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April 26, 2012

Molly Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *United States v. Chovan*, No. 11-50107
Argued: February 15, 2012 (Pasadena)
Before: Hon. Pregerson, Hon. Hawkins, and Hon. Bea.

Dear Ms. Dwyer:

On April 12, 2012, the panel issued an order "to file concurrent letter briefs on the applicability of *United States v. Brailey*, 408 F.3d 609 (9th Cir. 2005), to this case." Attached, please find Mr. Chovan's brief in response to the Court's order. It is within the 3,000 word limit.

Respectfully submitted,

s/ Devin Burstein
Devin Burstein
Federal Defenders of San Diego, Inc.

Introduction

Pursuant to 18 U.S.C. § 921(a)(33)(B)(ii), a person whose civil rights have been restored "shall not be considered to have been convicted of [a domestic violence misdemeanor]." In 2006, following a ten-year, state-law firearm disability, Mr. Chovan had the civil rights he lost -- the fundamental rights to keep and to bear arms -- restored under California law. Thus, he could not "be considered to have been convicted" of a domestic violence misdemeanor and was not amenable to prosecution under 18 U.S.C. § 922(g)(9).

This Court's decision in *Brailey* does not impact that conclusion. *Brailey* is distinguishable on both the law and the facts. And even if it were not, the doctrine of constitutional avoidance would require this Court to reconsider its interpretation of section 921(a)(33)(B)(ii), in light of *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

First and foremost, *Brailey* was decided several years before the Supreme Court determined that the rights to keep and bear arms were personal, fundamental, civil rights protected by the Second and Fourteenth Amendments. *See Heller*, 554 U.S. at 595; *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3032 (2010). Thus, *Brailey* did not consider that the restoration of those rights amounted to the restoration of basic civil rights. Instead, given the circuit law at the time, the Court assumed that the rights to keep and bear arms were not relevant civil rights and focused exclusively -- and we now know erroneously -- on the "rights of voting, serving as a juror, or holding public office." *Brailey*, 508 F.3d at 613.

Second, *Brailey* should be distinguished because, unlike Mr. Chovan, Mr. Brailey's rights to keep and bear arms were not truly restored under a state-law restoration process; rather, state law changed such that no misdemeanants were subject to any firearm disabilities. This is not merely a difference of semantics, but one of substance. As *Brailey* itself explained, section 921(a)(33)(B)(ii) applies only to misdemeanants who have actually had a right taken away and then given back through a "'state's restoration process.'" *Brailey*, 508 F.3d at 613. That did not happen in *Brailey* -- Utah law simply changed. Here, however, Mr. Chovan's rights, were actually restored by the applicable state-law process. Upon his conviction, he lost his civil rights to keep and bear arms. After ten years, he gained them back under California law, because he suffered no additional disqualifying convictions. That is a true restoration, as required by section 921(a)(33)(B)(ii).

Accordingly, because *Brailey* was decided before the Supreme Court determined that the rights to keep and bear arms were core, personal, civil rights (thus civil rights capable of restoration), and because *Brailey* did not address a scenario where the state law provided a mechanism for a restoration of rights, that case is largely irrelevant to this one. Moreover, even if *Brailey* could not be distinguished -- which it can and should be -- the doctrine of constitutional avoidance would require this Court to reconsider *Brailey*'s interpretation of section 921(a)(33)(B)(ii), in light of *Heller*. Any interpretation of that statute which would exclude the Second Amendment's core, enumerated, individual rights from the term "civil rights" would raise serious constitutional concerns and should be avoided.

Argument

1. *Brailey* does not control, because the Court there did not consider the rights to keep and to bear arms to be civil rights.

In *Brailey*, the defendant was convicted, under Utah law, of felony assault against his wife. *See* 408 F.3d at 611. After his release from prison, in 1997, a Utah court granted his petition to reduce the felony conviction to a misdemeanor. At that time, Utah law prohibited possession of a firearm by anyone convicted of a crime of violence, including a misdemeanor. *See id.* In 2000, however, Utah changed its law, such that the firearm prohibition did not apply to misdemeanants. *See id.*

Based on this change in the law, Mr. Brailey claimed that his civil rights had been restored and thus he could not be convicted of violating 18 U.S.C. § 922(g)(9). In support of this argument, however, Mr. Brailey offered little by way of analysis. He filed a cursory, ten-page opening brief that did not address whether the rights to keep and bear arms were considered civil rights. *See* Appellant's Opening Brief, Case No. 04-30083, 2004 WL 1763183 (July 8, 2004). He did not file a reply brief. *See* 9th Cir. Docket, Case No. 04-30083.

The Court rejected Mr. Brailey's claim. Not surprisingly, considering the issue had not been briefed, the Court appears to have assumed that Mr. Brailey's rights to keep and bear arms were not relevant civil rights. The issue was not expressly addressed or considered, but the Court's assumption can be inferred from its conclusion that "in states where civil rights are not removed for a misdemeanor conviction of a crime of domestic violence, an individual convicted of such a

misdemeanor 'cannot benefit from the federal restoration exception." *Brailey*, 408 F.3d at 612 (citation omitted). In other words, the Court did not view the rights to keep and bear arms as "civil rights" that were "removed." Indeed, the only civil rights actually considered were "the right to vote," "the right to sit as a juror," and "the right to hold public office." *Id.* at 611-12.

That the Court did not consider the rights to keep and bear arms to be core civil rights relevant to the restoration question is certainly understandable, given the timing of the decision (and the fact that the issue was not analyzed in the appellant's brief). In fact, that assumption was compelled by the then well-established law in the Ninth Circuit that the rights to keep and bear arms were not personal, civil rights. *See, e.g.*, *Silveira v. Lockyer*, 312 F.3d 1052, 1056 (9th Cir. 2002) ("the Second Amendment does not confer an individual right to own or possess arms"); *United States v. Stewart*, 451 F.3d 1071, 1075 n.6 (9th Cir. 2006) ("the Second Amendment does not grant individual rights."). Thus, there was no reason for the Court to have addressed those rights as "civil rights" on par with, for instance, the right to vote.

Since the Court decided *Brailey*, however, there has been a sea change in the law. *Heller* declared that the Second Amendment "conferred an individual right to keep and bear arms." 554 U.S. at 595. *McDonald* then concluded "that the Framers and ratifiers of the Fourteenth Amendment counted *the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty*." 130 S. Ct. at 3032 (emphasis added).

Following these cases, there can be no doubt that the rights to keep and to bear arms are "individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th and 19th Amendments" -- by definition, "civil right[s]." *Black's Law Dictionary* 240 (7th ed. 1999) (defining "civil right" as quoted). Because *Brailey* did not consider these rights to be relevant civil rights, however, it cannot control this case. *See United States v. Espinoza-Baza*, 647 F.3d 1182, 1191 (9th Cir. 2011) ("a previous decision does not bind a subsequent panel with respect to matters that were not considered or addressed in the prior case."); *see also Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("unstated assumptions on non-litigated issues are not precedential holdings binding future decisions.").

Brailey's basic assumption, though understandable at the time, was proved wrong by the Supreme Court.[1]

And, once the rights to keep and bear arms are viewed as individual civil rights -- as they now must be -- the conclusion that they fall within section 921(a)(33)(B)(ii) is almost inescapable. Here, upon his conviction, Mr. Chovan lost his civil rights to keep and bear arms. They were then restored. At that point, his restoration of civil rights was complete. He had all the civil rights he possessed prior to his conviction.

The fact that some of those rights, such as the right to vote, were retained (i.e., not "restored") by Mr. Chovan is of no moment. This Court has held that, "[i]f the state restores civil rights by operation of law, the 'restoration must be more than de minimis.'" *United States v. Herron*, 45 F.3d 340, 342 (9th Cir. 1995). The loss and restoration of fundamental, constitutionally guaranteed civil rights -- expressly enumerated in the Bill of Rights -- is certainly more than de minimis.[2] The issue, therefore, is not that Mr. Chovan retained certain rights, but rather that he had his core civil rights to keep and bear arms taken away, *see McDonald*, 130 S. Ct. at 3032, and then returned. Accordingly, he fits within the plain language of 18 U.S.C. 921(a)(33)(B)(ii): "the law of the applicable jurisdiction provides for the loss of civil

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[1] Further support for the conclusion that the rights to keep and bear arms are civil rights under 18 U.S.C. § 921(a) can be found in *United States v. Valerio*, 441 F.3d 837, 839 (9th Cir. 2006). There, the Court explained that "no *civil right* could be more relevant to [ ] future dangerousness than the *right to possess firearms*." *Id.* (emphasis added). Although *Valerio* also commented that restoration of the right to bear arms was "not enough" to save the defendant from federal prosecution, it was because the defendant's other civil rights "to serve on a jury and his right to hold public office have not been restored." *Id*. at 843. Given the continued loss of those two important civil rights, "he does not get past the second step of the analysis, restoration of civil rights." *Id*. That problem is not present here. And, at any rate, a broader reading of *Valerio* would suffer from the same post-*Heller* issues afflicting *Brailey*.

[2] De minimis means "[t]rifling; minimal." *Black's Law Dictionary* 443 (7th ed. 1999). No one reading *Heller* or *McDonald* could conclude that the rights to keep and bear arms are "trifling."

rights under such an offense" and Mr. Chovan is a person who "has had civil rights restored."[3]

As a result, Mr. Chovan cannot be considered to have been convicted of a domestic-violence misdemeanor, under section 922(g)(9). Thus, he should not have been prosecuted under that section and his conviction should be vacated. *See United States v. Gomez*, 911 F.2d 219, 222 (9th Cir. 1990) ("Idaho restored Gomez's civil rights without expressly restricting his right to possess firearms. We cannot say that at the time of his arrest he stood 'convicted' of a crime punishable by imprisonment for a term exceeding one year within the meaning of section 922(g).").

2. Unlike Mr. Chovan, Mr. Brailey did not benefit from a state-law process that restored his rights.

Brailey should also be distinguished on its facts. Unlike California law, the Utah law at issue did not provide for a restoration of rights. Instead, the law changed to eliminate any firearm prohibition "for persons convicted of misdemeanors." *Brailey*, 408 F.3d at 611. Under the amended Utah law, therefore, misdemeanants simply did not lose their firearm rights. *See id.*

Mr. Brailey attempted to take advantage of the happenstance that his misdemeanor conviction occurred under the old law, claiming that the change in the law was tantamount to a restoration of his rights, but this was clearly a stretch. In Utah, there was no actual state-law mechanism for a restoration of his firearm rights. Rather, he was simply considered not to have lost them. And a right that has not been lost cannot be restored. *See Logan v. United States*, 552 U.S. 23, 31-32 (2007).

This is a critical distinction and one upon which *Brailey* focused. *See Brailey*, 408 F.3d at 612 (noting that Mr. Brailey's civil rights could not be "'restored' in 2000 within the meaning of the federal exception because his misdemeanor conviction had not resulted in the loss of his civil rights as expressly required to qualify for the

[3] It is important to note that the term "civil rights" in section 921(a)(33)(B)(ii) is not limited to include only certain civil rights -- e.g., the right to vote. Nothing in the statute suggests that the civil rights to keep and bear arms are not also relevant rights. Indeed, as discussed below, such a construction must be avoided, as it would raise significant constitutional concerns.

federal exception.'"). Indeed, *Brailey* explained that "'Congress reasonably could [have concluded] that misdemeanants who had been through a state's restoration process and had regained their civil rights were more fit to own firearms than misdemeanants who had not lost their civil rights, had not had their convictions expunged, or had not been pardoned.'" 408 F.3d at 613 (quoting *United States v. Jennings*, 323 F.3d 263, 275 (4th Cir. 2003)). And that restoration process had simply not occurred for Mr. Brailey.

But it did for Mr. Chovan. California has determined that everyone convicted of certain misdemeanor crimes shall lose their core Second Amendment rights. *See* Cal. Penal Code § 12021(c)(1). Critically, the state has further determined that, after ten years, those rights will be restored (if there is no new disqualifying conviction). *See id.* In other words, California provides a legal framework by which these rights are taken from and then restored to individual defendants, based on the time that person has been offense-free. Under such a framework, there is a true restoration, as contemplated by section 921(a)(33)(B)(ii). And it does not at all lessen the impact of this restoration that it is accomplished by operation of law. *See Caron v. United States*, 524 U.S. 308, 313 (1998) (noting that the state "restored petitioner's civil rights by operation of law rather than by pardon or the like. *This fact makes no difference*.") (emphasis added).

Mr. Chovan is thus not similarly situated to Mr. Brailey. No matter how the government attempts to spin that case, Mr. Brailey did not go through a state-law process -- such as being offense free for a certain number of years -- by which his rights were restored. Mr. Chovan did. As *Brailey* did not address this scenario, it cannot control the outcome here. Mr. Chovan's rights were actually restored. His conviction should be vacated.

3. Even if *Brailey* was not distinguishable -- which it is -- it would not foreclose Mr. Chovan's argument because, under the doctrine of constitutional avoidance, this Court would have to reconsider section 921(a)(33)(B)(ii).

The doctrine of constitutional avoidance counsels against any interpretation of *Brailey* that would undermine Mr. Chovan's restoration-of-rights argument. If, as the government will likely claim, *Brailey* says that the rights to keep and bear arms are not relevant civil rights in the context of section 921(a)(33)(B)(ii), that provision becomes constitutionally suspect. Any statute that diminishes the importance of the

rights to keeps and bear arms, as individual civil rights, runs headlong into the Second Amendment, as interpreted in *Heller* and *McDonald*.

The doctrine of constitutional avoidance is a cardinal principle of statutory interpretation, "which requires a statute to be construed so as to avoid serious doubts as to the constitutionality of an alternate construction." *See Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006). Here, those "serious doubts" are easily avoided. Only if this Court interprets *Brailey* as having construed section 921(a)(33)(B)(ii) to exclude the civil rights guaranteed by the Second Amendment will there be a constitutional problem with the statutory scheme. Thus, this Court should avoid that interpretation of *Brailey*.

Moreover, even if such a constitutionally troublesome interpretation were warranted -- which it is not -- "the doctrine of constitutional avoidance [would] require[] [this Court] to revisit [its] prior interpretation of section [921(a)(33)(B)(ii)] . . . . [because] intervening Supreme Court precedent requires reconsideration." *United States v. Rehlander*, 666 F.3d 45, 47 (1st Cir. 2012). As the First Circuit recently explained, "*Heller* now adds a constitutional component" to statutes bearing on the permanent deprivation of "its newly recognized constitutional right." *Id.* at 48.

Thus, based on *Heller* and *McDonald*, even if *Brailey* did undercut Mr. Chovan's argument -- which it does not -- this Court would not be compelled to follow that decision, but, rather, to reconsider it. *See United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011) (reconsidering and declining to follow a prior, precedential holding, based on intervening Supreme Court precedent); *United States v. Orozco-Acosta*, 607 F.3d 1156, 1161 n.3 (9th Cir. 2010) (reconsidering whether admission of certain evidence violated the Confrontation Clause, in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and concluding that prior cases were "overruled to the extent of their irreconcilability with *Melendez-Diaz*."); *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that where intervening higher authority is irreconcilable with established circuit law, a three-judge panel 'should consider [itself] bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled'"); *Le Vick v. Skaggs Cos.*, 701 F.2d 777, 778 (9th Cir. 1983) (reconsidering the Court's prior interpretation of a federal statute based on intervening Supreme Court law).

Finally, constitutional avoidance also counsels again construing *Brailey* as foreclosing Mr. Chovan's restoration-of-rights argument, because such construction

would compel this Court to decide whether section 922(g)(9) is constitutional under the Second Amendment. Non-constitutional grounds for decision are always preferred. *See Nadarajah*, 443 F.3d at 1076 ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision."). Thus, any interpretation of *Brailey* that would lead this Court potentially to strike down section 922(g)(9) should be avoided as unnecessary.

Conclusion

Brailey does not change the fact that Mr. Chovan's core civil rights to keep and to bear firearms were restored under California law. Based on that restoration, Mr. Chovan cannot be considered to have been convicted of a domestic violence misdemeanor. Accordingly, his conviction should be vacated.

DATED: April 26, 2012

Respectfully submitted,

s/ Devin Burstein
Devin Burstein
Federal Defenders of San Diego, Inc.

CERTIFICATE OF COMPLIANCE

I certify that the attached letter brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as it complies with a Court Order dated April 12, 2012 and does not exceed 3,000 words.

s/ Devin Burstein

Date: April 26, 2012

DEVIN BURSTEIN, ESQ.
Signature of Attorney or
Unrepresented Litigant

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on April 26, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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s/ Devin Burstein