Prohibition of Persons With Mental Illness From Gun Ownership Under *Tyler*

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The U.S. Supreme Court's *Heller* and *McDonald* decisions are the most important legal affirmations of the right of U.S. citizens to possess and bear firearms under the Second Amendment. *Heller* and *McDonald* are also significant in citing persons with mental illness as an exceptional group, whose right may be restricted by the U.S. Government. From 1968 onward, federal and state governments have enacted legislation prohibiting gun ownership by persons with mental illness who have been involuntarily committed to an institution or deemed by a legal authority to be dangerous or mentally incompetent. The U.S. Sixth Circuit Court of Appeals in its first *Tyler* decision (*Tyler I*) placed limitations on legislation that restricts persons with mental illness from owning firearms. In its second decision (*Tyler II*), the appellate court reversed and remanded the case to the district court with instruction to apply "intermediate scrutiny" to determine whether this statute was constitutionally applied to appellant Charles Tyler, whose right to possess firearms was restricted in 1985 after a singular involuntary commitment during a transitory mental health crisis. Although it applies only to the Sixth Circuit, *Tyler* could have precedential influence on gun restrictions for persons with mental illness in other jurisdictions.

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The U.S. Supreme Court's landmark *Heller*[1] and *McDonald*[2] decisions shaped the contemporary legal understanding of gun rights in America, affirming that the Second Amendment to the Constitution confers the right for individuals to bear arms for personal protection but cautioning that the right is "not unlimited" (Ref. 1, p 626); longstanding gun prohibitions pertaining to certain categories of people, including "felons and the mentally ill" (Ref. 1, p 626; Ref. 2, p 786), remain presumptively legal. The Court thus preserved the 1968 Gun Control Act's prohibition of firearms sales to persons legally found to be dangerous or mentally "defective"[3], a criterion that federal regulations and many state statutes have long defined as having a record of involuntary civil commitment or other mental-health–related adjudication.[4] *Heller* and *McDonald* implicitly left to future litigation the question of whether such a categorical restriction, one based on a mere record of past involuntary commitment, for example, might violate the constitutional rights of a prohibited person who later recovers from mental illness, commits no crimes, and poses no threat to public safety, yet is denied the opportunity to seek restoration.

The case of Charles Tyler, a law-abiding Michigan resident whose record of a single involuntary commitment effectively produced a lifelong ban on gun ownership, recently gave the Sixth Circuit Court of Appeals an opportunity to further consider the meaning of the Second Amendment right with respect to persons with a history of mental illness, and to clarify the limits of its lawful restriction for those with only a remote history of a mental health civil adjudication who pose no current risk to themselves or others.[5,6]

That the government maintains a legitimate public-safety interest in enacting gun restrictions related to mental health depends, to some extent, on the law's putative effectiveness in preventing gun violence, which in turn rests on the assumption that upstream judicial decisions in civil commitment hearings and related adjudications can serve as valid and reliable proxy indicators of an individual's long-

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term risk of violent or suicidal behavior with a gun. Whether such record-based, categorical gun restrictions are constitutional and fair, particularly in situations where they can result in a permanent firearms ban for an ostensibly nondangerous, law-abiding individual, is one of the important questions recently addressed by the Sixth Circuit in *Tyler*.

The appellate court rendered two separate opinions in the case, the first from a three-judge panel in 2014 (*Tyler I*[5]) and the second *en banc* in 2016 (*Tyler II*[6]). This article analyzes the *Tyler* case in the context of *Heller*[1] and *McDonald*,[2] with the goal of understanding the impact of *Tyler* on persons with a history of mental illness and its implications for clinicians who care for them. Our discussion combines public health, clinical, and legal perspectives at the intersection of gun violence prevention and concern for the Second Amendment right. (For concise summaries and commentaries on *Tyler,* see Olivero and Pinals,[7] Appelbaum,[8] and Vars.[9]).

Most states provide for legal gun rights restoration after statutory prohibition.[8,10] Still, the fact that federal policy has essentially left the matter up to the states' discretion, and that 19 states and the District of Columbia have not enacted restoration procedures, invites the question of whether categorical gun restrictions predicated on historical records of mental health adjudication may infringe on the Second Amendment right when applied permanently to law-abiding citizens with mental illness, who may have long outgrown the risk factors for violence or self-harm that might have justified gun prohibition at the outset.

In the *Tyler I* decision, the court took the position that a record of involuntary commitment or mental health adjudication *per se* is not a sufficiently reliable proxy for current dangerousness to justify continuing imposition of firearms restriction, that is, a permanent individual gun ban with no opportunity for restoration. This argument is consistent with the position statement of the American Psychiatric Association.[11] In *Tyler II,* the 2016 *en banc* opinion, the Sixth Circuit nullified *Tyler I*, left the federal firearms statute undisturbed, but questioned its continuing application to former patient Charles Tyler, as substantial time had passed without any evidence of continuing mental illness or dangerousness. The case was remanded to the district court to determine whether Mr. Tyler's individual Second Amendment right had indeed been infringed. Together, *Heller*, *McDonald*, and *Tyler* (*Tyler I* now replaced by and having informed *Tyler II*) define the Second Amendment right to bear arms as it applies specifically to persons with mental illness and the limitations on the government's authority to restrict this right, that is, at least for the Sixth Circuit (the only circuit court to have ruled on this question). *Tyler* will undoubtedly be examined by courts and policymakers in other states.

Tyler I and *II* Second Amendment Right

In *Tyler I* the Sixth Circuit U.S. Court of Appeals addressed the Second Amendment and its restriction for persons with mental illness. To our knowledge, this is the first U.S. court of appeals decision that considered the Constitutional limitations on the Government in restricting firearms ownership for persons with mental illness. The *Tyler II* decision, which nullified *Tyler I,* may carry some precedential value, even outside of the Sixth Circuit, although this remains to be seen. In any event, it deserves studied attention, given the continuing enactment of state laws restricting persons with mental illness from gun ownership (for example, laws that extend firearms prohibitions to persons detained in short-term involuntary psychiatric holds or even those who voluntarily check themselves in to a hospital during a mental health crisis[12,13]). For mental health clinicians who must strive to respect their patients' constitutional rights while safely managing their care, *Tyler II* is a decision with which to become familiar. *Tyler I* also merits consideration as a decision that seriously addressed the question of dangerousness (i.e., whether a record of involuntary commitment was a sufficiently valid indicator of persistent dangerousness to justify lifelong firearms restriction).

The basic question before the Sixth Circuit was "whether a prohibition on the possession of firearms by a person 'who has been committed to a mental institution,' 18 U.S.C. §922(g)(4), violates the Second Amendment" (Ref. 5, p 311). The federal statute in question reads:

> It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce [18 U.S.C.§922(g)(4)].

Summary of the Facts

Mr. Tyler, then 23 years old, was committed by state court to a mental institution after enduring "an emotionally devastating divorce" in 1985. His involuntary commitment on January 2, 1986, was based on his risk for suicide. He was then reported to have been unable to sleep and cried "non-stop" (Ref. 5, p 314). For two weeks, he remained at the Ypsilanti Regional Center in Michigan, where he refused prescribed medication.

Upon discharge he returned home and remained employed for the next 18 to 19 years. He denied substance abuse and legal involvements. In a 2012 psychological evaluation, he denied having had any further depressive episodes since the initial episode in 1985. The psychologist determined that Mr. Tyler had no criminal history, and his personal physician denied that he had shown evidence of mental illness. The psychologist also concluded that Mr. Tyler showed "no evidence of mental illness" (Ref. 5, p 314) and that his involuntary commitment in 1985 appeared to have been related to "a brief reactive depressive episode in response to his wife divorcing him" (Ref. 5, p 314, citing psychologist's report).

On February 7, 2011, Mr. Tyler attempted to purchase a firearm, but was denied. The Hillsdale County Sheriff's Office informed Mr. Tyler that he was not eligible to purchase a firearm because of his previous record of involuntary commitment to a mental institution, as revealed by the National Instant Criminal Background Check System (NICS) of the Federal Bureau of Investigation (FBI). Upon appeal to the NICS, he was again informed that under 18 U.S.C. §922(g)(4) he was prohibited from purchasing a firearm. Mr. Tyler's counsel was informed by the NICS section that his appeal was denied. In its letter to Mr. Tyler's counsel, the NICS section explained that the NICS Improvement Amendments Act of 2007 "provides states with the ability to pursue an ATF-approved relief of disability for individuals adjudicated as a mental defective or who have been committed to a mental institution . . . . Until your state has an ATF approved relief from disabilities program in place your federal firearms rights may not be restored" (Ref. 5, p 315, citing the letter). The Sixth Circuit commented, "The letter did not mention that federal law allows Tyler to apply directly to ATF for relief but that Congress denied funding for a federal relief-from-disabilities program" (Ref. 5, p 315).

Legal History

Mr. Tyler filed suit in federal court on May 12, 2012, asserting that, in light of Michigan's not providing a procedure for relief from the disability, the enforcement of §922(g)(4) violated his federal constitutional rights:

> [T]he federal disability scheme constitutes an overbroad infringement on his right to keep and bear arms under the Second Amendment and Fourteenth Amendment and also . . . the scheme violates equal protection under the Due Process Clause of the Fifth Amendment and under the Fourteenth Amendment. [Moreover,] the government's failure to afford Tyler notice and opportunity to be heard on the matter, even in a postdeprivation proceeding, violates the Due Process Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment [Ref. 5, p 315].

Granting the federal defendants' motion to dismiss, the district court held that "the Second Amendment, as historically understood, did not extend to persons in Tyler's position," and even if it did, §922(g)(4) "would survive intermediate scrutiny because Congress's method of keeping firearms from those who have been previously institutionalized is 'reasonably related to the government's stated interest' in preventing firearm violence" (Ref. 5, p315). (For an excellent explanation of the three levels of scrutiny used to evaluate actions by the government in restricting gun rights, the reader is referred to Horwitz *et al.* 2016.[10]) Mr. Tyler's Fifth Amendment claims were dismissed as "coextensive with" his Second Amendment claims. Mr. Tyler appealed to the Sixth Circuit.

Sixth Circuit Holding in Tyler I

Through the process of strict scrutiny, the Sixth Circuit held that Mr. Tyler's alleged complaint stated a violation of the Second Amendment. In reversing and remanding this case, the court concluded:

> The government's interest in keeping firearms out of the hands of the mentally ill is not sufficiently related to depriving the mentally healthy, who had a distant episode of commitment, of their constitutional rights. The government at oral argument stated that it currently has no reason to dispute that Tyler is a non-dangerous individual. On remand, the government may, if it chooses, file an answer to Tyler's complaint to contest his factual allegations. If it declines to do so, the district court should enter a declaration of unconstitutionality as to §922(g)(4)'s application to Tyler [Ref. 5, p 344].

Second Sixth Circuit Opinion in Tyler

In its final *en banc* hearing, the Sixth Circuit had seven separate opinions in addition to the majority opinion delivered by Justice Gibbons. Ten justices would reverse the district court's opinion and 12 agreed that intermediate scrutiny should be applied. The majority concluded that "Tyler has a viable claim under the Second Amendment and 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'," 18 U.S.C. §922(g)(4) (Ref. 6, p 699).

The Sixth Circuit first addressed whether the Supreme Court's *Heller* decision found §922(g)(4) to be constitutional as applied to Mr. Tyler. The Sixth Circuit commented that *Heller* "only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis" (Ref. 6, p 686). The Sixth Circuit concluded, "To rely solely on *Heller's* presumption here would amount to a judicial endorsement of Congress's power to declare, 'Once mentally ill, always so.' This we will not do" (Ref. 6, p 688).

The Sixth Circuit then adopted a two-step approach to resolve Second Amendment challenges as set forth in *United States v. Greeno*.[14] The first step is to determine "whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood" (Ref. 6, p 688, citing *Greeno* at 518); if it does, then the second step requires the government to justify the constitutionality of the law under the appropriate level of heightened scrutiny. Applying the first step in *Greeno*, the Sixth Circuit concluded that §922(g)(4) did indeed "burden conduct" that is protected by the second amendment, despite the *Heller* court's oblique observation that such a regulation is "presumptively lawful" (Ref. 6, p 690 citing *Heller* at p 627, n 26).

Next the court applied the second *Greeno* step and determined "the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights" (Ref. 6, p 690, citing *Greeno* at p 518). For this, the court determined the level of scrutiny. *Heller* had already ruled out "rational basis" leaving intermediate and strict scrutiny as the options, the latter having been applied in the first *Tyler* decision. The court preferred intermediate scrutiny for assessing challenges to §922(g)(4) an approach that "appropriately places the burden on the government to justify its restriction, while also giving [Congress] considerable flexibility to regulate gun safety" (Ref. 6, p 692, citing *Bonidy v. U.S. Postal Serv.*, at 1126[15]).

The court found the following government interests to be not only legitimate, but compelling (Ref. 6, p 693): to keep firearms out of the hands of "presumptively risky people," (citing *Dickerson v. New Banner Inst.*, p 112, n 6[16]) and those not allowed to possess them because of "age, criminal background or incompetency" (quoting S. Rep. No. 90-1501 at 22 (1968)); to prevent suicide and protect the community from crime; and to "cut down or eliminate firearm deaths caused by persons who are not criminals, but who commit sudden, unpremeditated crimes with firearms as a result of mental disturbances," (i.e., Congress's purpose in §922(g)(4) (Ref. 6, p 693).

In addressing the questions of "fit," the court found ample evidence to justify the initial firearms restriction, citing elevated risk of suicide in previously committed individuals who have attempted suicide (although Mr. Tyler himself never attempted suicide). The assertion was made that the risk of suicide peaks at the beginning of treatment and the risk of violence peaks around the time of hospital admission and remains elevated for a period of time following hospital discharge (Ref. 6, p 696). Nonetheless, "§922(g)(4) imposes a lifetime ban on a fundamental constitutional right. More evidence than is currently before us [in the *Tyler* case] is required to justify such a severe restriction" (Ref. 6, p 699).

In reversing and remanding the case to the district court to determine whether the statute constitutionally applies to Mr. Tyler with application of intermediate scrutiny, the Sixth Circuit stated that one of two justifications for §922(g)(4) might be established by the government: either explain with additional evidence the necessity of §922(g)(4)'s lifetime ban or show with evidence that §922(g)(4) constitutionally applies to Mr. Tyler because, if allowed to possess a firearm, he would pose a risk to himself or others (Ref. 6, p 699).

Without explicitly stating so, the court implied that there was a fairly straightforward solution to the problem, one that did not involve having to justify a lifetime gun ban with evidence that involuntary commitment somehow conveys permanent risk of violence. Rather, taking the second option, Michigan simply needed to institute a relief-from-disability

procedure. If such a restoration process were in place, Mr. Tyler and similarly situated individuals would have no complaint, because they would presumably be able to show, after a reasonable period has lapsed since imposition of the firearms restriction, that they no longer present an elevated risk of serious harm to self or others and thus would get their gun rights back.

Discussion

In its *Heller* and *McDonald* decisions, the U.S. Supreme Court mentioned mental illness as a category for which restriction of gun possession may be permissible, but left to lower courts and legislatures to define which persons with mental illness should be subjected to such restriction and how this should be implemented. The Sixth Circuit in its first *Tyler* decision, now nullified by *Tyler II*, made clear that the criteria for gun restriction in persons with mental illness must be narrowed, but without formulating a standard for accomplishing this. From the court's opinion, however, policymakers who wish to restrict gun ownership for persons who are mentally ill and dangerous could well anticipate that narrowing should occur at the front and back doors to be constitutional. *Tyler II*, emphasizing the application of §922(g)(4) to Mr. Tyler, left the statute and its imposition of a firearms restriction undisturbed, but its decision would logically support a back-door restoration policy to avoid misapplication of the statute.

Front door narrowing means that the criteria for imposing gun restriction on persons with mental illness must be clear and rational. That the person at one time required civil commitment may not, *per se*, be narrowed enough. Note again that the final *Tyler* decision did not endorse a front-door narrowing of the criteria for firearms restriction. Once a person enters the structure of firearms deprivation because of mental illness, a back door for escaping from this restriction, for obtaining relief from this government-imposed restriction based on disability, would best protect against misapplication of the restriction. This is because the active mental illness and heightened risk of causing serious harm to oneself or to others that warranted firearms restriction in the first place can represent a temporary state. The mental illness can subside in the at-risk person because of treatment, changing circumstances, or simply the passage of time. Unlike gun restriction due to a criminal record, where a person forfeits certain civil rights by breaking the law, gun restriction associated with mental illness is inherently predicated solely on risk of harm to self or others; hence, when such risk abates over time, the government's grounds for gun restriction are undermined.

The position of the American Psychiatric Association[11] and related documents[17–18] is consistent with the *Tyler I* decision, but goes beyond *Tyler II* regarding the front-door imposition of the restriction. Although not opposed to commitment-based disqualification, these documents argue that hospital commitment *per se* is an insufficient justification for gun disqualification. Rather, current evidence-based behavioral factors should contribute to the justification for both imposing and for removing and restoring the right to possess and bear firearms (see also Swanson and Felthous[19]). This position is informed by the evidence that most violent individuals do not have mental illness, and most individuals with mental illness are not violent.[20] If applied to persons with mental illness, gun restriction should be limited to the small subset who are dangerous and only for as long as there is reason to believe that they remain dangerous.[19] Several authorities in addition to the APA Position Statement find that civil commitment alone is insufficient to conclude that individuals are sufficiently and continuously dangerous to warrant dispossession of gun access.[19]

While allowing for variation in the restoration process to accommodate differences in states' legal and clinical infrastructure, resources, and traditions, some standardization and guidelines may be useful. The Consortium for Risk-Based Firearms Policy has elaborated model statutory language for a restoration process that is generally consistent with recommendations from the American Psychiatric Association.[21]

The consortium model calls for a judicial process of restoration that is informed by evidence and opinion from a qualified mental health clinician as the standard. The basic principles are: first, that time must pass, at least one year, before a gun-prohibited person can petition for relief; second, that there must be evidence that the symptoms responsible for elevating risk of violence or suicide have abated; third, that the individual has been adherent to treatment if recommended, and that the individual appears likely to continue to adhere to treatment, particularly if there is a clear connection to be made between persistence in treatment and control of the particular symptoms

that were implicated in the increased risk of violent or suicidal behavior necessitating commitment; and fourth, that the petitioner is not misusing alcohol or illegal drugs and has not been involved in criminal behavior. In the end, though, the decision on whether to grant relief must be made by a judge based on a preponderance of the evidence presented in favor of restoration and the conclusion that granting relief would not be contrary to the public interest.

Thus, the mental health professional's involvement in statutory gun restriction depends on the specific requirements of the law. For a summary of state gun restriction laws, relief from disabilities provisions, and suggestions for relief assessments see Gold and Vanderpool.[22] Where the law would require only civil commitment to apply the restriction and only passage of a specific period of time without further commitment or criminal conviction, clinical involvement may not be needed at all. On the other hand, a law requiring reporting after a separate clinical assessment to determine present mental illness and dangerousness specific to the matter of firearms competence could require direct clinical involvement beyond the commitment that triggered the gun restriction process.

So far, gun restriction laws have not explicitly required separate assessments before imposition in individual cases. Nonetheless, with or without a gun restriction law in place, for safe clinical management, the clinician must continue to assess, monitor, and manage the nature and degree of the patient's risk. For the patient who is hospitalized under civil commitment, this means the clinician must determine when the patient's symptoms of mental illness and risk of serious harm have subsided sufficiently to warrant hospital discharge. Even upon hospital discharge, however, prudence requires ongoing risk monitoring and managing. The clinician will have already inquired about gun ownership and access and will have made efforts to have such weapons safely removed before hospital discharge. This inquiry should occur regardless of whether jurisdictional law requires firearms removal.[23] If the patient refuses to comply with firearms removal that is not required by law, this refusal can become a factor in assessing the patient's risk and readiness for discharge, yet not necessarily preclude discharge. The patient who is discharged while still in possession of firearms may require closer monitoring and management as an outpatient in comparison with the patient who is compliant with this measure.

Conclusions

Tyler demonstrates that legislation that restricts gun ownership from persons with mental illness may or may not be constitutional in its formulation and implementation. The limitations that *Tyler I* placed on such legislation involve both the front and back door of gun restriction, whereas *Tyler II* left §922(g)(4) undisturbed, but addressed the back-door restoration of firearms rights. From the front door of *Tyler I*, firearms restriction for persons with mental illness must be clear and rational when initiated. A back door to gun restriction, in the form of provision for relief and restoration of gun ownership rights, once the person is no longer has mental illness and is not dangerous, must exist for the policy to be constitutional, according to *Tyler I*, and for it to be constitutionally applied, according to *Tyler II*. Such a process should ideally involve a judicial proceeding that is expedient and clinically informed by a qualified mental health professional as to the continuing presence or absence of symptoms associated with dangerousness, risk-elevating factors such as substance abuse and criminal justice involvement, patterns of adherence to recommended treatment, and whether such treatment is effective, and such adherence is necessary to prevent deterioration and recurrence of dangerous behavior. Barring further stipulations from future court decisions, these requirements can be addressed with various approaches, with more or less direct clinical involvement. One novel approach at the level of state statutory authority is the exercise of a civil court order for time-limited removal of firearms by public safety officers based on evidence of significant risk of harm to self or others,[24] evidence that clinicians could supply (along the same lines as the aforementioned clinician-informed restoration process) while balancing competing obligations to protect patient privacy. Other approaches involving direct clinical involvement include assessment, identifying and registering individuals who are adjudicated mentally ill and dangerous for the purpose of initiating gun confiscation and restriction of possession, as well as later assessment to determine and register that the affected person no longer has mental illness and is not dangerous. This latter approach amounts to an assessment for competence to

own and possess firearms, a competence for which standards and assessment training do not yet exist.

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