UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Duy T. Mai,
Appellant,

v.

United States, et al.,
Appellees.

No. 18-36071

Appellant's Reply Brief

Appeal from the United States District Court
for the Western District of Washington

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I. Argument

A. This Court should reject the Third Circuit's *Beers* decision.

On June 20, 2019, shortly after the government filed its response brief, the Third Circuit issued an opinion regarding 18 U.S.C. § 922(g)(4) in *Beers v. Attorney General*, No. 17-3010, 2019 U.S. App. LEXIS 18519 (3d Cir. 2019). The Third Circuit's Second Amendment jurisprudence in general is questionable at best and applies a different standard for Second Amendment challenges than this Circuit and most sister circuits. Also, the facts in *Beers* can easily be distinguished from the facts in this case. Finally, the Third Circuit chose to do what is easy, instead of what is right. Therefore, this Court should reject the Third Circuit's approach to Second Amendment jurisprudence in general, and 18 U.S.C. § 922(g)(4) challenges specifically.

Bradley Beers filed an as-applied challenge to the constitutionality of 18 U.S.C. § 922(g)(4) as applied to him following an involuntary commitment in Pennsylvania at the end of 2005. *Beers*, 17-3010 at *1-2. In support, he submitted an opinion from a physician that Beers "was able to safely handle firearms again without risk of harm to himself or others." *Id.* at *3. There is no indication in the opinion whether Mr. Beers was a juvenile or an adult at the time of the commitment.

The court began its analysis by recounting the Third Circuit's torrid history of Second Amendment jurisprudence. It explained that it initially adopted a two-part test for Second Amendment challenges: "First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, we need not proceed to the second step. If it does, however, we assess the law under heightened scrutiny. Where the law survives heightened scrutiny, it is constitutional; if not, it is invalid." *Id.* at *6 (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)). This is the same test applied by this Circuit as well as most circuits.

However, the Third Circuit later carved out a different test for (g)(1) felon challenges. *Id.* at *7. To challenge a (g)(1) prohibition, "the challenger had to distinguish his circumstances from those of persons historically-barred from possession of a firearm by demonstrating either (1) that he was convicted of a minor, nonviolent crime and thus he is no more dangerous than a typical law-abiding citizen; or (2) that a significant time has passed so that he has been 'rehabilitated' and 'poses no continuing threat to society.'" *Id.* at *7-8 (citing *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011)). Unsatisfied with itself, the Third Circuit decided to backpedal this exception five years later in *Binderup v. Attorney General*, 836 F.3d 336 (2016) by changing the test. *Beers* at *9-10. An exception to (g)(1) still exists, but the test is now different: "the only way a felon

can distinguish himself from the historically-barred class of individuals who have been convicted of serious crimes is by demonstrating that his conviction was for a non-serious crime, i.e., that he is literally not a part of the historically-barred class." *Id.* at *10.

It remains a mystery why the Third Circuit's jurisprudence can tolerate an exception to (g)(1) but not (g)(4) without running afoul of the Supreme Court's language in *Heller*. What is not a mystery is that the Third Circuit's Second Amendment jurisprudence is an aberration in federal Second Amendment case law. This Court should categorically disregard it.

Furthermore, the facts in *Beers* are distinguishable. Foremost, there is no mention of whether Mr. Beers was a juvenile or adult at the time of the commitment. This should play an important role in Second Amendment jurisprudence because children are inherently different. *See Roper v. Simmons*, 543 U.S. 551 (2005) and subsequent Supreme Court case law. Secondly, Mr. Beers's offer of rehabilitation sounds more like he passed a firearm safety course than a comprehensive mental health evaluation. *Beers* at *3 ("A physician who examined Beers in 2013 opined that Beers was able 'to safely handle firearms again without risk of harm to himself or others.'"). This is a far cry from Mr. Mai's proffer from mental health professionals that he does not present any observable psychopathology, is of low risk for future violent and nonviolent criminal

behavior, has consistently screened negative for depression, and does not represent a significant risk to himself or to others. Excerpts of Record at 40-54.

Finally, the Third Circuit did what is convenient instead of what is right. In ruling against Mr. Beers, it fell back on the notion that "most importantly, . . . courts are not 'institutionally equipped' to conduct 'a neutral, wide-ranging investigation' into post-conviction assertions of rehabilitation." *Id.* at *10. Apparently, the Third Circuit has no problem at all deciding the controversial question of what is or is not a "non-serious crime" for the purposes of the (g)(1) exception it carved out, yet weighing evidence of rehabilitation for the purposes of (g)(4) is simply too much for the federal courts to handle. The *Beers* opinion is not even internally consistent. The duty of the court is to enforce the Constitution and protect individual liberty against government encroachment. A court is in dereliction of that duty when it denies a constitutional right because the issue presented is difficult or inconvenient.

This Court should reject the Third Circuit and adopt the Sixth Circuit's *Tyler* opinion. *Tyler* applied the same two-part test applied by this Circuit, was an *en banc* decision instead of a panel decision, contains more comprehensive research and analysis, and comes to the correct conclusion: the government cannot prohibit individuals who were once committed for mental health treatment but who are no longer mentally ill from possessing firearms without passing intermediate scrutiny.

B. There is no persuasive case law in the Ninth Circuit or elsewhere that categorically prohibits a (g)(4) challenge.

The government does not and cannot cite a single published case from this Circuit or any sister circuit that categorically forecloses an as-applied (g)(4) challenge.[1] Instead, it relies on unpublished cases that have no precedential value. 9th Circuit Rule 36-3(a). In fact, the weight of authority nationwide allows as-applied challenges to (g)(4). *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *Tyler v. Hillsdale Cnty. Sheriff's Dep't.*, 837 F.3d 678 (6th Cir. 2016) (en banc); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *United States v. Johnson*, No. CR15-3035-MWB, 2016 WL 212366, 2016 U.S. Dist. LEXIS 5731 (N.D. IA Jan. 19, 2016).

In providing historical references and citations to frame its argument, the Government makes a classic mistake: it links past mental illness with current mental illness. In doing so, it implicitly adopts the view that "once mentally ill, always so." Every historical citation uses present-tense language: "(noting that 'lunatics' and 'those of unsound mind' were historically prohibited from firearm possession)," Response at 11; "[t]he report asserted that citizens have a personal

[1] The government could not cite *Beers* because it filed its response brief before the Third Circuit issued that decision. But, as explained previously, the *Beers* decision is poorly reasoned, unpersuasive, and distinguishable.

right to bear arms unless for crimes committed, or real danger of public injury," Response at 12.

Furthermore, placing a heavy emphasis on the way mentally ill individuals were treated in the eighteenth century is not the answer in 2019. Citing quotations that only "virtuous citizen[s]" and "law-abiding, responsible citizens" were allowed to possess firearms is blatantly offensive because it implies that mentally ill individuals, or those who were once mentally ill, are unvirtuous, not law-abiding, and not responsible. We no longer refer to mentally ill individuals as "lunatics" and we no longer lock up the mentally ill unless they are a *present* danger to themselves or others, and only then after affording each individual with due process. The treatment of a constitutional right should follow the same progression.

Heller's "presumptively lawful" language refers to individuals who are mentally ill in the present tense. This language can be squared with Mr. Mai's challenge. Those who *are* mentally ill and pose a danger to themselves or others should not possess firearms and (g)(4) is a proper exercise of that public policy. Those who are verifiably no longer mentally ill are inherently different and it violates the Second Amendment to say that one is the same as the other.

C. 18 USC § 922(g)(4) cannot withstand intermediate scrutiny.

In support of its argument that (g)(4) withstands intermediate scrutiny, the Government primarily relies on Congressional intent and various scientific studies to support its position. But, a careful study of these factors indicates that these sources are not helpful to the question before the Court.

First, the idea that Congress's intent to keep firearms out of the hands of dangerous individuals is a reasonable fit to (g)(4) is incredulous in light of the NICS Improvement Amendments Act of 2007, Pub L. No. 110-180, 121 Stat. 2559 (2008). In the wake of an awful tragedy on the campus of Virginia Tech that was carried out by a mentally ill individual, Congress *eased restrictions* on the possession of firearms. Congress created an avenue for restoration of the right to possess a firearm, where none had existed previously, for those who had been involuntarily committed or adjudicated as a "mental defective." Congress does not care to keep firearms out of the hands of those who had been involuntarily committed – it only cares about doing so on its own terms. Congress defined a certain standard for restoration, but left it to the states to implement that standard. A large portion of the country has thus been left out through no virtue other than geography.

Second, every scientific study cited by the Government references mental illness in the present or mental illness combined with some other co-existing

diagnosis. The question before this Court is not "should mentally ill individuals possess firearms?" The answer is obviously, "no." The question before this Court is "does the fact of a previous involuntary commitment lead, in every instance, to a higher risk of violence against the self or others *forever*, and even in the face of an otherwise clean bill of mental health?" The Government ultimate position is "once mentally ill, always so," but it cannot proffer a shred of persuasive evidence to that effect.

Mr. Mai is no longer mentally ill and is not a danger to himself or others. This has been verified by numerous mental health professionals. 18 USC § 922(g)(4) cannot withstand intermediate scrutiny as applied to him. The objective of keeping firearms away from those who pose a danger to themselves or others does not fit the conduct regulated – the possession of a firearm by an individual who is not a present danger to himself or others.

II. CONCLUSION

Based on the foregoing, this Court should reverse the trial court's dismissal and remand for further proceedings.

Respectfully submitted,

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7/26/19

9th Circuit Case Number(s) 18-36071

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