

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERALD HARRELLSON,

Defendant.

REPORT AND
RECOMMENDATION

04-CR-063-S

REPORT

Before the court for report and recommendation is defendant Gerald Harrellson's motion to dismiss the charge against him on the ground that the charging statute is unconstitutional. Because Seventh Circuit law clearly is against Harrellson on this point, he agreed to waive briefing, but wishes to obtain a ruling to preserve his record for the future.

Harrellson claims that the federal felon-with-a-gun statute, 18 U.S.C. § 922(g)(1), is unconstitutional in that it exceeds the power of Congress under Article I, Section 8 of the Constitution. *See* Motion to Dismiss, Dkt. 8. Harrellson, however, acknowledges that the Seventh Circuit has consistently ruled to the contrary. *See, e.g., United States v. Thomson*, 359 F.3d 470, 480 (7th Cir. 2004). The Ninth Circuit case cited by Harrellson (*United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003) actually addresses a different statute (§ 922(o)) and a different fact situation (the in-state home-manufacture of machine guns) and therefore is

inapposite to Harrellson's case. It does not violate the Commerce Clause for Congress to forbid felons from possessing firearms that previously have traveled in interstate commerce.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(D) and for the reasons stated above, I recommend that this court deny defendant Gerald Harrellson's motion to dismiss the indictment.

Entered this 23rd day of June, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge