 U. S. 145 (1879) , our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us". *Heller* at 2821. The *Heller* Court's discussion of M-16s is primarily an acknowledgment that these arms would continue to be banned after its decision. The legality of M-16s was not the matter before it and the issue had not been briefed by either party. Thus, the Court was not inclined to make a broad sweeping proclamation about the ban and left that issue for another day[6].

DEFENDANTS MISREAD *HELLER*'S FELON AND THE MENTALLY ILL LANGUAGE

Defendants misread *Heller*'s felon and mentally ill language. Defendants aver that *Heller* refers to the "current versions of these bans" which they correctly note are of "mid-20th century vintage". This argument finds no support in *Heller*. The Court in *Heller* explained the Second Amendment was a codification of a Common Law right and supported this position with historical analysis. Thus, to properly evaluate this language one must conduct an historical inquiry.

At Common Law there were three classes of crimes. The three classes of crime were Treason, Felony and Misdemeanor. At Common Law, felonies were those offenses which

[6] Defendants contend fully automatic weapons are not part of the ordinary soldier's equipment because the M-16 was converted to a three round burst firearm in the 1980s. This is somewhat a moot point since a firearm with a three round burst is still considered a machine gun under federal law. However fully automatic weapons are still part of the ordinary soldiers equipment as all Marines and Army soldiers are trained in the use of squad automatic weapons ("S.A.W."). In a fire team (which is a group of 4 Marines/soldiers) one person is assigned a S.A.W. The person assigned the S.A.W. can change often so every member needs to be proficient in its use. A S.A.W. is by definition bearable upon the person, fully automatic and designed to be operable by one person. The U.S. military currently issues a number of fully automatic light machine guns to its ordinary soldiers. The most common being the M249. *See* http://en.wikipedia.org/wiki/Fireteam. *See also* http://en.wikipedia.org/wiki/M249_light_machine_gun. Thus, Defendants argument that automatic weapons are not part of the ordinary soldier's equipment is incorrect.

occasioned forfeiture of the lands and goods of the offender and to which might be added death or other punishment according to the degree of guilt. 4. Bl. Comm. 94; *Fasset v. Smith,* 23 N.Y. 257(1891); *Bannon v. U.S.*, 156 U.S. 464 (1895). The Common Law felonies were murder (this included suicide), manslaughter, rape, sodomy, robbery, larceny, arson, burglary, and mayhem by castration. *See* William Lawrence Clark, William Lawrence Marshal New York, Fred B Rothman & Co A, Treatise on the Law of Crime (1905) at 12. All other crimes were either misdemeanors or treasons.

Treason- At common law, treason was divided into petit and high treason. High treason was the compassing of the King's death, and aiding and comforting of his enemies, the forging or counterfeiting of the privy seal, or the killing of the chancellor, or either of the king's justices; and petit treason was where a wife murdered her husband, an ecclesiastic his lord or ordinary, or a servant his master. In this country, treason is defined by the Constitution of the United States, and consists of levying of war against the United States, or adhering to their enemies, giving them aid and comfort. *Id* at 10. At the Common Law, all other crimes were misdemeanors.

Felony by Statute- Since the ratification of the Second Amendment, many crimes which at common law were misdemeanors have been lifted by statute to felony. However, *Heller* teaches us that constitutional rights and their limitations should be viewed at the time they were enshrined. To find otherwise would allow the legislature to rely on *Heller's* dicta to disarm the citizenry by lifting even the pettiest offense (such as speeding or littering) to felony. The *Heller* Court clearly did not intend that. Thus, the only reasonable reading of *Heller* is Common Law felons are disqualified from Second Amendment rights.

This leaves us with how to interpret the mentally ill component of *Heller's* text. Ultimately, the question is what persons may be precluded from Second Amendment rights?

Heller found it is those classes which were precluded at 1791, i.e. unvirtuous citizens. The classical republican notions inextricably linked to the Founding of the United States emphasized civic virtue, i.e. the virtuous citizenry. Historically, the State disarmed unvirtuous citizens and those like children or the mentally unbalanced who were deemed incapable of virtue. *See, e.g.* Robert Dowlut, The Right to Arms: Does the Constitution or the Predilection of Judges Reign? 36 OKLA. L.R EV. 65, 96 (1983) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms].").

In the political philosophy inextricably tied to the Founding of our Nation, a person with civic virtue possessed qualities associated with the effective functioning of the civil and political order, or the preservation of its values and principles. Within the Second Amendment context, this means a person that can contribute to the preservation or the efficacy of the militia. *See United States v. Miller*, 307 U.S. (1939). A person currently suffering from severe mental illness is unable to so contribute. As established above, Defendants are mistaken and *Heller* refers to Colonial Era restrictions on Common Law felons and the mentally ill.

EQUAL PROTECTION

Mr. Hollis proved, in App.069 of his Appendix [#24] that an M60 machinegun, manufactured after May 19, 1986, was allowed to be transferred to a non-governmental entity. Defendants make no suggestion that this is not the case. Additionally, Mr. Hollis' affidavit is sufficient to take discovery of the facts alleged under Fed. R. Civ. P. 56(d).

CONCLUSION

The Circuit Court decisions in the Ninth and Sixth Circuit along with this Court's recent decision in *Mance* supports applying (at the very least) strict scrutiny on Defendants' complete

ban on a class of protected arms as does the history of this Court's Circuit. Likewise, Defendants can refer this Court to no current statistical analysis on how or why the machinegun ban is narrowly tailored. As such, the machinegun ban is unconstitutional both facially and as applied to Mr. Hollis.

When the constitutional rights of every single U.S. citizen were jeopardized by the collective rights theory, this Court's Circuit stood up for the Second Amendment. Thus, in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002), the 5th Circuit looked to the text, history and tradition of our nation and became the first Circuit to find the Second Amendment confers an individual right to keep and bear arms. If this Court does the same, and it would not be a stretch for it to do so, it will find that Defendants' ban on the quintessential militia arm of the modern day defies the protections our Constitution guarantees.

This, the 27th day of February, 2015.

Respectfully submitted,

/s/ Stephen D. Stamboulieh
STEPHEN D. STAMBOULIEH
ATTORNEY FOR PLAINTIFF

/s/Alan Alexander Beck
ALAN ALEXANDER BECK
ATTORNEY FOR PLAINTIFF

Of Counsel:

Stephen D. Stamboulieh
Stamboulieh Law, PLLC
P.O. Box 4008
Madison, MS 39130
(601) 852-3440
stephen@sdslaw.us
MS Bar No. 102784

Elisha M. Hollis
Attorney At Law
P.O. Box 1535

Alan Alexander Beck
Law Office of Alan Beck
4780 Governor Drive
San Diego, CA 92122
(619) 971-0414
alan.alexander.beck@gmail.com
CA Bar No. 276646
Admitted Pro Hac Vice

Greenville, TX 75403
Tel: (903) 450-2473
Fax: (903) 200-1290
elishahollis@gmail.com
TX Bar No. 24083189

CERTIFICATE OF SERVICE

I, Stephen D. Stamboulieh, hereby certify that the above Plaintiff's Sur-reply to Defendants' Reply to Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment has been filed electronically with the Clerk of this Court, which sends notification of such filing to all counsel of record in this case.

/s/ Stephen D. Stamboulieh
Stephen D. Stamboulieh
Stamboulieh Law, PLLC
P.O. Box 4008
Madison, MS 39130
(601) 852-3440
stephen@sdslaw.us
MS Bar No. 102784