U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

November 27, 2017

Mr. Thomas Hungar
General Counsel
U.S. House of Representatives
Washington, D.C. 20515

Re: *Keyes* v. *Sessions*, No. 15-cv-457, 2017 WL 4552531 (M.D. Pa. Oct. 11, 2017)

Dear Mr. Hungar:

Consistent with 28 U.S.C. 530D, I write to advise you concerning the above-referenced decision of the United States District Court for the Middle District of Pennsylvania. A copy of the decision is enclosed.

Section 922(g)(4) of Title 18, United States Code, provides that a person may not possess a firearm if he "has been committed to a mental institution." The two plaintiffs in this case were subject to that prohibition because they were involuntarily committed to mental institutions in separate incidents in 2006. In 2015, they filed a suit in federal district court contending, as relevant here, that Section 922(g)(4) violates the Second Amendment to the United States Constitution as applied to them.

In July 2016, the district court granted summary judgment to plaintiff Jonathan K. Yox on his as-applied Second Amendment challenge. See *Keyes* v. *Lynch*, 195 F. Supp. 3d 702 (M.D. Pa. 2016). The court concluded that Yox was entitled to relief if he could show that, notwithstanding his prior involuntary commitment, he is "no more dangerous than a typical law-abiding citizen." *Id.* at 720 (citation omitted). The court then held that Yox had met that burden. The court noted that Yox had been committed only once, when he was 15 years old, and that there was no evidence that he "ha[d] ever been violent or acted in an unstable or dangerous manner toward himself or others since his commitment." *Ibid.* The court also emphasized that Yox had been authorized to use firearms during four years of service in the U.S. Army, including a deployment to Afghanistan, and while serving as a Pennsylvania state correctional officer. *Ibid.* Finally, the court observed that a Pennsylvania state court had restored Yox's right to possess firearms under state law based on its finding that he "no longer suffers from the mental health condition that was the basis for his commitment[]" and that he "may safely possess a firearm without risk to himself or any other person." *Id.* at 720-721. Under the circumstances, the court concluded that Section 922(g)(4) may not be applied to prohibit Yox from possessing a firearm. *Id.* at 722.

On January 11, 2017, Attorney General Lynch submitted a letter under Section 530D explaining that the Department of Justice had determined that an appeal was not warranted under the particular circumstances of Yox's case, including the Third Circuit's recent decision in *Binderup* v. *Attorney General*, 836 F.3d 336 (2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017), which had sustained as-applied Second Amendment challenges to 18 U.S.C. 922(g)(1)'s prohibition on the possession of firearms by felons.

In October 2017, the district court issued a decision granting summary judgment to Yox's co-plaintiff, Michael L. Keyes. See *Keyes* v. *Sessions*, No. 15-cv-457, 2017 WL 4552531 (M.D. Pa. Oct. 11, 2017). The district court's decision is very similar to its earlier decision granting relief to Yox. The court interpreted the Third Circuit's intervening decision in *Binderup* as confirming the correctness of the approach it had followed in Yox's case. *Id.* at *7-*9. The court then explained that, like Yox, Keyes had been committed only once, in 2006, and that there is no evidence that he "has acted in an unstable or dangerous manner toward himself or others in the past ten years." *Id.* at *13. The court noted that, like Yox, Keyes had been "able to *prove* his competency with firearms" while serving as a law-enforcement officer. *Ibid.* Specifically, Keyes had "continued to serve as a Master Trooper for the Pennsylvania State Police for over eight years following his last mental health incident," and during that time he had "received performance evaluations of 'outstanding' and qualified in the top of his class with several firearms." *Ibid.* Finally, the court noted that, like Yox, Keyes had his right to possess firearms under state law restored by a Pennsylvania court based on the court's finding that he is capable of possessing firearms "without risk to himself or any other person." *Id.* at *14 (citation omitted). The court therefore held that, like Yox, Keyes had "distinguished himself from the class of persons traditionally prohibited from possession [of firearms] due to mental illness" and was entitled to prevail on his as-applied challenge to Section 922(g)(4). *Ibid.*

As with respect to the district court's prior decision granting relief to Yox, the Department of Justice has determined that, under the particular circumstances of this case, an appeal of the district court's nonprecedential and fact-specific decision is not warranted. A notice of appeal would be due on December 11, 2017. Please let me know if we can be of further assistance in this matter.

Sincerely,

Noel J. Francisco
Solicitor General

Enclosure

2017 WL 4552531
Only the Westlaw citation is currently available.
United States District Court,
M.D. Pennsylvania.

Michael L. KEYES, Plaintiff,
v.
Jefferson B. SESSIONS, III,[1]
Attorney General of the United
States, et al., Defendants,

1:15-cv-457
|
Signed October 11, 2017

1 Jefferson B. Sessions III is now the Attorney General of the United States, and thus pursuant to Federal Rule of Civil Procedure 25(d), he is substituted for Eric H. Holder, Jr. as the defendant in this action.

Attorneys and Law Firms

Joshua G. Prince, Prince Law Offices PC, Bectelsville, PA, for Plaintiff.

Daniel M. Riess, U.S. Dept of Justice, Washington, DC, for Defendants.

MEMORANDUM

Hon. John E. Jones III

*1 Presently pending before the Court are cross motions for summary judgment. (Docs. 80, 89). Both motions have been fully briefed (Docs. 81, 87, 97 att. 4, 98 att. 1) and are therefore ripe for our review. For the reasons that follow, we shall grant summary judgment in favor of the Plaintiff.

I. BACKGROUND

Plaintiff Michael Keyes is a former U.S. Air Force Airman 1st Class and former Master Trooper with the Pennsylvania State Police ("PSP"). (Doc. 82, ¶ 1). Keyes was involuntarily committed as an adult to Holy Spirit Hospital from August 25, 2006 to September 8, 2006 after consuming numerous alcoholic beverages and making suicidal statements following an emotional divorce. (*Id.*). As a result of his involuntary commitment, Plaintiff lost his federal and state private capacity firearm rights by operation of 18 Pa.C.S.A. § 6105(c)(4) and 18 U.S.C. § 922(g)(4).

Despite his loss of private capacity firearm rights, Keyes returned to the PSP after his hospitalization where he possessed and utilized firearms while on duty as a Master Trooper. (*Id.*, at ¶ 3). Keyes received performance evaluations of "outstanding" and qualified in the top of his class with several firearms, including a fully automatic AR-15 select fire rifle, a Remington 870 12 gauge shotgun, a Sig Sauer 227 handgun, and a Glock 37 handgun. (*Id.*).

On December 3, 2008, Keyes filed for restoration of his state private capacity firearm rights with the Perry County Court of Common Pleas, pursuant to 18 Pa.C.S. § 6105(f). (*Id.*, at ¶ 4). The court issued a memorandum and order, finding "that Petitioner has in fact met his burden of showing that he may possess a firearm without risk to himself or any other person under the applicable provisions of law." (*Id.*). The court therefore issued an order relieving Keyes of his state firearm disability. (Doc. 22, ¶ 26). Keyes had also requested expungement of his involuntary commitment so that his federal firearm disability would be relieved, but the court held that it did not have the power to do so. (*Id.*). Keyes appealed the denial of expungement to the Superior Court, which affirmed the ruling. *In re Keyes*, 83 A.3d 1016, 1024 (Pa. Super. Ct. 2013), *appeal denied*, 627 Pa. 766, 101 A.3d 104 (Pa. 2014). In his appeal, Keyes raised a Second Amendment challenge, arguing that 18 U.S.C. § 922(g)(4) violates the Second Amendment as applied to him. *Id.*, at 1021. The Superior Court rejected this argument. *Id.*, at 1028.

On March 5, 2015, Keyes and his former co-Plaintiff Jonathan Yox filed a Complaint with this Court alleging, among other things, that 18 U.S.C. § 922(g)(4) violates the Second Amendment as applied to them. (Doc. 1). Jonathan Yox is a State Correctional Officer at the State Correctional Institution at Graterford who, like Keyes, had lost his private firearm possession rights due to an involuntary commitment, yet still carried firearms in his professional capacity. (Doc. 1, ¶ 8). On November 9, 2015, we dismissed Keyes' Second Amendment challenge on the basis of issue preclusion because he had argued his Second Amendment claim during his state appeal in the Superior Court. (Doc. 21).

*2 Following discovery, the parties filed cross motions for summary judgment. On July 11, 2016, we granted Plaintiffs' motion for summary judgment in part, upholding the Second Amendment as-applied challenge with regard to Yox and directing final judgment in his favor. (Doc. 49). We otherwise granted Defendants' motion and entered judgment in favor of Defendants on all other claims. (*Id.*).

Our decision to uphold Yox's Second Amendment claim is in stark contrast to the Pennsylvania Superior Court's denial of Keyes' identical Second Amendment challenge. In light of this disparity, on October 4, 2016, we issued an Order amending our earlier dismissal of Keyes' Second Amendment challenge, reviving Count I of the complaint. (Doc. 59). The parties thereafter engaged in discovery with regard to Keyes. Keyes filed a motion for summary judgment on March 24, 2017 (Doc. 80), and the Defendants responded with a cross motion for summary judgment on April 28, 2017. (Doc. 86).

II. KEYES' MEDICAL BACKGROUND

As discussed further *infra*, resolution of the cross motions for summary judgment requires the Court to analyze whether Keyes can present facts to distinguish himself from the historic class of persons who have been barred from firearm possession due to involuntary commitments. To this end, we must consider Keyes' medical history and commitment background. Defendants cite extensively to Exhibits 1 and 2, attached to their statement of undisputed material facts, in describing Keyes' mental health history to argue that he is not entitled to Second Amendment rights. (Doc. 885, Ex. 1, 2). Exhibits 1 and 2 are portions of Keyes' health records, obtained by Defendants through subpoenas in discovery and relied upon by Defendants in their briefings. Keyes objects to our consideration of these exhibits on five grounds, but thoughtfully submitted a protectionary response to Defendants' statement of undisputed material facts in the event that we do consider the exhibits. (Doc, 97, att. 1) (Doc. 100).

First, Keyes requests the Court to strike these exhibits due to Defendants' failure to comply with the protective order in this matter. (Doc. 91, att. 1). As background, we issued a protective order on February 6, 2017 governing the use of certain protectable information in this litigation. (Doc. 66). The protective order provides:

> Three (3) days prior to the filing of any Protectable Information in this litigation, Defendants shall identify such information to Plaintiff Keyes. If Plaintiff Keyes objects to the use of such information, Defendants shall file such information under seal and highlight such information for the Court as "subject to discovery dispute." The parties shall then confer in good-faith effort to resolve the dispute, and, if unable to resolve the dispute, shall present their positions to the Court in an appropriate manner for judicial resolution.

(Doc. 66, ¶ 7(e)). Defendants "inadvertently erred" by not identifying Exhibits 1 and 2 to Keyes prior to filing, but did file the information under seal. (Doc. 98, att. 2, ¶ 5). Keyes requests that we do not consider the exhibits due to the failure to disclose. (Doc. 97, att. 1, ¶ 12). While we understand Keyes' frustration in not being able to respond with objections to specific, highlighted sections of the exhibits, we will deny his request to strike them outright. Instead, we will consider Keyes' remaining four evidentiary objections in light of each portion of the exhibits that we consider.

*3 Second, Keyes argues that Exhibits 1 and 2 contain psychiatric relations and communications privileged and confidential pursuant to 42 Pa.C.S. § 5944. (Doc. 97, att. 1, ¶ 13(a)). This statute represents the psychiatrist-patient privilege under Pennsylvania law. However, Federal Rule of Evidence 501 explicitly states that federal common law privileges apply in cases arising under federal law. FED. R. EVID. 501. As this case arises under the Second Amendment to the United States Constitution, federal common law privileges apply and 42 Pa.C.S. § 5944 is inapplicable. Federal common law does indeed recognize a psychotherapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1, 12, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996).

Nevertheless, "the patient may of course waive the protection." *Id.*, at 15, n.14, 116 S.Ct. 1923. Courts in our district have long held that "[w]hen a plaintiff puts [his] mental health at issue in a civil law suit ... [he] impliedly waives the protection of the privilege." *Smith v. Cent. Dauphin Sch. Dist.*, 2007 WL 188569, at *2 (M.D. Pa. Jan. 22, 2007). Keyes has certainly placed his mental health at issue in pursuit of his as-applied challenge to § 924(g)(4). Keyes is, of course, well aware of this reality, as he states in his brief that the reason for his challenge is "because there is no reasonable procedure pursuant to which an individual could regain their Second Amendment Rights *upon demonstrating their current mental and emotional fitness.*" (Doc. 81, p. 2) (emphasis added). He argues that his "background is easily distinguishable from those who are *currently* mentally ill." (*Id.*, at p. 21). This claim puts Keyes' mental health at issue as we are tasked with determining its veracity. As such, Keyes has waived his psychotherapist-patient privilege.

Third, Keyes argues that Exhibits 1 and 2 constitute privileged information pursuant to the doctor-patient privilege codified at 42 Pa.C.S. § 5929. (Doc. 97, att. 1, ¶ 13(b)). Again, Pennsylvania privileges are not applicable in this matter, and "the federal common law does not recognize a more general physician-patient privilege." *Sarko v. Penn–Del Directory Co.*, 170 F.R.D. 127, 131 (E.D. Pa. 1997) (citing *Whalen v. Roe*, 429 U.S. 589, 602 n. 28, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *U.S. v. Colletta*, 602 F.Supp. 1322, 1327 (E.D.Pa.), *aff'd.*, 770 F.2d 1076 (3d Cir.1985)). Moreover, even if we were to apply the Pennsylvania physician-patient privilege, we would hold that Keyes has waived this privilege for the same reason that he has waived his psychotherapist-patient privilege.

Fourth, Keyes argues that Exhibits 1 and 2 constitute inadmissible hearsay, and as such, we cannot consider them in our summary judgment determination. (Doc. 97, ex. 1, ¶ 13(c)). It is unclear from the objection itself whether Keyes contests the entirety of the medical records as hearsay or whether he objects to specific statements contained therein—while the medical records as a whole are technically hearsay, parties routinely agree in cases such as these that they are admissible under the regularly conducted activities exception to the rule against hearsay. While we are unaware of an agreement with these specific parties, considering the context, we do not judge Keyes' hearsay objection as targeting the medical records wholesale. In Keyes' response to Defendants' statement of undisputed facts, as well as his brief in opposition to Defendants' motion for summary judgment, he addresses hearsay with regard to one specific statement contained within Exhibit 1. (Doc. 97, att. 4, p. 2) (Doc. 100, ¶ 8). This alleged statement is heavily relied upon by the Defendants, and we are confident that Keyes aims his hearsay objection at this statement specifically and will address the objection as such.

*4 The statement at issue is contained within the medical records of Exhibit 1 on page 17. (Doc. 85, Ex. 1, p. 17). The page is titled "Adult Psychiatric Care Record" and dated July 15, 2006. (*Id.*). The middle of the page contains hourly information regarding Keyes' sleep, safety, and nutrition throughout the day, signed off by the three therapists. (*Id.*). The top of the page contains two handwritten notes from two of those therapists. (*Id.*). Part of the first handwritten note states, "Pt reports that he feels he could have the courage to commit suicide and had a plan to kill himself with a gun and up until tonight had access to gun." [2] (*Id.*). From the signature attached to the note, we can only make out that the therapist's initials are "S.Z." and attached to his signature is the title "MHW." (*Id.*). In a supplemental declaration, Keyes denies ever making this statement and cannot identify the individual who wrote the statement. (Doc. 97, att. 2, ¶¶ 2–3).

2 Due to the handwriting, the Court is unable to tell if this statement says "guns" or "gun".

Defendants argue that this statement is not subject to the rule against hearsay pursuant to Federal Rule of Evidence 803(4). (Doc. 98, att. 2, ¶ 14). Rule 803(4) provides that statements "made for—and reasonably pertinent to—medical diagnosis or treatment" are not subject to the rule against hearsay where they "describe[ ] medical history; past or present symptoms or sensations; their inception; or their general cause." FED. R. EVID. 803(4). Keyes' purported statement clearly fits within this hearsay exception because he was allegedly describing his present feelings and symptoms related to his depression. Indeed, Keyes does not offer any argument that this alleged statement would not have been made for purposes of medical treatment, but focuses his objection on the unknown identity of the author. (Doc. 97, att. 4, p. 2).

The rationale behind the exception for statements made in pursuit of medical diagnosis or treatment focuses on the indicia of reliability of the declarant; "[s]uch statements are regarded as inherently reliable because of the recognition that one seeking medical treatment is keenly aware of the necessity for being truthful in order to secure proper care." *Williams v. Gov't of Virgin Islands*, 271 F.Supp.2d 696, 702 (D.V.I. 2003). The comments to Rule 803(4) make clear that the exception's focus is on the declarant and his purposes rather than the person to whom the statement is made. *See* FED. R. EVID. 803(4), advisory committee note to paragraph (4) ("Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included."). The handwritten note is contained within Keyes' treatment records and specifically indicates that Keyes made the statement. The unclear identity of the author is certainly relevant to the credibility of the note, especially considering that Keyes vehemently denies ever making the statement. However, it fits squarely within Rule 803(4)'s hearsay exception and is therefore admissible.

Finally, and relatedly, Keyes argues that Exhibits 1 and 2 should be excluded because he "is unaware of the identity of the individuals making the putative statements and has therefore been denied an opportunity to inquire of the individuals as to the accuracy of their specific statements." (Doc. 97, att. 1, ¶ 13(d)). We view this objection as, again, relating to the specific statement in the medical records, rather than the records as a whole. Keyes cites to no authority for this argument and provides no further clarification.[3] We are therefore not persuaded to exclude the exhibits on this basis.

3 Keyes references that he has "been denied all opportunity to cross-examine this unknown individual on the putative statement." (Doc. 97, att. 4, p. 2). This is reminiscent of a Sixth Amendment Confrontation Clause argument, which, of course, applies "in all criminal prosecutions." U.S. CONST. AM. VI. This argument is of no avail in this civil litigation.

*5 Having resolved Keyes' evidentiary objections, we will now discuss his relevant medical and professional background. As we do so, we make explicit that while we are considering Keyes' full mental health medical history, Keyes was only involuntarily committed for mental health treatment on one occasion from August 25, 2006 to September 8, 2006. (Doc. 80, att. 2, ¶ 1). This commitment serves as the basis for his federal firearm disability pursuant to 18 U.S.C. § 924(g)(4).

In 1998, Keyes was hospitalized for depression at The Meadows in Centre Hall, Pennsylvania. (Doc. 84, ¶ 1). He had been receiving outpatient treatment from a psychotherapist for depression since 1997 and continued his outpatient treatment into 1999. (*Id.*, at ¶ 2).

Keyes' next encounter with inpatient mental health care was in 2006. (*Id.*, at ¶ 3). On June 18, 2006, Keyes was admitted to Pinnacle Hospital after attempting suicide by overdosing with ninety ten-milligram tablets of Ambien and four beers. (Doc. 85, Ex. 1, p. 3). Keyes was transferred to the inpatient unit of Holy Spirit Hospital in Camp Hill, Pennsylvania on June 20, 2006. (*Id.*, at p. 1). The medical records reflected that Keyes had married his second wife in December 2006 and that they entered marital counseling four months later. (*Id.*, at p. 3). It further states that marital issues with his wife are suspected to be one of the reasons that he attempted suicide. (*Id.*). The notes also reflect that work stress was "a major contributor to his depression and anxiety." (*Id.*, at p. 4). Keyes was discharged on June 27, 2006. (Doc. 84, ¶ 5).

Keyes again attempted to overdose in July 2006 by taking Seroquel, Effexor, and Ambien. (*Id.*, at ¶ 6). On or about July 15, 2006, Keyes voluntarily readmitted himself to Holy Spirit Hospital because of suicidal ideations with a plan to overdose. (*Id.*, at ¶ 7). His medical records indicate "[h]e is having marital counselling because he is having some marital discord." (Doc. 85, Ex. 1, p. 10). A psychiatric care record dated July 15, 2006 states that Keyes "had a plan to kill himself with a gun." (*Id.*, at p. 17). Keyes was transferred to partial hospitalization and approved for discharge on July 24, 2006. (*Id.*, at p. 13).

On August 4, 2006, Keyes overdosed on a mix of his medications. (Doc. 85, Ex. 2, p. 4). The records reflected that Keyes "has history of binge drinking." (*Id.*). Keyes was discharged on August 8, 2006. (Doc. 84, ¶ 13).

On August 23, 2006, Keyes was admitted to Holy Spirit Hospital pursuant to Section 302 of Pennsylvania's Mental Health Procedures Act following a threat to attempt suicide. (*Id.*, at ¶ 14). In the application to take Keyes to the hospital for treatment, the applicant stated that Keyes had called his wife and told her to file for divorce and she agreed. (Doc. 85, Ex. 1, p. 18). Keyes had called the applicant and said "he was going to look for a bar." (*Id.*). When the applicant found him, Keyes "said he was going to drink himself numb until he could do something to himself" and that "tonight's the night that he is going to kill himself." (*Id.*). On August 25, 2006, the Pennsylvania Court of Common Pleas approved an application to admit Keyes for extended involuntary emergency treatment. (Doc. 84, ¶ 15). Keyes was discharged on September 8, 2006. (Doc. 80, att. 2, ¶ 1).

Keyes attempted to commit suicide by overdose on January 14, 2007, and was readmitted to Pinnacle Health Hospital on January 15, 2007. (Doc. 84, ¶¶ 17–18). He was discharged the following day. (*Id.*).

*6 Keyes gave a deposition in this matter on February 23, 2017. (Doc. 85, Ex. 3). When asked "what prompted you to taking the pills," Keyes responded it "was probably some depression as a result of the—this continued going through life and having—living in a marriage where the person is not happy." (Doc. 85, Ex. 3, 60:4–11). He stated that his "mixing alcohol and medication and depression" is what caused things to "spiral[ ] out of control." (*Id.*, at 59:13–20). Keyes also testified that he was having sleep issues during June 2006 that contributed to his mental health. (*Id.*, at 72:8–9).

Keyes was asked during his deposition "during the past year [if he] ever felt depressed or hopeless." (*Id.*, 142:18–20). He responded "no." (*Id.*). He also testified that he consumes alcohol "[e]very couple days or so," but that it is sporadic. (*Id.*, at 152:23–24). Regarding his sleep, Keyes testified that he periodically uses a sleep aid for sleep issues and that he had difficulty falling asleep a couple of times in the past month. (Doc. 84, ¶¶ 20, 21). Keyes is currently retired; he was hired by the Pennsylvania State Police on October 7, 1991 and retired on September 11, 2015. (Doc. 85, Ex. 3, 12:12–24).

III. STANDARD OF REVIEW

Summary judgment is appropriate if the moving party establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute is "genuine" only if there is a sufficient evidentiary basis for a reasonable jury to find for the non-moving party, and a fact is "material" only if it might affect the outcome of the action under the governing law. *See Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 172 (3d Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A court should view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences therefrom, and should not evaluate credibility or weigh the evidence. *See Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 772 (3d Cir. 2013) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)).

Initially, the moving party bears the burden of demonstrating the absence of a genuine dispute of material fact, and upon satisfaction of that burden, the non-movant must go beyond the pleadings, pointing to particular facts that evidence a genuine dispute for trial. *See id.* at 773 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). In advancing their positions, the parties must support their factual assertions by citing to specific parts of the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." FED. R. Civ. P. 56(c)(1).

A court should not grant summary judgment when there is a disagreement about the facts or the proper inferences that a factfinder could draw from them. *See Reedy v. Evanson*, 615 F.3d 197, 210 (3d Cir. 2010) (citing *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 84 (3d Cir. 1982)). Still, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 211 (3d Cir. 2011) (quoting *Anderson*, 477 U.S. at 247–48, 106 S.Ct. 2505) (internal quotation marks omitted).

IV. DISCUSSION

Keyes brings an as-applied Second Amendment challenge, arguing that 18 U.S.C.§ 922(g)(4) unconstitutionally deprives him of his right to keep and bear arms. The statute prohibits firearm possession for any person "who has been adjudicated as a mental defective or who has been committed to a mental institution." 18 U.S.C. § 922(g)(4). An exception to this prohibition is codified at 18 U.S.C. § 925(a)(1) and allows the use and possession of firearms "issued for the use of, the United States or any department or agency therof or any State or any department, agency, or political subdivision." 18 U.S.C. § 925(a)(1). Together, these statutes create the dichotomy where Keyes may possess and operate numerous firearms in the course of his position as Master Trooper for the PSP, but may not possess or use a firearm in his personal capacity under federal law. Federal statute contemplates a mechanism of relief for people with private firearm disabilities under 18 U.S.C. § 925(c), but because Congress has not funded this program and Pennsylvania has not created an equivalent, those with federal firearm disabilities from previous commitments have no avenue to seek relief.

*7 To properly consider the cross motions for summary judgment, we will first discuss the applicable legal framework to use with as-applied Second Amendment challenges, as that analysis has changed since our consideration of Yox's Second Amendment challenge. We will then analyze Keyes' circumstances in light of the correct legal test.

1. Legal Framework

On July 11, 2016, we awarded judgment to Yox on his as-applied Second Amendment challenge and deviated significantly from the legal analysis employed by the Pennsylvania Superior Court in rejecting Keyes' identical claim. (Doc. 49). The state court applied the two-prong Second Amendment framework from *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) to analyze and ultimately deny Keyes' Second Amendment claims. *In re Keyes*, 83 A.3d 1016, 1024 (Pa. Super. Ct. 2013), *appeal denied*, 627 Pa. 766, 101 A.3d 104 (Pa. 2014). In analyzing a Second Amendment challenge pursuant to *Marzzarella*, a court examines "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee" under the first prong. 614 F.3d at 89. "If it does not, our inquiry is complete," and there is no Second Amendment violation. *Id.* However, if the law does impose a burden on such conduct, a court must "evaluate the law under some form of means-end scrutiny." *Id.* "If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." *Id.*

In our opinion regarding Yox's claims, which were for all material purposes identical to Keyes', we held that *Marzzarella* was the incorrect legal framework to apply, and instead found the legal test of *United*

States v. Barton, 633 F.3d 168 (3d. Cir. 2011) to be the appropriate analytical lens with which to view as-applied Second Amendment claims. (Doc. 48). In *Barton*, a case concerning an as-applied challenge to 18 U.S.C. § 922(g)(1), the felon-in-possession statute, the Third Circuit stated that,

> [t]o raise a successful as-applied challenge, [the challenger] must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections. For instance, a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen. Similarly, a court might find that a felon whose crime of conviction is decades-old poses no continuing threat to society.

633 F.3d at 174. Using this framework, we held that "Mr. Yox provides the perfect test case to challenge § 922(g)(4), as the illogical contradiction of being able to possess firearms in his professional capacities but not being able to possess a firearm for protection in his own home puts in relief a factual scenario where an as-applied Second Amendment challenge to this statute may succeed." (Doc. 48, p. 42). Because we found that he had shown that he is "no more dangerous than a typical law-abiding citizen" and that he is not a "continuing threat" to himself or others, we awarded judgment in favor of Yox. (*Id.*) (citing *Barton*, 633 F.3d at 174).

Shortly after our ruling regarding Yox, on September 7, 2016, the Third Circuit issued an *en banc* opinion in *Binderup v. Attorney General United States of America* addressing the legal framework for as-applied Second Amendment claims. 836 F.3d 336 (3d Cir. 2016). While *Binderup* concerned as-applied challenges to the felon-in-possession statute of 18 U.S.C. § 924(g)(1), as we noted in our grant of summary judgment to Yox, "we see no reason that the same logic would not apply" to as-applied challenges to § 924(g)(4). (Doc. 81, p. 29). Unfortunately, while judgment on the two particular cases on appeal in *Binderup* was agreed upon by a majority, none of the three judicial opinions announcing the proper analytical framework garnered a majority of the Court. *Id.* Despite this fragmented result, a discussion on the various opinions in *Binderup* is necessary to determine the proper test we are to use in analyzing Keyes' as-applied Second Amendment claim.

*8 *Binderup* is the consolidated appeal from two district court decisions that shaped our analysis in our previous grant of summary judgment to Yox—*Binderup v. Holder*, 2014 WL 4764424 (E.D. Pa. Sept. 25, 2014) and *Suarez v. Holder*, ––– F.Supp.3d ––––, 2015 WL 685889 (M.D. Pa. Feb. 18, 2015). (Doc. 48, p. 28). The plaintiffs in *Binderup* and *Suarez* both posed as-applied challenges to 18 U.S.C. § 922(g)(1), which disarms those convicted of "a crime punishable by imprisonment for a term exceeding one year." The plaintiffs had been deprived of their firearm rights by 924(g)(1) because of previous misdemeanors punishable by more than one year, and brought Second Amendment challenges. Both district courts found in their favor. In considering the as-applied Second Amendment challenges, the *Binderup* district court found that *Barton* "supplies the controlling framework." 2014 WL 4764424, at *13. In doing so, the *Binderup* district court noted that the Supreme Court in its *Heller* decision found that the "longstanding prohibitions on the possession of firearms by felons and the mentally ill" were "presumptively lawful," suggesting that the presumption could be rebutted. 2014 WL 4764424, at *14 (quoting *Heller*, 554 U.S. at 626–627 n.26, 128 S.Ct. 2783).

In *Suarez*, the district court also ultimately applied the *Barton* framework to the as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(1), although it framed its analysis slightly differently in retaining the *Marzzarella* two-prong structure. There, the district court stated that *Marzzarella* provided the governing framework for Second Amendment challenges as a general matter, and that some sort of means-end scrutiny would, in theory, be appropriate. *Suarez*, ––– F.Supp.3d at

——, 2015 WL 685889, at *7. The court went on to hold that *Barton* speaks to the first prong of *Marzzarella* and that "if a challenger satisfies *Barton* by demonstrating that he is outside the scope of § 922(g)(1), and thereby shows he is a law-abiding citizen who falls within the core of the Second Amendment's protection, any means-end scrutiny would be fatal in fact." *Id.*

In the *en banc* appeal, a majority of the Third Circuit affirmed the judgements of the district courts for both cases. *Binderup v. Attorney General United States of America,* 836 F.3d 336 (3d Cir. 2016). Circuit Judges Ambro, Hardiman and Fuentes authored opinions, none of which garnered a precedential majority. Fifteen judges took part in the *Binderup* ruling.

Judge Ambro, joined in full by Judges Smith and Greenaway, Jr., held that "*Marzzarella* and *Barton* are neither wholly distinct nor incompatible" and that joint consideration of the two precedents represents the proper framework for as-applied Second Amendment challenges. *Id.*, at 347. Parts III.A, III.B, III.C.1, III.C.2, and III.C.3a of Judge Ambro's opinion were also signed on by Judges Fuentes, Vanaski, Krause, and Roth. In these sections, Judge Ambro instructs:

> Read together, *Marzzarella* and *Barton* lay out a framework for deciding as-applied challenges to gun regulations. At step one of the *Marzzarella* decision tree, a challenger must prove, per *Barton* that a presumptively lawful regulation burdens his Second Amendment rights. This requires a challenger to clear two hurdles: he must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, *id.* at 173, and then (2) present facts about himself and his background that distinguishes his circumstances from those of persons in the historically barred class, *id.* at 174.

Id., at 346–347 (citing *United States v. Barton,* 633 F.3d 168 (3d Cir. 2011)). In other words, the framework of *Barton* is used in order to analyze step one of the *Marzzarella* test. *Id.*

Judges Fuentes, Vanaskie, Krause, and Roth withdraw their support of Judge Ambro's opinion when he applies the framework to the specific facts of the cases in Part III.C.3b and applies means-end scrutiny in Part III.D. In these sections, Judge Ambro, joined by Judges Smith and Greenaway, Jr., held that the challengers sufficiently distinguished themselves from the presumptively lawful historically barred class by showing their prior misdemeanor convictions to not be as "serious" as felonies, and that the Government could not satisfy intermediate scrutiny. *Id.*, at 350–353. Judge Ambro concludes in his opinion that "the Government falls well short of satisfying its burden—even under intermediate scrutiny" because it offered "no evidence explaining why banning people like them (*i.e.*, people who decades ago committed similar misdemeanors) from possession firearms promotes public safety." *Id.*, at 353–354.

***9** Judge Hardiman authors a separate opinion, joined by Judges Fisher, Chagres, Jordan, and Nygaard. In his opinion, Judge Hardiman states that "*Barton* alone provides the standard for an as-applied Second Amendment challenge to a presumptively lawful regulatory measure ... that denies a core Second Amendment right to a certain class of persons." *Id.*, at 365–366. Thus, Judge Hardiman and the supporting judges would do away with the second step of the *Marzzarella* framework altogether: "when, as in these appeals, it comes to an as-applied challenge to a presumptively lawful regulation that *entirely bars* the challenger from exercising the core Second Amendment right, any resort to means-end scrutiny is inappropriate once it has been determined that the challenger's circumstances distinguish him from the historical justifications supporting the regulation. This is because such laws are categorically invalid as applied to persons entitled to Second Amendment protection—a matter of scope." *Id.*, at 363.

Judge Fuentes authors a separate opinion, joined by former Chief Judge McKee and Judges Vanaskie, Shwartz, Krause, Restrepo, and Roth. In the opinion, Judge Fuentes states that *Marzzarella* is the proper framework for as-applied Second Amendment challenges and that step one of the analysis asks whether the challenged law imposes a burden on Second Amendment conduct. *Id.*, at 387. Judge Fuentes departs from Judge Ambro's opinion, however, in stating that "*Heller* itself tells us that felons are disqualified from exercising their Second Amendment rights" and "there is no principled basis, at least in this context, for distinguishing" the challengers' misdemeanor convictions from the statute's scope. *Id.*, at 388. He therefore dissents in the judgment. *Id.* Because Judge Fuentes would hold that the challengers' misdemeanors are categorically outside of the scope of historical Second Amendment rights, means-end scrutiny is not required. *Id.*, at 396. Judge Fuentes offers a discussion on the appropriate application of the scrutiny anyway, however, stating that intermediate scrutiny is appropriate in this type of challenge. *Id.*, at 398. Further, Judge Fuentes criticizes Judge Ambro's narrow formulation of intermediate scrutiny, framing the issue as such:

> The question is not whether someone *exactly like the plaintiffs* poses a threat to public safety. The question is whether 'the fit between the challenged regulation and the asserted objective [is] reasonable, not perfect.'

Id., at 400 (citing *Marzzarella*, 614 F.3d at 98). Under this formulation, Judge Fuentes "conclude[s] that the government's evidence adequately establishes a connection between past criminal conduct and future gun violence." *Id.*, at 401.

In sum, former Chief Judge McKee and Judges Ambro, Smith, Greenaway, Jr., Vanaskie, Shwartz, Krause, Restrepo, and Roth agree that the two-step *Marzzarella* framework controls all Second Amendment challenges, including as-applied challenges. As this opinion garnered a majority, it is now the law of the Circuit. *Id.*, at 356. Additionally, each opinion recognized that after proving that a presumptively lawful regulation burdens his Second Amendment rights, the court then considers whether "the plaintiffs, are situated differently." *Id.*, at 391. Judge Ambro frames this inquiry as using *Barton* under step one of the *Marzzarella* framework; Judge Hardiman frames this inquiry as employing *Barton* as the controlling test for as-applied Second Amendment challenges altogether; and Judge Fuentes frames this inquiry as simply using step one of the *Marzzarella* framework without reference to *Barton.*[4] Regardless of how the inquiry is framed, each opinion either explicitly or implicitly affirms *Barton*'s proposition that a successful as-applied challenger must "present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections." *Barton*, 633 F.3d at 174. Finally, former Chief Judge McKee and Judges Ambro, Vanaskie, Fuentes, Shwartz, Krause, Restrepo, Roth, Smith, and Greenaway, Jr. agree that intermediate scrutiny is the proper level of means-end scrutiny to apply in step two of the *Marzzarella* framework, although scrutiny was applied in different ways that did not garner majorities.

4 Judge Fuentes states that he would overrule *Barton* to the extent that it permits as-applied challenges to 18 U.S.C. 924(g)(1) because, as currently constructed, the statute only disarms those who have committed serious crimes and are therefore categorically outside of the scope Second Amendment. *Binderup*, 836 F.3d at 387, n. 72. However, Judge Fuentes did consider the particulars of the challengers' specific situation to determine whether "the plaintiffs [ ] are situated differently," before concluding that their misdemeanor convictions were not sufficiently distinguished from historically barred felons in possession. *Id.*, at 391.

2. Keyes' As–Applied Second Amendment Challenge

***10** Having laid out the relevant precedential background, we now move forward in assessing Keyes' as-applied Second Amendment challenge. Following the direction of *Binderup*, we will proceed with *Marzzarella*'s two-step framework, using *Barton* as guidance in analyzing step one. In applying *Marzzarella*, a court examines "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee" under the first prong. 614 F.3d at 89. "If it does not, our inquiry is complete," and there is no Second Amendment violation. *Id.* However, if the law does impose a burden on such conduct, a court must "evaluate the law under some form of means-end scrutiny." *Id.* "If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." *Id.*

a. Step One of the *Marzzarella* Framework

Judge Ambro's articulation of step one of the *Marzzarella* framework is particularly instructive: "[t]his requires a challenger to clear two hurdles: he must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class." *Binderup*, 836 F.3d at 347 (internal citations omitted).

Regarding the first hurdle, we thoroughly analyzed the traditional justifications underlying the federal prohibition of firearm possession by those who have been committed to a mental institution in our grant of summary judgment to Yox. (Doc. 81, pp. 32–37). We consulted case law and history and found that while "there is little historical evidence of mentally ill people being subject to laws specifically disarming them ... there is clear historical evidence that persons prone to violent behavior were outside the scope of Second Amendment protection." (Doc. 48, p. 36). The Defendants do not attempt to re-argue our earlier conclusions, and instead quote our prior opinion where we concluded;

> Thus, while we do not know the exact intended parameters of the category of "mentally ill" that the Supreme Court referred to in *Heller*, it logically appears that the historical justifications for the prohibition on firearm possession by the "mentally ill" most likely involved a concern over individuals who had mental impairments that made them dangerous to themselves or others in society.

(Doc. 48, p. 37). Keyes cites to much of the same research we consulted in our grant of summary judgment to Yox, and likewise does not appear to dispute our conclusion regarding the historical justifications for § 922(g)(4). As such, we shall forgo a lengthy reiteration of our previous analysis and move forward with the much more pertinent hurdle in this matter—whether Keyes can "present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class." *Binderup*, 836 F.3d at 347 (internal citations omitted).

There is no finite list of factors for the Court to consider in determining whether Keyes can distinguish himself from the historically barred class of disarmed persons. However, Defendants cite to Judge Ambro's opinion in *Binderup* for the proposition that the timing of Keyes' commitment and evidence of rehabilitation "ha[ve] no bearing on this analysis." (Doc. 87, p. 13). We disagree.

In considering the felon-in-possession statute, Judge Ambro did state that "[t]here is no historical support for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights that were forfeited." *Binderup*, 836 F.3d at 350. By way of background, Judge Ambro made this statement in conjunction with his disagreement with *Barton*'s holding that a challenger that once lost his Second Amendment rights by § 922(g)(1) may regain them by showing that the crime of conviction is decades-old, and he no longer poses a threat to society. (*Id.*). The *Barton* court held that the passage of time and evidence of rehabilitation were pertinent to the analysis because the traditional justification for disarming felons was the probability of violent recidivism. *Id.*, at 349–350. Judge Ambro and the six judges that joined this section of his opinion disagreed, holding that the true traditional justification for the dispossession of felons was because people who commit serious crimes are "unvirtuous." *Id.* In essence, "persons who have committed serious crimes forfeit the right to possess firearms" because they are unvirtuous citizens. *Id.*, at 348–349. Therefore, Judge Ambro and his supporters hold that a person distinguishes themselves from the historically barred class not by showing that they will not recidivate, but by showing that they did not commit serious crimes to begin with and are consequently not "unvirtuous." The focus is on the crime of conviction itself rather than the individual.

*11 In contrast, the Defendants have agreed with our previous conclusion that the traditional justification for the dispossession of those who have been involuntarily committed "involved a concern over individuals who had mental impairments that made them dangerous to themselves or others in society." (Doc. 48, p. 37) (Doc. 87, p. 11). The justification is not rooted in an unvirtuous choice citizens have made in the past, but in their danger to themselves and others. A person who has previously committed a felony has made a voluntary and deliberate choice to break the law. That choice operates as a forfeiture of their Second Amendment rights in the same way that it operates as a forfeiture of other civil liberties such as voting. *Binderup*, 836 F.3d at 349. Involuntary commitments are not premised on the violation of any law, or any truly voluntary and deliberate actions at all. They are premised on a person's mental illness that causes them to be a threat to themselves and others. To hold that a person's mental illness in the past operates as a voluntary forfeiture of Second Amendment rights in the same way that the "unvirtuous" choice of committing a serious crime does suggests that mental illness is a "choice."

The *Binderup* court disagreed with *Barton*'s conclusion regarding the historical justification for dispossessing felons, focusing on the prior conviction itself rather than the person's propensity to commit violent crimes. *Binderup*, 836 F.3d at 350. Because of this, the passage of time since the conviction and the person's rehabilitation were irrelevant. *Id.* These factors are, however, highly relevant here, where we have concluded that the person's potential danger to society *is* the traditional justification for dispossessing the mentally ill. Judge Fuentes, joined by six other judges, described the ban of firearm possession by felons as a longstanding "black-and-white proscription" as opposed to other longstanding prohibitions that "have much more ambiguous boundaries." *Binderup*, 836 F.3d at 395.Whether a person who has previously been involuntarily committed poses a continuing threat to society to justify forfeiture of Second Amendment rights certainly requires examination of "ambiguous boundaries" and consideration of all factors.

To be sure, considering the passage of time and the person's rehabilitation is essential to determining whether a citizen has distinguished himself from the class of persons barred from possessing firearms because of mental health impairments. If we were to look only at the commitment itself as the *Binderup* court looked at the prior crime of conviction itself, there could not ever be a successful as-applied challenge to § 924(g)(4)—a person is involuntarily committed *because of* the danger to himself and to others. Ignoring the passage of time and rehabilitation would effectively hold that a person who is involuntarily committed at one point in his life is forever a danger to himself and society. Indeed, the Defendants themselves implicitly recognize the need to consider time and rehabilitation by citing to facts reflecting exactly those things. Because of all of this, we shall recognize the passage of time and evidence of rehabilitation as factors to consider in determining whether Keyes has distinguished himself from the historically barred class of persons.

Our esteemed colleague Judge Mark A. Kearney of the Eastern District of Pennsylvania came to a different result in *Jefferies v. Sessions*, --- F.Supp.3d ----, ----, 2017 WL 4411044, at *1 (E.D.Pa. Oct. 3, 2017). There, Judge Kearney faced an as-applied challenge to § 924(g)(4) and employed the modified two prong framework from *Marzzarella* and *Binderup*. *Id.* The court first agreed with our conclusion that the historical justification for the prohibition of firearm possession by the mentally ill involved a concern for individuals with mental impairments that made them dangerous to themselves and others. *Id.*, at ——, 2017 WL 4411044 at *7. The court then, however, cites Judge Ambro from *Binderup* and holds that the challenger cannot use post-commitment conduct to distinguish himself from the class of historically barred individuals. *Id.*, at ——, 2017 WL 4411044 at *8. Instead, the court indicated that the challenger would need to offer "evidence distinguishing his *commitment* from the class of individuals prohibited from possessing a firearm." *Id.* (emphasis added).

*12 We have the utmost respect for Judge Kearney, but we find that his conclusion places too much reliance on one isolated statement in *Binderup* and ignores the inherent differences between § 924(g)(1) and § 924(g)(4). Each commitment inherently reflects a decision that the individual was a danger to themselves or to others in society—to focus on the commitment itself would render any as-applied challenge as futile and hold that persons once committed are forever a danger to society and themselves. Faced with this reality, Judge Kearney holds fast to *Binderup*, stating "[o]ur court of appeals is specifically discussing felons but its next sentence extends the reasoning to any federal prohibition, '[t]here is no historical support for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights that were forfeited.' " *Id.*, at ——, 2017 WL 4411044 at *9 (quoting *Binderup*, 836 F.3d at 350). We disagree with Judge Kearney's extension of *Binderup* to § 924(g)(4)—the Court's language may have referenced Second Amendment rights generally, but the entirety of the analysis regarded the felon-in-possession statute. Because an involuntary commitment is premised on mental illness rather than a deliberate choice to break the law and forfeit civil rights, the analysis of as-applied challenges to § 924(g)(4) differs from § 924(g)(1) in this regard. As such, we depart from Judge Kearney's holding in *Jefferies.* [5]

5 *Jefferies* cites to two Eastern District cases that purportedly support its conclusion that an individual's post-involuntary commitment mental health is not relevant to an as-applied challenge to § 924(g)(4). *Beers v. Lynch* dismissed an as-applied challenge to § 924(g)(4) pursuant to Federal Rule of Civil Procedure 12(b)(6) and offered scant analysis, save for its reliance upon the same *Binderup* sentence that *Jefferies* and the Defendants point toward. No. 2:16–CV–6440, Doc. 31 (E.D.Pa. Sept. 5, 2017). *Simpson v. Sessions* also relied on that same *Binderup* sentence in holding that passage of time and evidence of rehabilitation is immaterial to an as-applied § 924(g)(4) challenge, but then contradictorily rejected the challenge because the plaintiff "has no record of responsible firearms usage and he has undergone continuing mental health treatment." 2017 WL 1910141, at *6–7 (E.D.Pa. May 10, 2017). We do not find either of these cases persuasive.

We now turn to the specific factual arguments offered by the Defendants. In support of their contention that Keyes has "failed to present facts about himself and his background that distinguish his circumstances from the class of persons with mental impairments that make them dangerous to themselves," Defendants point to the fact that he attempted suicide on one occasion after his commitment and to facts showing a "significant likelihood of a relapse." (Doc. 87, pp. 14–15). Specifically, Defendants note that Keyes attempted suicide on four occasions, once after commitment, and that his mental health hospitalizations occurred over a span of years. (Doc. 87, pp. 11–14). The Defendants argue that the "lengthy gap" between Keyes' first hospitalization in 1998 and final hospitalization in 2007 "belies any suggestion that Mr. Keyes' instances of mental illness can be treated as safely in the past." (*Id.*, at p. 14).

The Defendants also point to Keyes' "present circumstances" that, in their view, suggest "a significant likelihood" of relapse into mental illness that would cause danger. (*Id.*, at pp. 14–15). As discussed previously, Keyes testified at his deposition that depression, issues with his wife, combining his medications with alcohol, and sleep issues prompted his suicide attempts. (Doc. 85, Ex. 3, 59:13–20, 72:8–9). Defendants point to portions of Keyes' deposition testimony where he states that he periodically takes a sleep aid for sleep issues and had difficulty falling asleep a couple times in the past month. (Doc. 87, pp. 15–16). Defendants also point to Keyes' alcohol consumption—he testified that he drinks every other day or so and that he usually drinks up to four or five beers. (*Id.*, at p. 16). Defendants argue that this is significant because his "present reported alcohol use does not differ significantly from his reported alcohol use at the time of his admittance to Holy Spirit Hospital in 2006." (*Id.*). Finally, Defendants point to Keyes' testimony that he "live[s] a lonely life." (*Id.*).

***13** Regarding his proclivity for danger with firearms, Defendants rely heavily on the note included with his psychiatric care records discussed previously. The therapist note reflected that Keyes had a plan to kill himself with a gun. (Doc. 85, Ex. 1, p. 17). Keyes denies that he ever made this statement. For purposes of resolving the motions for summary judgment, and because we do not find that it is a material fact, we shall accept the veracity of this treatment note and assume that Keyes did, in fact, make that statement to his therapist in 2006.

Nevertheless, we find that Keyes has sufficiently met his burden to "present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class." *Binderup*, 836 F.3d at 347 (internal citations omitted).To start, we disagree with Defendants that Keyes' present circumstances indicate a likelihood for relapse. Defendants place weight on Keyes' occasional sleep difficulties and social drinking habits, but we do not find these facts suggestive that Keyes is likely to relapse into his depressive and suicidal state. Keyes has always maintained that his mental health issues stemmed largely from the emotional turmoil in his relationship with his ex-wife, and that is a circumstance that he is no longer facing. Furthermore, Defendants recognize that Keyes no longer takes anti-depressant medication, eliminating the combination of alcohol and medication that helped prompt his prior suicide attempts. (Doc. 87, p. 15). Keyes is no longer battling depression as he was at the time of and surrounding his commitment—he was asked during his deposition "during the past year [he] ever felt depressed or hopeless." (Doc. 5, Ex 3, 142:18–20). He responded with an unequivocal "no." (*Id.*).

We also find that the significant passage of time is relevant. The last mental health issue that the Defendants cite dates back to January, 2007. (Doc. 84, ¶¶ 17–18). The Defendants do not provide evidence of any episode of mental illness from the past decade. The absence of evidence that Keyes has acted in an unstable or dangerous manner towards himself or others in the past ten years weighs in favor of finding that he poses no "continuing threat." *Barton*, 633 F.3d at 174.

Keyes never misused his firearms, even during his time encountering depression and suicidal ideations. The *only* reference to Keyes' misuse of firearms is the one therapist note reflecting Keyes' intent to commit suicide with a gun. There is no evidence that Keyes ever actually misused or attempted to misuse his firearm, and we find it particularly relevant that this statement was made in conjunction with a hospital visit where he voluntarily admitted himself to receive treatment to combat his suicidal ideations, reflecting a responsibility to prevent such misuse. (Doc. 84, at ¶ 7). Keyes had access to a multitude of firearms through his employment as a State Trooper before, during, and after his mental health struggles, but we have not been presented with any evidence demonstrating any irresponsible use of firearms.

Keyes is in a unique position in that he was actually able to *prove* his competency with firearms. Unlike most citizens who lose their private firearm rights, Keyes continued to serve as a Master Trooper for the Pennsylvania State Police for over eight years following his last mental health incident. (Doc. 85, Ex. 3, 12:12–24). He received performance evaluations of "outstanding" and qualified in the top of his class with several firearms, including a fully automatic AR–15 select fire rifle, a Remington 870 12 gauge shotgun, a Sig Sauer 227 handgun, and a Glock 37 handgun. (Doc. 82, ¶ 3). It is an illogical contradiction to say that private possession of firearms would present a danger when Keyes spent years with access to the aforesaid array of firepower without any documented incident. In the end, Defendants seek to have us conclude that despite having daily access to this weaponry over the entire course of his career with the Pennsylvania State Police, and despite a record bereft of any misdeeds with those weapons, he was and continues to be a risk to possess firearms on his own. We find this both illogical and absurd.

*14 Further, it is noteworthy that a state court has already found Keyes to not be a continuing threat to himself or others. As detailed earlier, a Pennsylvania state court reviewed Keyes' petition for restoration of his state firearm rights and issued an order relieving him from any disability imposed pursuant to state law. (Doc. 82, ¶ 4). The judge specifically found "that Petitioner has in fact met his burden of showing that he may possess a firearm without risk to himself or any other person under the applicable provisions of law." (*Id.*).

While the lines of what a challenger must prove to succeed on an as-applied Second Amendment challenge to § 924(g)(4) may be ambiguous, Keyes represents a exceptional situation where we have no trouble holding that he has distinguished himself from the class of persons traditionally prohibited from possession due to mental illness. The traditional justification for prohibiting the mentally impaired from firearm possession involves a concern over people with mental impairments that cause them to be a danger to themselves or others in society. As we said with regards to his co-Plaintiff, it would require a suspension of logic to believe that Keyes is and was mentally stable enough to possess and use various types of firearms in his professional capacity, but is not mentally stable enough to possess a firearm for self-protection in his home without posing a danger to himself or society. We find that Keyes has adequately and compellingly demonstrated the factual grounds to satisfy step one of the *Marzzarella* framework.

b. Step Two of the *Marzzarella* Framework

Judge Hardiman and the four judges who joined his opinion found that when "it comes to an as-applied challenge to a presumptively lawful regulation that *entirely bars* the challenger from exercising the core Second Amendment right, any resort to means-end scrutiny is inappropriate once it has been determined that the challenger's circumstances distinguish him from the historical justifications supporting the regulation." Judge Hardiman relied on *District of Columbia, et al. v. Heller* itself for this conclusion—the Supreme Court in *Heller* rejected a law that precluded individuals from possessing operable firearms in the home and made "it impossible for citizens to use them for the core lawful purpose of self-defense." 554 U.S. 570, 630, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The law was deemed unconstitutional without any means-end scrutiny. *Id.* The district court in *Suarez* had come to this same conclusion previously, though instead of framing it as doing away with the second prong of *Marzzarella*, the court instead recognized that any means-end scrutiny would be fatal in fact as applied to a person who has satisfied the first prong. ––– F.Supp.3d at ––––, 2015 WL 685889, at *7. In our previous grant of summary judgment to Yox, we agreed with the *Suarez* court, referring to the second step as potentially "theoretically" still applying "with a phantom means-end prong." (Doc. 48, p. 31).

Regardless, both Judge Ambro's and Judge Fuentes' opinions held that intermediate scrutiny is applicable to as-applied Second Amendment challenges, garnering a majority and creating a law of the Circuit. We do note, however, that Judge Ambro's opinion did not delineate why intermediate scrutiny was correct because he found that the law would easily fail intermediate or strict scrutiny anyway. *Binderup*, 836 F.3d at 353. Judge Fuentes did offer an explanation for why intermediate, as opposed to strict, scrutiny was the appropriate standard.

In his opinion, Judge Fuentes examines the second prong of *Marzzarella* only "out of an abundance of caution," because he had determined that the challengers failed step one. *Id.*, at 396. He then concluded that intermediate scrutiny is the correct standard because the felon-in-possession ban "constrains the rights of persons who, by virtue of their prior criminal conduct, fall outside of the core of the Second Amendment's protections." *Id.*, at 397. We first feel constrained to note that this conclusion is in conflict with Judge Fuentes' cautious procession to step two; by proceeding to the second prong of the *Marzzarella* analysis, Judge Fuentes was employing an "even if" argument assuming that the challengers had met the first prong of the analysis. *Id.*, at 396. Assuming the challengers had met the first prong of *Marzzarella* would mean that the challengers had successfully distinguished themselves from the class of people traditionally banned from firearm possession—in Judge Fuentes' words, that they have demonstrated that they are not part of the class of "persons who commit serious crimes" that "are disqualified from asserting their Second Amendment rights." *Id.*, at 387. If the challengers had successfully demonstrated that they are not part of the class of persons that lose their Second Amendment rights, it is unclear how Judge Fuentes could find that the complete deprivation of their right to possess firearms would not "burden[ ] the 'core' Second Amendment right." *Id.*, at 398.

***15** Irrespective of the reasoning, a majority of the Third Circuit in *Binderup* agreed that intermediate scrutiny applied in joining either Judge Ambro's or Judge Fuentes' opinions. However, the two opinions differed in their application of intermediate scrutiny. Both agreed on the general premise of intermediate scrutiny—the Government bears the burden of proof to demonstrate that the challenged law involves an important government interest and that there is a "reasonable fit" between that interest and the challenged law. *Binderup*, 836 F.3d at 354, 399. Judge Ambro interprets this to require the Government to adduce evidence explaining why banning people *in the Plaintiff's position* from firearm possession is a reasonable means to further its governmental interest. *Id.*, at 354–355. To this end, Judge Ambro found that the Government's reliance on general statistical studies that felons are more likely to commit violent crimes was misplaced. *Id.* Instead, the Government needed to present reliable evidence "that people with the Challengers' backgrounds were more likely to misuse firearms or were otherwise irresponsible or dangerous." *Id.*, at 355.

Judge Fuentes takes issue with this analysis, stating that "Judge Ambro's level of specificity is problematic." *Id.*, at 396. Judge Fuentes concludes that the Government satisfied its burden that the law is a "reasonable fit" to its important interest in public safety because it pointed to studies that explore the link between past criminal conduct and future gun violence, even without any link to the challenger's specific characteristics. *Id.*, at 400.

The problem with employing Judge Fuentes' high level analysis of intermediate scrutiny is that it would effectively foreclose all as-applied challenges. There is a reason why the challengers in *Binderup* and our challengers Keyes and Yox did not bring facial challenges to the respective sections of § 924(g)—they recognize that, generally, the Government does have an important interest at play and that the dispossession of certain groups of people are reasonable to pursue that interest. To allow the Government to defeat an as-applied challenge by demonstrating that the statute was a reasonable fit to its important interest in general would mean that the challengers' efforts to distinguish themselves from the overall class are rendered futile. In essence, without considering the challengers' specific characteristics, the second step of the *Marzzarella* framework is the same in both facial and as-applied challenge, rendering the first prong in as-applied challenges superfluous and done in vain.

Judge Fuentes recognized this reality by questioning whether as-applied challenges to the felon-in-possession statute are even permissible at all, and he ultimately concluded that they are not. *Id.*, at 401. He points out that "Second Amendment limitations like the felon-in-possession ban and the ban on mentally-ill persons possessing guns" are intended to meet a governmental objective that "is neither logistical nor abstract," but "quite simply, to prevent armed mayhem and death." *Id.*, at 402. Because of the high import of the governmental interest, and the costly consequences should a court make a wrong decision, Judge Fuentes concludes that as-applied challenges are "too error-prone to support the government's objective of preventing armed violence." *Id.*, at 403.

In anticipating an overbreadth argument, Judge Fuentes notes that federal law lifts the felon-in-possession ban when a conviction has been expunged, set aside, or pardoned. *Id.*, at 406. Unfortunately, Judge Fuentes' reasoning is inapplicable to § 925(g)(4) because people in Keyes' position have no recourse to have their prior commitments expunged, set aside, or pardoned. The threat of overbreadth is much more potent in this context where a prior commitment will deprive firearm rights in perpetuity.

For support from First Amendment doctrine that some laws cannot withstand as-applied challenges, Judge Fuentes points to *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). There, the Supreme Court confronted an as-applied challenge to a law that prohibited government employees from engaging in certain kinds of partisan political activity. The challenger argued that he was not a type of government employee whose conduct was likely to raise integrity concerns, which was the governmental interest behind the regulation. *Mitchell*, 330 U.S. at 101, 67 S.Ct. 556. The Court rejected the argument, observing that "[w]hatever differences there may be [in the class of persons]... are matters of detail for Congress." *Id.*, at 102, 67 S.Ct. 556.

*16 We do not find this analogy to be persuasive to consideration of § 924(g)(4). The law at issue in *Mitchell* foreclosed certain First Amendment rights by regulating one subset of speech; the dispossession of those previously committed forecloses the entirety of their Second Amendment rights. Further, the law in *Mitchell* restricted First Amendment rights for those who have made *the choice* to work for the government. Should they become dissatisfied with the abridgement on their First Amendment rights, they have the option to terminate their employments and have their rights restored. This is not true for those who have been previously committed. Keyes and those like him never made a cognitive choice to suffer from mental illness and cannot simply make a decision to remove themselves from the class of people restricted by § 924(g)(4) even once they are healthy and have demonstrated competency with firearms. Because § 924(g)(4) operates to completely eviscerate Second Amendment rights for those who have demonstrated that they are not within the class of persons traditionally barred from possession of firearms, we cannot, and will not, conclude that their differences from the general class of excluded persons are simply "details for Congress."

Finally, Judge Fuentes discusses the difficulty of considering as-applied challenges to the felon-in-possession statute. *Binderup*, 836 F.3d at 407–410. His concerns about the consideration of as-applied challenges for § 924(g)(1) are equally applicable to those challenging § 924(g)(4); he cites to problems with consistency, fair warning, and the burden on the district courts. *Id.* However, for all of the reasons that we have distinguished the felon-in-possession statute from the prohibition on possession by the previously committed, including the lack of a conscious choice, the lack of a violation in the law, and the lack of any "unvirtuous" prior act, we cannot foreclose as-applied challenges to § 924(g)(4) simply because of the difficulty in administration.

Because we find that Judge Fuentes' reasoning is inapplicable to a challenge to § 924(g)(4), and because his high level analysis of means-end scrutiny would effectively foreclose as-applied challenges to § 924(g)(4), we will follow Judge Ambro's lead and conduct our means-end scrutiny analysis with a lens towards Keyes' specific circumstances.

The Defendants have clearly established an important, and indeed, compelling, interest served by the dispossession of those previously involuntarily committed. Section 924(g)(4) serves to protect public safety and cut down on firearm violence committed as a result of mental illness. (Doc. 87, p. 19). Keyes does not appear to dispute this governmental interest.

However, it is the Defendants' burden to present "evidence explaining why banning people like" Keyes "promotes public safety." *Binderup*, 836 F.3d at 353–354. Instead, Defendants refer to evidence illustrating how disarming those who have been previously involuntarily committed *in general* promotes public safety, and refer to their previous factual arguments that Keyes remains at a heightened risk for relapse. (Doc. 87, pp. 22–23). Having already concluded that Keyes has satisfactorily distinguished his circumstances from those in the general class of persons barred by § 924(g)(4), the Defendants' evidence is insufficient.

We have been presented with no evidence to indicate that disarming those who went through a period of mental illness and suicide attempts over a decade ago and who have regularly carried firearms in their professional capacity since that time reasonably fits within the governmental interest to promote safety. As such, 18 U.S.C. § 924(g)(4) cannot withstand intermediate scrutiny in the face of Keyes' as-applied challenge. Enforcement of the statute against Keyes therefore violates his right to keep and bear arms—a right guaranteed to him by the Second Amendment to the United States Constitution.

V. CONCLUSION

For all of these reasons, we shall grant summary judgment in favor of Plaintiff Michael Keyes. We freely acknowledge our mindfulness of the fact that this decision is rendered in a time when our country appears awash in gun violence. Given the tenor of the times, it would be easy and indeed alluring to conclude that Plaintiff lacks any recourse. But to do so would be an abdication of this Court's responsibility to carefully apply precedent, even when, as here, it is less than clear. Our jurisprudence and the unique facts presented guide us to the inescapable conclusion that if the Second Amendment is to mean anything, and it is beyond peradventure that it does, Plaintiff is entitled to relief.

*17 A separate order shall issue in accordance with this ruling.

All Citations

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