

FEDERAL
DEFENDERS
OF
SAN DIEGO,
INC.

February 7, 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: Supplemental Citation [Fed R. App. P. 28(j)]
United States v. Chovan, No. 11-50107
Argument: February 15, 2012 (Pasadena)
Before: Hon. Pregerson, Hon. Hawkins, and Hon. Bea.**

Dear Ms. Dwyer:

In the government’s Rule 28(j) letter of this date, it cited one recent Fourth Circuit decision, but neglected to bring to this Court’s attention *United States v. Carter*, Case No. 09-5074, ___ F.3d ___, 2012 WL 207067 (4th Cir. Jan. 23, 2012). Mr. Chovan submits this letter to rectify that omission.

In *Carter*, the Fourth Circuit vacated the defendant’s conviction for possessing a firearm while being an unlawful user of marijuana, in violation of 18 U.S.C. § 922(g)(3). *See id.* at *1. Applying intermediate scrutiny to the defendant’s Second Amendment claim, the court held “that the government failed to make the record to substantiate the fit between [section 922(g)(3)’s] objective and the means of serving that objective.” *Id.* Thus, the government had not established the provision’s constitutional validity. The same is true here.

Indeed, *Carter* noted that the government’s evidentiary burden in demonstrating the validity of section 922(g)(3) would be less than in supporting section 922(g)(9) -- the subsection at issue here: “To be sure, the record need not be as fulsome as that necessary to justify § 922(g)(9), which was the subject of *Chester*, because the statutory text of § 922(g)(3) contains an important limiting principle that is absent from § 922(g)(9), as well as from many of the other § 922(g) provisions.” *Id.* at *6. The Fourth Circuit emphasized that “[s]ection 922(g)(9) permanently disarms anyone convicted of a misdemeanor crime of domestic violence, even if the defendant has only one remote conviction. Although we ultimately upheld § 922(g)(9) as constitutional in *Staten*, *Chester* understandably required the government to make a heightened evidentiary showing before upholding the measure.” *Id.* (emphasis added).

As discussed at length in Mr. Chovan’s briefs, the government has not made this “heightened evidentiary showing” here. It did not proffer any statistical data to the district court whatsoever -- and very little on appeal -- and thus cannot have met its burden in establishing section 922(g)(9)’s constitutionality under any level of heightened judicial scrutiny. Accordingly, as in *Carter*, this Court should vacate Mr. Chovan’s conviction.

Respectfully submitted,

s/ Devin Burstein

Devin Burstein

Federal Defenders of San Diego, Inc.

cc: Caroline Han, Assistant U.S. Attorney

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Participants**

I hereby certify that on February 7, 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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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

s/ Devin Burstein