APPENDIX A

Opinion of the United States Court
of Appeals of the Ninth Circuit
(August 20, 2021)
Appendix Pages A-001 - A-020

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JAMES MICHAEL BARTLEY, *Defendant-Appellant.*	No. 20-30034 D.C. No. 1:19-cr-0002-DCN OPINION

Appeal from the United States District Court
for the District of Idaho
David C. Nye, Chief District Judge, Presiding

Argued and Submitted May 3, 2021
Seattle, Washington

Filed August 20, 2021

Before: Danny J. Boggs,* A. Wallace Tashima, and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Tashima

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* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed a criminal judgment in a case in which the defendant, who was committed in 2011 to an Idaho state hospital after he was found incompetent to stand trial, entered a conditional guilty plea to unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g)(4), which prohibits the possession of a firearm by any person "who has been adjudicated as a mental defective or who has been committed to a mental institution."

The panel rejected the defendant's contention that the 2011 state proceedings to determine his competency to face criminal charges lacked due process.

The panel rejected the defendant's contention that because the state court did not find that he was both mentally ill and dangerous, the 2011 proceedings did not constitute an adjudication or commitment within the meaning of § 922(g)(4). The panel explained that neither § 922(g)(4) nor 27 C.F.R. § 478.11 requires a finding that the committed person was both mentally ill and dangerous. The panel also rejected the defendant's contention that because the state court did not make a finding under Idaho Code § 66-356 that he is a person to whom § 922(g)(4) applies, the 2011 competency proceedings do not come within the meaning of § 922(g)(4). The panel explained that this argument is

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

precluded by the language of § 922(g)(4) and § 478.11, which do not require a separate finding.

Assuming without deciding that the application of § 922(g)(4) to the defendant burdens Second Amendment rights, the panel applied intermediate scrutiny, which requires the government's statutory objective to be "significant, substantial, or important," and a "reasonable fit" between the challenged law and that objective. Applying intermediate scrutiny, the panel held that the application of § 922(g)(4) to the defendant does not violate his Second Amendment right to possess a firearm.

COUNSEL

Theodore Braden Blank (argued), Assistant Federal Defender, Federal Defender Services of Idaho, Boise, Idaho, for Defendant-Appellant.

Francis Joseph Zebari (argued), Assistant United States Attorney; Bart M. Davis, United States Attorney; United States Attorney's Office, Boise, Idaho; for Plaintiff-Appellee.

OPINION

TASHIMA, Circuit Judge:

James Michael Bartley was charged with unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g)(4), based on his 2011 commitment to an Idaho state hospital after he was found incompetent to stand trial. Section 922(g)(4) prohibits the possession of a firearm by any person "who has

been adjudicated as a mental defective or who has been committed to a mental institution." Bartley moved to dismiss the indictment on the grounds that: (1) the competency proceedings resulting in his commitment did not comport with due process; (2) he was not "adjudicated as a mental defective" or "committed to a mental institution" within the meaning of § 922(g)(4); and (3) the application of the statute to him violated his Second Amendment right to possess a firearm. The district court denied the motion to dismiss. *United States v. Bartley*, 400 F. Supp. 3d 1066, 1073 (D. Idaho 2019). Bartley then entered a conditional guilty plea and now appeals his conviction. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

BACKGROUND

I. The 2011 Commitment

In 2011, Bartley was stopped for driving under the influence (DUI). After Bartley's defense counsel questioned his competence to stand trial, the state court ordered a mental evaluation under Idaho Code § 18-211. The psychologist who performed the evaluation found that Bartley "appeared genuine and consistent in his presentation and belief, stating that he is the son of God, experiencing persecution by those who do not believe him. This appears to be a fixed delusional belief with prominent religious features with possible auditory hallucinations." The psychologist believed that Bartley's delusional disorder would prevent him from assisting in his defense.

Based on its review of the mental evaluation, the court found that Bartley lacked fitness to stand trial and lacked the capacity to make informed decisions about his treatment. On

August 8, 2011, the court ordered Bartley committed to the Idaho Department of Health and Welfare for evaluation and treatment pursuant to Idaho Code § 18-212. There, Bartley was diagnosed with paranoid schizophrenia and chronic mental illness. Six weeks after his commitment, the state hospital determined that Bartley's competency was restored and discharged him. On October 20, 2011, the court entered an order terminating the commitment pursuant to Idaho Code § 18-212 and sentenced Bartley to probation on the DUI charge.

II. The 2018 Offense

In July 2018, someone called the police because Bartley was in the parking lot of a business, yelling obscenities at a vehicle. A witness and Bartley argued, and the witness recorded the interaction on his telephone. Bartley pointed a gun at the witness and then left. Officers executed a search warrant at Bartley's home and found firearms and ammunition.

III. Procedural History

In denying Bartley's motion to dismiss the indictment, the district court, applying intermediate scrutiny, concluded that the firearm ban in § 922(g)(4) is not overburdensome "because those to whom the statute applies can participate in a petition process to restore their right to firearm possession." *Bartley*, 400 F. Supp. 3d at 1071. The court also rejected Bartley's as-applied challenge to the statute. *Id.* The court concluded that the 2011 state proceeding in which Bartley was found incompetent to stand trial and committed to the state hospital brought Bartley within the meaning of

§ 922(g)(4). *Id.* at 1073. Finally, the court rejected Bartley's due process claim. *Id.*

Bartley entered a plea of guilty pursuant to a plea agreement, reserving the right to appeal the denial of his motion to dismiss the indictment. The court sentenced Bartley to a twenty-month term of imprisonment. Bartley timely appealed.

STANDARD OF REVIEW

The constitutionality of a statute is reviewed de novo. *United States v. Chovan*, 735 F.3d 1127, 1131 (9th Cir. 2013). The district court's denial of a motion to dismiss the indictment also is reviewed de novo. *United States v. Sineneng-Smith*, 982 F.3d 766, 773 (9th Cir. 2020), *pet. for cert. filed*, No. 20-1803 (U.S. Jun. 25, 2021). Although our court has not addressed the issue, we agree with the district court that the issue of whether a defendant's adjudication or commitment comes within the meaning of § 922(g)(4) "is a question of law to be determined by the court rather than a question of fact to be reserved for the jury." *Bartley*, 400 F. Supp. 3d at 1072 (quoting *United States v. McLinn*, 896 F.3d 1152, 1156 (10th Cir. 2018)). The facts of Bartley's circumstances are undisputed – the only question is whether those facts come within the meaning of the statute, which is a question of law. *See McLinn*, 896 F.3d at 1156 (stating that "every court of appeals to have addressed the issue has held that whether a defendant's adjudication or commitment qualifies under the current version of § 922(g)(4) is a question of law to be determined by a judge rather than a question of fact reserved for the jury," and concluding likewise).

DISCUSSION

On appeal, Bartley raises three arguments. First, he contends that the 2011 competency proceedings did not include sufficient due process protections to bring him within the purview of § 922(g)(4). Second, he argues that the 2011 proceedings did not constitute an adjudication or commitment within the meaning of the statute. Third, he argues that the statute as applied to him violates his Second Amendment rights.

I. Due Process

Contrary to Bartley's contention, the 2011 state proceedings to determine his competency to face criminal charges did not lack due process. He relies on the observation in *Mai v. United States*, 952 F.3d 1106, 1110 (9th Cir. 2020), *cert. denied*, No. 20-819, 2021 WL 1602649 (Apr. 26, 2021), that "commitments under state-law procedures that lack robust judicial involvement do not qualify as commitments for purposes of § 922(g)(4)." *Id.* *Mai* relied for this principle on *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012), which addressed Maine's emergency procedure for involuntary admission to psychiatric hospitals. Unlike Maine's procedure for "full-scale commitments (as opposed to temporary hospitalization)," the statute governing the emergency procedure provided for temporary hospitalization following ex parte procedures and thus did not require a traditional adversary proceeding. *Id.* at 46. The First Circuit concluded that "temporary hospitalizations supported only by ex parte procedures" did not constitute a commitment under § 922(g)(4). *Id.* at 50.

Bartley's commitment proceedings were unlike the emergency procedure found insufficient in *Rehlander*. To the contrary, Bartley was examined by a qualified psychologist and represented by counsel, and the determination that he was not fit to proceed was made by the court based on the examiner's findings. *See* Idaho Code §§ 18-211, 18-212. In addition, Idaho law requires an adversarial proceeding if either the prosecutor or defense counsel contests the finding of the report, and the party contesting the finding has the right to cross-examine the examiner and offer evidence. Idaho Code § 18-212(1). Bartley's commitment did not "lack robust judicial involvement." *Mai*, 952 F.3d at 1110.

Bartley also relies on the statement in *Mai* that "[i]nvoluntary commitments comport with due process only when the individual is found to be *both* mentally ill *and* dangerous." *Id.* (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). But *Foucha*, on which *Mai* relied, does not support Bartley's due process argument. *Foucha* addressed the constitutionality of a Louisiana statute that permitted the continued civil commitment of the petitioner, who had been found not guilty by reason of insanity. *Foucha*, 504 U.S. at 73–74. The statute required the petitioner to prove that he was not dangerous in order to be released from a psychiatric hospital, even though he no longer suffered from mental illness. *Id.* The Court explained that, "even if [the petitioner's] continued confinement were constitutionally permissible, keeping [him] against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." *Id.* at 78.

Unlike in *Foucha*, Bartley is not currently confined, and his confinement after he was found not competent to stand

trial was for a constitutionally valid reason. *Jackson v. Indiana*, 406 U.S. 715, 733 (1972), held that a person's civil commitment passes constitutional scrutiny even "[w]ithout a finding of dangerousness" when the commitment is "for a 'reasonable period of time' necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future." And, as Justice O'Connor pointed out, the opinion in *Foucha* "addresses only the specific statutory scheme before us, which broadly permits indefinite confinement of sane insanity acquittees in psychiatric facilities." *Foucha*, 504 U.S. at 86–87 (O'Connor, J., concurring). The statute governing Bartley's confinement is nothing like the broad statute at issue in *Foucha*, and he *was* found mentally ill, which was the componenet missing during the extended confinement period in *Foucha*. *Mai* accordingly does not support the contention that the proceedings to determine Bartley's competency to face criminal charges lacked due process.

II. Adjudication or Commitment

A. Finding of Dangerousness

Bartley contends that the 2011 proceedings did not constitute an adjudication or commitment within the meaning of § 922(g)(4) because the state court did not find that he was both mentally ill and dangerous. This argument is not supported by the plain language of the statute and its implementing regulation, 27 C.F.R. § 478.11.

Section 922(g)(4) prohibits the possession of a firearm by any person "who has been adjudicated as a mental defective

or who has been committed to a mental institution."[1] The regulation defines the phrase "committed to a mental institution" simply as "[a] formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority." 27 C.F.R. § 478.11. It includes "a commitment to a mental institution involuntarily," "commitment for mental defectiveness or mental illness," and "commitments for other reasons, such as for drug use." *Id.* Nowhere does the statute or regulation require a finding that the committed person was both mentally ill and dangerous.

Bartley relies on *Mai*'s statement that "§ 922(g)(4)'s prohibition as to those who were committed involuntarily . . . applies only to those who were found, through procedures satisfying due process, *actually* dangerous in the past." *Mai*, 952 F.3d at 1121. This statement must be read in light of *Mai*'s holding. The plaintiff in *Mai* had been committed involuntarily after a state court determined he was both mentally ill and dangerous. *Id.* at 1110. He successfully petitioned for relief from state law prohibiting him from possessing a firearm, but he was forbidden by § 922(g)(4) from purchasing a handgun, and there was no state mechanism for relief from the federal prohibition. *Id.* He

[1] We focus our discussion on the "committed" prong and conclude that Bartley's commitment to the state hospital qualifies. In light of our conclusion, we need not address whether the finding that Bartley was not competent to stand trial was an adjudication "as a mental defective" within the meaning of § 922(g)(4), although the definition of the phrase in 27 C.F.R. § 478.11 indicates that it qualifies. We do note, as has the Department of Justice, that the statutory phrase "mental defective" is an unfortunate relic in the United States Code and does not comport with current usage. *See* Amended Definition of "Adjudicated as a Mental Defective" and "Committed to a Mental Institution" Summary, 79 Fed. Reg. 774 (proposed Jan. 7, 2014).

brought an as-applied challenge to § 922(g)(4), "arguing that its *continued* application to him despite his alleged return to mental health and peaceableness violates the Second Amendment." *Id.* at 1109. *Mai* held that "the prohibition on the possession of firearms by persons, like Plaintiff, whom a state court has found to be both mentally ill and dangerous is a reasonable fit with the government's indisputably important interest in preventing gun violence." *Id.* *Mai* thus concluded that the prohibition properly applied to the plaintiff. It did not hold that findings of both mental illness and dangerousness are always necessary in order for a state commitment to come within the meaning of § 922(g)(4). Such a requirement would be inconsistent with the plain language of the statute.[2] *See Rehlander*, 666 F.3d at 50 ("[S]ection 922(g)(4) does not bar firearms possession for those who are or were mentally ill and dangerous, but . . . only for any person 'who has been adjudicated as a mental defective' or 'has been committed to a mental institution.'").

B. Idaho Code § 66-356

Bartley further argues that the 2011 competency proceedings do not come within the meaning of § 922(g)(4) because the state court did not make a finding under Idaho Code § 66-356 that he is a person to whom § 922(g)(4) applies.[3] This argument is precluded by the language of the

[2] Bartley's argument that his commitment does not qualify under § 922(g)(4) because he was not found dangerously mentally ill under Idaho Code § 18-212(2) must be rejected for the same reason.

[3] Section 66-356 is entitled "Relief from firearms disabilities" and provides in part that a court that "[f]inds a defendant incompetent to stand trial pursuant to section 18-212, Idaho Code, shall make a finding as to

statute and regulation, which do not require a separate finding. The only question is whether he was "adjudicated as a mental defective" or "committed to a mental institution." § 922(g)(4); *cf. NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600, 603 (1971) ("'In the absence of a plain indication to the contrary, . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law.'" (quoting *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60, 62 (4th Cir. 1965))).

The state court order committing Bartley to the state hospital falls within the meaning of "committed to a mental institution" for purposes of § 922(g)(4). The phrase means a "formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority," and it "includes a commitment to a mental institution involuntarily." 27 C.F.R. § 478.11. This is precisely what occurred here. The state court ordered a mental evaluation of Bartley after his defense counsel questioned his competence. Based on the psychologist's evaluation, the court found Bartley lacked fitness to stand trial and lacked the capacity to make informed decisions about his treatment, and ordered him committed to the state hospital for evaluation and treatment under Idaho Code § 18-212. Bartley was "committed to a mental institution" within the meaning of § 922(g)(4). *See, e.g., United States v. McIlwain*, 772 F.3d 688, 689, 697 (11th Cir. 2014) (concluding that the appellant's commitment by an Alabama probate court constituted a commitment under § 922(g)(4) where he "received a formal hearing, was represented by an attorney, and the state probate court heard sworn testimony and made

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whether the subject of the proceeding is a person to whom the provisions of 18 U.S.C. 922(d)(4) and (g)(4) apply." Idaho Code § 66-356(1)(f).

substantive findings of fact that it included in its formal order of commitment"); *United States v. Dorsch*, 363 F.3d 784, 786–87 (8th Cir. 2004) (holding that the appellant "was committed to a mental institution as contemplated by § 922(g)(4) and 27 C.F.R. § 478.11," where a county board found that he was mentally ill and ordered his involuntary commitment to a mental facility following "a hearing during which [he] was represented by counsel, was given the opportunity to present evidence and cross-examine witnesses, and during which a physician testified that [he] was mentally ill"); *United States v. Midgett*, 198 F.3d 143, 146 (4th Cir. 1999) (concluding that the defendant's "confinement falls squarely within any reasonable definition of 'committed' as used in section 922(g)(4)," where he "was examined by a competent mental health practitioner" and represented by counsel, and a judge heard evidence, made factual findings, concluded that he suffered from a mental illness, and issued an order committing him to a mental institution); *United States v. Waters*, 23 F.3d 29, 34 (2d Cir. 1994) (concluding that the defendant was committed within the meaning of § 922(g)(4) where he was committed to a mental health facility pursuant to "established 'commitment' procedures under New York State law").

III. Second Amendment

The application of § 922(g)(4) to Bartley does not violate his Second Amendment right to possess a firearm. He concedes that this issue is controlled by *Mai*, which explained that "[a] law does not burden Second Amendment rights 'if it either falls within one of the "presumptively lawful regulatory measures" identified in [*District of Columbia v. Heller*, 554 U.S. 570 (2008)] or regulates conduct that historically has fallen outside the scope of the Second

Amendment.'" *Mai*, 952 F.3d at 1114 (quoting *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019)). The "presumptively lawful" measures identified by the Supreme Court include "the 'longstanding prohibitions on the possession of firearms by felons and the mentally ill.'" *Id.* (quoting *Heller*, 554 U.S. at 626).

Bartley contends, nonetheless, that § 922(g)(4) is unconstitutional as applied to him, relying on his arguments that his competency proceedings did not comport with due process and that he was not found to be actually dangerous. Although the "longstanding prohibition[] on the possession of firearms by . . . the mentally ill" is presumptively lawful, *id.* (quoting *Heller*, 554 U.S. at 626), *Mai* explained that "the 'well-trodden and "judicious course"' taken by our court in many recent cases" is to "assume, without deciding, that § 922(g)(4), as applied to [Bartley], burdens Second Amendment rights." *Id.* at 1114–15 (quoting *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018), *cert. denied sub nom. Pena v. Horan*, 141 S. Ct. 1081 (2020)).

Therefore, assuming, without deciding, that the application of § 922(g)(4) to Bartley burdens Second Amendment rights, intermediate scrutiny applies. *Id.* at 1115. This means "the government's statutory objective must be 'significant, substantial, or important,' and there must be a 'reasonable fit' between the challenged law and that objective." *Id.* (quoting *Silvester v. Harris*, 843 F.3d 816, 821–22 (9th Cir. 2016)). Bartley has conceded that "there is a significant interest in protecting the community from gun violence," *Bartley*, 400 F. Supp. 3d at 1071, and he does not argue that there is not a reasonable fit between § 922(g)(4) and that objective. *Cf. Mai*, 952 F.3d at 1117 (noting that the plaintiff did not challenge the conclusion that § 922(g)(4) is

"a reasonable fit for the government's laudable goal of preventing gun violence"). Nor does he challenge the conclusion in *Mai* that scientific evidence supported the congressional judgment that those who have been involuntarily committed to a mental institution posed an increased risk of violence. *See id.* at 1116–21.

As discussed above, Bartley's due process rights were not violated by his competency proceedings, and a finding of actual dangerousness is not required for the statute to apply to him. Bartley contends only that the issues he raises are "magnified" as applied to him because he is "a twice-honorably discharged veteran" and a college graduate and has no other felony convictions. He does not, however, offer any evidence or explanation as to why those factors mean that § 922(g)(4) is unconstitutional as applied to him. *Cf. Chovan*, 735 F.3d at 1142 (rejecting an as-applied challenge to § 922(g)(9) where the defendant offered no evidence to contradict the evidence that the rate of domestic violence recidivism is high).

Moreover, the burden on Bartley's Second Amendment rights is weaker than the burden in *Mai*, where the state offered no relief from the firearm prohibition. By contrast, here, Idaho law provides for the restoration of rights. *See* Idaho Code § 66-356(2). There is no indication that Bartley ever sought such restoration or whether he could have obtained it. *Mai* acknowledged that the plaintiff did not have any avenue for relief from § 922(g)(4), but nonetheless concluded that "§ 922(g)(4)'s prohibition on those who have been involuntarily committed to a mental institution is a reasonable fit for the important goal of reducing gun violence." *Mai*, 952 F.3d at 1121. The prohibition on Bartley's right to possess a firearm is "'presumptively

lawful,'" not an unconstitutional burden.[4] *Id.* at 1113 (quoting *Heller*, 554 U.S. at 627 n.26); *see Torres*, 911 F.3d at 1258 (stating that presumptively lawful measures such as the ban on possession of firearms by the mentally ill "comport with the Second Amendment because they affect individuals or conduct unprotected by the right to keep and bear arms" (quoting *Binderup v. Att'y Gen. U.S.*, 836 F.3d 336, 343 (3d Cir. 2016) (en banc))).

The judgment is **AFFIRMED.**

[4] Bartley relies on a Sixth Circuit reversal of a district court's dismissal of a Second Amendment claim on the ground that "the government has not justified a lifetime ban on gun possession by anyone who has been 'adjudicated as a mental defective' or 'committed to a mental institution.'" *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 699 (6th Cir. 2016) (en banc) (quoting § 922(g)(4)). But, as is apparent from *Tyler*, the Michigan law at issue did not provide any means for those barred from firearm possession under § 922(g)(4) to petition for reinstatement of their rights. Idaho's provision for the restoration of rights under § 922(g)(4) means that Bartley's prohibition is not a lifetime ban, in effect regardless of later mental health status.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

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9th Cir. Case Number(s)

Case Name

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APPENDIX B

Memorandum Decision and Order
United States District Court
For the District of Idaho
(July 9, 2019)
Appendix Pages A-021 - A-031

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, JAMES MICHAEL BARTLEY, Defendant.	Case No. 1:19-cr-00002-DCN **MEMORANDUM DECISION AND ORDER**

I. INTRODUCTION

Pending before the Court is Defendant James Michael Bartley's ("Bartley") Motion to Dismiss Indictment. Dkt. 15. Bartley claims that the charge brought against him under 18 U.S.C. § 922(g)(4) for illegal possession of a firearm, is unconstitutional as applied in this case.

Having reviewed the record and briefs, the Court finds that the facts and legal arguments are adequately presented. Accordingly, in the interest of avoiding further delay, and because the Court finds that the decisional process would not be significantly aided by oral argument, the Court will decide the Motion without oral argument. Dist. Idaho Loc. Civ. R. 7.1(d)(1)(B).

For the reasons set forth below, the Court DENIES the Motion.

II. BACKGROUND

Bartley is a 47-year-old, college-educated military veteran. He served two multi-year tours of duty in the United States Army and has lived most of his life in the

intermountain west. Dkt. 15-1, at 3. In 2011, at a misdemeanor proceeding for driving under the influence, Bartley's mental competence was evaluated. A state court judge found that Bartley was not fit to proceed because he could not assist in his own defense. The judge also found that Bartley lacked the capacity to make informed decisions about treatment and committed Bartley to the Idaho Department of Health and Welfare pursuant to Idaho Code § 18-212. Dkt. 22, at 1, 6. Bartley was released from the Idaho Department of Health and Welfare's custody approximately six weeks later. *Id.* at 5.

On July 29, 2018, Bartley was riding his bicycle in a Boise parking lot when an altercation occurred with another person. At some point in the altercation, Bartley pulled out a Glock pistol and waved or pointed it in the direction of a person. Dkt. 21, at 2. He was eventually arrested, then indicted by a grand jury for unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(4) based on his prior adjudication and mental evaluation in connection to the 2011 case. Bartley then filed this Motion to Dismiss Indictment on April 30, 2019.

III. DISCUSSION

Bartley argues the indictment must be dismissed based on three theories. First, he argues that his Second Amendment rights have been violated. Second, he argues that he has never been adjudicated a "mental defective" or "committed to a mental institution" and therefore § 922(g)(4) does not prohibit him from possessing firearms. Last, Bartley argues that his due process rights have been violated. The Court finds that Bartley's Second Amendment rights have not been violated, that § 922(g)(4) does apply to him, and that his due process rights have not been violated.

The Government contends that Bartley's Second Amendment argument is really based on equal protection and therefore the statute in question need only "be rationally related to a legitimate governmental purpose." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). Regardless of the standard applied, the Court finds that Bartley's motion fails on all three argued theories, so the Court will not specifically address this part of the Government's argument.

1. Second Amendment

When a statute is challenged on Second Amendment grounds, strict scrutiny or intermediate scrutiny may apply. *District of Columbia. v. Heller*, 554 U.S. 570, 628 n.27 (2008). For a statute to withstand intermediate scrutiny, the Government must demonstrate a "significant, substantial, or important" objective in enforcing the statute. *United States v. Chovan*, 753 F.3d. 1127, 1139 (9th Cir. 2013). It must then show there is a "reasonable fit between the challenged regulation and the asserted objective." *Id.* Conversely, under strict scrutiny, "the law must advance a compelling state interest by the least restrictive means available." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

The Ninth Circuit has explained that whether strict scrutiny or intermediate scrutiny applies in a Second Amendment challenge to a statute depends on two factors: "(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right." *Chovan*, 735 F.3d at 1138. A "restriction that implicates the core of the Second Amendment right and severely burdens the right warrants strict scrutiny while a restriction that does not implicate a core Second Amendment right, or does not places a substantial burden on the Second Amendment

right, warrants intermediate scrutiny." *Mahoney v. Sessions*, 871 F.3d 873, 879 (9th Cir. 2017).

a. Level of scrutiny

The core of the Second Amendment right is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. The Government argues that Bartley's Second Amendment right is not implicated through 18 U.S.C. 922(g)(4) because it is a presumptively lawful statute that regulates firearm possession for individuals "who [have] been adjudicated as a mental defective or who [have] been committed to a mental institution." In *Heller*, the Supreme Court held that the Second Amendment provides an individual with a right to possess and use a firearm for lawful purposes, but made clear that "the right secured by the Second Amendment is not unlimited" and that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626-27.

Section 922(g)(4) does not implicate the core of the Second Amendment right because it only implicates a narrow class of individuals, not the public at large. *See Chovan*, 735 F.3d at 1138 (finding that § 922(g)(9) did not implicate the core of the Second Amendment because individuals with criminal convictions were not included "within the core right identified in *Heller*—the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense")(quoting *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010).

The second prong of the test is the "severity of the law's burden on the right."

Chovan, 735 F.3d at 1138. The § 922(g)(4) prohibition is not permanent and allows for a restoration of firearm rights. This constraint can be removed pursuant to a process outlined in Idaho Code § 66-356(2).

In sum, although Section 922(g)(4) may slightly burden Second Amendment rights, because the statute does not implicate the core of the Second Amendment, only intermediate scrutiny applies to this case.

There are two requirements a statute must meet to survive the intermediate scrutiny test. The Government must demonstrate: (1) the statute's stated objective is "significant, substantial, or important," and (2) a "reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139. Bartley concedes there is a significant interest in protecting the community from gun violence. Dkt. 15-1, at 10. Therefore, the only inquiry necessary is whether § 922(g)(4) is substantially related to that significant interest. Bartley argues that "reliance on a person's commitment in a mental institution, or adjudication as 'mentally defective,' is a poor proxy for any actual risk that a person might pose to the community." *Id.*

In support of this contention, Bartley cites to a Sixth Circuit case which found that § 922(g)(4) constituted a lifetime ban on firearms possession because the state had no way of petitioning for those rights to be reinstated. The court there found that a lifetime bar on gun ownership for previously institutionalized people was not reasonably necessary. *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 697 (6th Cir. 2016). However, Bartley overlooks a key difference between the *Tyler* case and his own. In *Tyler*, Michigan state law did not provide a way for a person who had been barred from

firearm possession under § 922(g)(4) to petition for those rights to be reinstated. Idaho does have a provision that allows this, namely Idaho Code § 66-356(2). Thus, although Bartley argues being subjected to § 922(g)(4) necessarily constitutes a lifetime ban on possession of firearms, that is not the case. The legislature has provided a process to regain the right to possess firearms, and Bartley could have utilized that process.

The government has a significant interest in preserving human life and protecting the community from gun violence. This interest is substantially connected to § 922(g)(4) because that statute limits who can possess guns. This ban is not overburdensome though because those to whom the statute applies can participate in a petition process to restore their right to firearm possession. Based on this reasoning, § 922(g)(4) survives intermediate scrutiny and does not violate the Second Amendment.

b. As-applied challenge

Bartley makes an as-applied challenge to § 922(g)(4), arguing that it is unconstitutional as applied to him because he is a military veteran, was on one occasion examined and determined to not meet the criteria for commitment to a mental institution, and has a track record of responsibly using firearms in his professional capacity in the military. Dkt. 15-1, at 11. The Government argues that any conduct after the 2011 adjudication should be ignored because the relevant issue is the adjudication. In the alternative, the Government argues that because Bartley was adjudicated as incompetent, facts pertaining to his situation after that initial adjudication show that § 922(g)(4) is constitutional as applied to Bartley.

In 2011, Bartley was involuntarily committed to a mental health treatment facility after the judge found he was not fit to proceed with the case because he was suffering from a significant psychotic disorder and claimed to be the "Son of God." Dkt. 16, at 3. About six weeks later he was deemed competent to proceed. Dkt. 16, at 2. In 2017, Bartley was taken into custody after acting erratic and screaming at another individual. Dkt. 23, at 1-2. He claimed to be a "Soldier of God" and was armed with a collapsible police baton. *Id.* at 2. Bartley was examined and found not to meet the criteria for an involuntary commitment at that time. *Id.* at 8-9. Finally, in 2018, the incident giving rise to the instant case occurred. Bartley was riding his bicycle in a Boise parking lot, yelling obscenities at a vehicle. A shop owner came out and confronted him, took video of the encounter and Bartley pulled out a Glock pistol and waived it in the direction of the shop owner. Dkt. 21, at 10-11. Bartley argues that he displayed this firearm in self-defense after a half-naked man aggressively confronted him. Dkt. 24, at 6.

Bartley's as-applied challenge fails as well. After his examination in 2011, he was adjudicated as incompetent to proceed and was committed to a mental institution. Because of that adjudication and commitment, § 922(g)(4) applied to him. He fell within the category of persons that the statute applied to, and although Idaho's reinstatement process was available to him, he never took the steps necessary to restore his right to possess firearms. Bartley's situation and conduct, though somewhat in dispute, does not show that applying this statute to him violates his Second Amendment rights. Therefore, Bartley's claim that applying § 922(g)(4) to him would violate the Second Amendment fails and his motion to dismiss indictment is DENIED.

2. Adjudicated "mental defective" or "committed to a mental institution"

Bartley's indictment for illegal possession of a firearm in violation of 18 U.S.C. § 922(g)(4) is based on a 2011 misdemeanor case where the judge found that Bartley was not fit to proceed and was committed to the Idaho Department of Health and Welfare pursuant to I.C. § 18-212. Bartley argues that the court in the 2011 case did not make a finding that § 922(g)(4) applied to him, and simply found Bartley incompetent to stand trial pursuant to Idaho Code § 18-212.

Idaho Code § 66-356(1)(f) directs a court that "[f]inds a defendant incompetent to stand trial pursuant to section 18-212, [to] make a finding as to whether the subject of the proceeding is a person to whom the provisions of 18 U.S.C. 922(d)(4) and (g)(4) apply." Bartley argues that when the judge found Bartley incompetent to stand trial, he neglected to make a separate or additional finding of whether the relevant provisions of 18 U.S.C. § 922 applied to him. However, nowhere in the cited statutes does the word "additional" appear related to this finding. There was no authority cited, nor has the Court encountered any cases where another court has concluded that an additional finding is necessary.

The threshold issue of whether the determination that a defendant has been adjudicated a mental defective or committed to a mental institution is either a question of law or a jury question. Although the Ninth Circuit has not yet addressed this issue, many other circuits have, and all have held that it "is a question of law to be determined by the court rather than a question of fact to be reserved for the jury." *United States v. McLinn*, 896 F.3d 1152, 1156 (10th Cir. 2018) (citing *United States v. McIlwain*, 772 F.3d 688,

693 (11th Cir. 2014).[1] This Court will address the matter as a question of law.

Section 922(g)(4) prohibits any person "who has been adjudicated as a mental defective or who has been committed to a mental institution" from possessing a firearm. The definitions of these terms are found within the implementing regulations at 27 C.F.R. § 478.11(a)-(b), (d). 27 C.F.R. § 478.11(b) expressly includes "[t]hose persons found incompetent to stand trial" within the term "adjudicated as a mental defective." Bartley was found unfit to proceed during the 2011 misdemeanor trial pursuant to I.C. § 18-212. This triggered 18 U.S.C. § 922(g)(4) and from then on prohibited Bartley from possessing a firearm. Further, 27 C.F.R. § 478.11(d) defines "committed to a mental institution" as:

> A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Here, the state court judge ordered Bartley into the custody of the Department of Health and Welfare for treatment, fitting into this second definition as well.

Because Bartley fits into both definitions of adjudicated as a "mental defective" and "committed to a mental institution," he became subject to § 922(g)(4) after his adjudication and commitment in connection with his 2011 misdemeanor

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[1] The First, Second, Fourth, Sixth, and Eighth Circuits have reached the same conclusion *See*, *e.g.*. *United States v. Rehlander*, 666 F.3d 45, 47 (1st Cir. 2012); *United States v. Dorsch*, 363 F.3d 784, 785 (8th Cir. 2004); *United States v. Vertz*, 40 F. App'x 69, 76 (6th Cir. 2002) (unpublished); *United States v. Midgett*, 198 F.3d 143, 145-46 (4th Cir. 1999); *United States v. Waters*, 23 F.3d 29, 36 (2nd Cir. 1994).

case. Therefore, this argument fails and Bartley's motion to dismiss the indictment is DENIED.

3. Due Process

Bartley next argues that he was not given notice that his competency proceeding resulted in him being a prohibited person and barred him from possessing firearms under § 922(g)(4). However, in a prosecution under 18 U.S.C. § 922(g), the Government need only prove an individual knowingly possessed a firearm, not that the individual knew such a possession was illegal. *United States v. Kafka*, 222 F.3d 1129, 1131 (9th Cir. 2000). Further, "ignorance of the law is no defense." *Id.* at 1133.

Bartley argues that he was not given notice that he would be barred from firearm possession and that the court order which placed him in custody of the Department of Health and Welfare did not contain any advisement about it either. Bartley relies on *Lambert v. California*, which held that defendants should have an "opportunity to comply with the law and avoid its penalty." 355 U.S. 225, 229 (1957). The Government argues that Bartley's conduct was active conduct and therefore due process did not require him to have notice that he was subject to § 922(g)(4). Significantly, "[t]he *Lambert* exception is narrow" and the Ninth Circuit, along with other circuits, has rejected the argument that the *Lambert* doctrine applies to firearms possession under § 922(g). *United States v. Hancock*, 231 F.3d 557, 564 (9th Cir. 2000). The Ninth Circuit has held that "possession of firearms is 'active' conduct, as distinct from the 'wholly passive' failure to register that was at issue in *Lambert*." *Id.* Bartley, along with every other gun owner, "knowingly subjected himself to a host of state and federal regulations" when he possessed a gun. *Id.*

Because owning a gun is considered active conduct, due process did not require Bartley to have notice that he was subject to § 922(g)(4), and therefore Bartley's due process rights have not been violated and his motion to dismiss the indictment is DENIED.

V. ORDER

The Court HEREBY ORDERS:

1. Defendant James Michael Bartley's Motion to Dismiss Indictment (Dkt. 15) is DENIED.
2. That a new trial be set for **October 15, 2019, at 1:30 p.m.** in the U.S. Courthouse in Boise, Idaho. The period of time between the prior trial date and the new trial date is deemed EXCLUDABLE TIME under the Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(A) & (B).
3. A new trial readiness conference will be conducted by telephone on **October 1, 2019, at 4:00 p.m.** The Government shall place the call to (208) 478-8391 with opposing counsel on the line.
4. All pretrial motions shall be filed on or before **September 16, 2019.**

DATED: July 9, 2019

David C. Nye
Chief U.S. District Court Judge