Ninth Circuit Joins Second Amendment Circuit Split on Mental Health

Issue Summary
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In 1776, Thomas Jefferson said, "No freeman shall ever be debarred the use of arms."[1] In 2020, the Ninth Circuit ruled against plaintiff Duy Mai and joined a circuit split over how the right to bear arms applies to individuals who were once involuntarily committed but who have since returned to mental health.[2] The Third and now Ninth Circuits have ruled that once an individual has been committed or adjudicated as mentally ill, absent relief under a state relief process, he or she is unable to regain his or her Second Amendment right.[3] The Sixth Circuit reached the opposite conclusion and ruled that a lifetime ban on firearms ownership does not survive intermediate scrutiny.[4]

In *Mai*, the plaintiff's commitment to a mental institution for more than nine months at the age of seventeen triggered a federal and state prohibition against his ownership of firearms.[5] After his release from the institution in 2000, Mai earned a GED, a bachelor's and master's degrees, passed an FBI background check, and became gainfully employed and the father of two children.[6] Mai successfully petitioned a Washington state court in 2014 and found relief from the state firearms prohibition.[7] When he attempted to purchase a firearm, he was unable to and received a notice from the ATF that the state-level restoration did not remove his Second Amendment disqualification under 18 U.S.C. § 922(g)(4).[8] Mai subsequently filed suit in Washington alleging a violation of his Second and Fifth Amendment rights.[9] After the district court granted the government's motion to dismiss, Mai appealed to the Ninth Circuit.[10]

Mai argued the Second Amendment required he be able to possess a firearm.[11] The court disagreed, holding an individual previously involuntarily committed and then later returning to mental health may only find relief from § 922(g)(4) under two potential avenues.[12] First, an individual may apply to the U.S. Attorney General for relief.[13] Second, an individual may apply

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[1] "I. First Draft by Jefferson, [before June 1776]," *Founders Online,* National Archives, https://founders.archives.gov/documents/Jefferson/01-01-02-0161-0002 (last visited Dec. 22, 2020).
[2] Mai v. United States, 952 F.3d 1106, 1109–10, 1114 (9th Cir. 2020).
[3] *Id.* at 1114, 1121; Beers v. AG United States, 927 F.3d 150, 159 (3d Cir. 2019).
[4] Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 688–99 (6th Cir. 2016).
[5] Mai, 952 F.3d at 1109; 18 U.S.C. § 922(g)(4) (2020); Wash. Rev. Code Ann. § 9.41.040 (West, Westlaw through Chapter 8 of the 2021 Regular Session).
[6] Mai, 952 F.3d at 1110; *see also* First Amended Complaint at 32–49, Mai v. United States, 2018 U.S. Dist. LEXIS 21020 (No. 2:17-cv-00561-RAJ) (declarations from medical and psychiatric professionals attesting that Mai posed no risk to himself or others).
[7] Mai, 952 F.3d at 1110.
[8] Mai v. United States, 2018 U.S. Dist. LEXIS 21020, 3 (W.D. Wash. 2018).
[9] Mai, 952 F.3d at 1112.
[10] *Id.*
[11] *Id.* at 1114.
[12] *Id.* at 1111.
[13] *Id.*

for relief through a state program so long as it qualifies under 34 U.S.C. § 40915.[14] The first method offers little more than false hope as the method under the U.S. Attorney General has been entirely defunded by Congress.[15] Washington's program did not qualify,[16] leaving Mai with no method to have his right reinstated.

Even though Mai had no viable path to his Second Amendment right being reinstated and the Ninth Circuit agreed the law's burden on Mai's right was substantial, the Court of Appeals ruled that the government's interest in preventing crime and preventing suicide was legitimate and compelling.[17] The court concluded that while they had no doubt Mai was no longer mentally ill, § 922(g)(4)'s application to Mai withstood scrutiny and justified Mai losing a fundamental right.[18]

Congress, in passing § 40195, designed a path for citizens to regain their Second Amendment right when they are determined to no longer be a threat to themselves or others. In *Heller*, the landmark Second Amendment case, the Court stated local legislatures are in the best position to evaluate local problems and "may seek to solve similar problems in different ways, and . . . must be allowed to solve problems in different ways, and . . . must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[19] Yet, the Ninth Circuit's decision in *Mai* suggests a diversion from this when the court determined Washington's approach to reinstating one's Second Amendment was not good enough.

Judge Bumatay, dissenting from the Ninth Circuit's denial of a panel rehearing, said the case implies a startling perspective on mental illness.[20] Many seek help with their mental health in the hopes of no longer suffering from their illness, and others fear seeking help because they do not want to be labeled as mentally ill forever. While the Ninth Circuit states in their conclusion they do not agree that "once mentally ill, always so,"[21] Judge Bumatay says the court's use of scientific literature to justify its conclusion regarding mental illness and a permanent prohibition of one's Second Amendment suggests the Ninth Circuit believes mental illness possibly justifies a lifetime of differential treatment and restricted rights.[22]

Mai's request for relief would likely have ended differently if the events transpired in Idaho. Similar to Mai, someone living in Idaho may be involuntarily committed by a judge only after a finding that the person is mentally ill, likely to hurt himself or others, and unable to make informed treatment decisions.[23] The involuntary commitment process moves quickly with the involvement of a local prosecutor's office, the individual's legal counsel, a magistrate, and

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[14] Mai, 952 F.3d at 1111.
[15] *Id.*
[16] *Id.* at 1112.
[17] *Id.* at 1120–21.
[18] *Id.* at 1121.
[19] District of Columbia v. Heller, 554 U.S. 570, 705 (2008), citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986) (internal quotation marks omitted).
[20] Mai v. United States, 974 F.3d 1082, 1083 (9th Cir. 2020) (Bumatay, J., dissenting).
[21] *Id.* at 1084.
[22] *Id.* "[W]e undermine our Second Amendment jurisprudence and give an unworthy judicial imprimatur to the false premise that 'once mentally ill, always mentally ill.'").
[23] Idaho Code § 66-329 (2020).

representatives from the Department of Health and Welfare [DHW].[24] The individual's mental health is evaluated three times by designated examiners within a span of 72 hours.[25] For commitment to be warranted, the designated examiners' findings must show the person is mentally ill and either a danger to himself, others, or disabled by their mental illness.[26] After the findings are submitted, the court has seven days to hold a hearing where a determination is made whether the person should be committed to the custody of DHW until mental health is restored.[27]

Once a person has been involuntarily committed in Idaho and a judge finds that § 922(g)(4) applies, federal and state firearms prohibitions are automatically triggered.[28] However, the firearms restriction is not permanent. Idaho provides a viable path for a person to petition the court to reinstate his Second Amendment rights once he has shown a return to mental health.[29] Idaho's Relief from Firearms Disabilities program complies with the requirements outlined in § 40915, resulting in potential relief from both the federal and state firearms prohibitions.[30] If Mai had lived in Idaho at the time of his mental health crisis and subsequent firearms reinstatement petition, he likely would have found success with the court.[31]

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[24] *See id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] 18 U.S.C. § 922(g)(4); Idaho Code § 66-356 (2020).
[29] Idaho Code § 66-356.
[30] *Id.* In contrast to Idaho, Washington's relief program is not a qualifying state program because the factual findings required in Washington differ from those required under § 40915. Washington requires a finding that a person "no longer presents a substantial danger to himself or herself, or the public." Wash. Rev. Code 9.41.047(3)(c)(iii). For a state program to qualify under 34 U.S.C. § 40915(a)(2), there must be a determination that "the person will not be likely to act in a manner dangerous to public safety."
[31] *See* Mai, 952 F.3d at 1112 (among other things, the denial of Mai's petition turned on Washington's choice of words).