

THE SIXTH CIRCUIT MOVES THE SECOND AMENDMENT TARGET

*Fredrick E. Vars**

ABSTRACT.....	1
I. THE MAJORITY OPINION.....	2
II. REMAND	3
III. CRITIQUE.....	4

ABSTRACT

In a recent en banc decision, the Sixth Circuit sustained a Second Amendment challenge to the federal prohibition on gun possession by individuals who have been involuntarily hospitalized. By refusing to permit commonsense assumptions by Congress, the court applied a version of intermediate scrutiny out of line with other circuits. But even applying this new standard, the outcome in the case should be reversed on remand.

Joseph Braman went to a gun shop, bought a gun after a background check, and killed himself with it three days later.¹ Braman was prohibited from purchasing a firearm under federal law, and should have failed the background check, because he had previously been involuntarily hospitalized for mental health problems.² Reporting of such hospitalizations (also referred to as “civil commitments”) to the background check system has since improved.³ But a recent Sixth Circuit decision could turn back the clock and allow more deaths like Braman’s.

Three years ago, my co-author and I argued that suicide prevention is the strongest rationale for restricting gun possession by the mentally ill.⁴ We further predicted that courts would likely uphold such restrictions

* Professor of Law, The University of Alabama School of Law. Thanks to Heather Elliott for helpful conversations and edits on an earlier draft. Thanks also to my Mental Health Law seminar students for comments and the *Alabama Law Review* for its expedited review and editorial work.

1. John Hurst, *Error Limits Gun Buyer Checks: Firearms: Assemblyman Vows to Amend Law Intended to Encourage People to Seek Mental Help by not Forbidding Them to Buy Weapons. A Widow Says the Measure Allowed Her Husband to Kill Himself*, L.A. TIMES (May 21, 1993), http://articles.latimes.com/1993-05-21/news/mn-38185_1_mental-patient.

2. *Id.*

3. *Id.*

4. Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 22 (2013).

under intermediate scrutiny.⁵ In the recent Sixth Circuit en banc decision *Tyler v. Hillsdale County Sheriff's Department*, both the majority and the dissent cited our article repeatedly.⁶ The six judges in the dissent agreed with us on both points,⁷ but the majority, unfortunately and incorrectly, did not.

This Essay first describes the key part of the majority opinion. The next section marshals evidence that should be considered on remand. The third section criticizes the court for adopting a version of intermediate scrutiny out of step with other circuits.

I. THE MAJORITY OPINION

Clifford Charles Tyler was involuntarily committed in 1986 for a depressive episode following an emotional divorce. “[D]espite a currently clean bill of mental health, Tyler is ineligible to possess a firearm because of his prior involuntary commitment, pursuant to 18 U.S.C. § 922(g)(4).”⁸ He challenged this restriction as applied to him on Second Amendment grounds. The en banc majority held that the restriction was subject to intermediate scrutiny and that the government did not meet its burden of justifying the restriction.⁹

The most significant component of the opinion is the conclusion that the government had not shown that the restriction was substantially related to the important interest in preventing gun deaths. If the challenge were truly as-applied and limited to Tyler, this conclusion would appear to be unobjectionable. It was undisputed that he was not currently mentally ill and his involuntary commitment happened thirty years earlier.¹⁰

The opinion’s reasoning, however, was not limited to Tyler:

[T]he evidence relied on by the government in its motion to dismiss and seized on by Judge Moore’s dissent highlights why it may be appropriate to prohibit firearm ownership by currently mentally ill individuals and those who were recently committed, but it does little to justify § 922(g)(4)’s inflexible, lifetime ban.¹¹

5. *Id.*

6. *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, No. 13–1876, 2016 WL 4916936, at *13 (6th Cir. Sept. 15, 2016); *id.* at *31–33 (Moore, J., dissenting).

7. *Id.* at *31–33 (Moore, J., dissenting).

8. *Id.* at *1 (majority opinion). Section 922(g)(4) prohibits anyone “who has been committed to a mental institution” from possessing a firearm. 18 U.S.C.A. § 922(g)(4) (2012).

9. *Tyler*, 2016 WL 4916936, at *4–16.

10. *Id.* at *3.

11. *Id.* at *13.

That evidence showed a 39-fold increase in suicide risk after civil commitment,¹² but the opinion rejected it because the underlying study followed most patients for only one year.¹³

This is not as-applied reasoning. Nineteen states have no restoration process and the bar on gun possession is effectively permanent.¹⁴ The majority opinion's reasoning applies to every person barred under § 922(g)(4) in each of these states. Indeed, the court stated that the government could succeed on remand by presenting additional evidence in support of an across-the-board lifetime ban, independent of Tyler's circumstances.¹⁵

II. REMAND

There is good reason to think the government can prevail on remand even under this unusually strict version of intermediate scrutiny. Here are additional facts¹⁶ the government could cite: "Usually it is psychotic, manic, and major depressive episodes that lead to involuntary treatment."¹⁷

The mental illnesses most likely to cause the first two types of episodes are not curable: "There is no cure for schizophrenia, . . ."¹⁸ "Bipolar disorder is a chronic mental illness . . ."¹⁹

People who have had one depressive episode are at relatively high risk for another, and for a significant fraction of individuals it is also a lifelong condition:

According to the American Psychiatric Association, at least 50% of people who have an episode of major depression will go on to have

12. Research not cited by the court puts the figure at twenty. Ryan C. W. Hall, Richard C. W. Hall, & Marcia J. Chapman, *Identifying Geriatric Patients at Risk for Suicide and Depression*, 11 CLINICAL GERIATRICS 36, 36, 41 (2003) (reporting overall suicide rate of 11.2/100,000 and 224/100,000 for patients with past psychiatric hospitalization; 224/11.2=20).

13. *Tyler*, 2016 WL 4916936, at *13.

14. *Id.* at *12.

15. *Id.* at *16.

16. The dissent in *Tyler* already laid out several key points: (1) the vast majority of suicide victims suffered from mental illness; (2) guns are much more lethal than other suicide methods; and (3) restricting access to firearms does not simply lead people to use other methods. *Id.* at *31 (Moore, J., dissenting).

17. Adam G. Gerhardstein, *A First Episode Standard for Involuntary Treatment*, 10 U. ST. THOMAS L.J. 469, 478 (2012).

18. *Schizophrenia*, NATIONAL ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-Conditions/Schizophrenia> (last visited Sept. 23, 2016).

19. *Bipolar Disorder*, NATIONAL ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/NAMI/media/NAMI-Media/Images/FactSheets/Bipolar-Disorder-FS.pdf> (last visited Sept. 23, 2016).

a second. And about 80% of people who have two episodes will have a third.²⁰

...

In about 20% to 30% of people who have an episode of depression, the symptoms don't entirely go away.²¹

All three of these mental illnesses greatly increase one's risk of suicide. "[V]irtually all mental disorders have an increased risk of suicide"²²

With respect to mood disorders, like bipolar and depression, research directly on point suggests that the elevated suicide risk persists throughout the lifespan. "[A]t least for individuals with relatively permanent risk factors like untreated mood disorders, studies have shown that suicide risk is consistent over time."²³ More broadly, suicide risk for men goes up dramatically in older age.²⁴

Of course, treatment is effective for many who stick with it and some may no longer meet diagnostic criteria. But the question for intermediate scrutiny is whether having been adjudicated to be mentally ill once puts you at significantly higher risk than other people of committing suicide. Plainly, the answer to that question is yes.

III. CRITIQUE

The majority opinion's exacting version of intermediate scrutiny is out of step with other circuits.

No doubt swayed by the sympathetic party before it, the court disallowed the government's implicit assumption that someone adjudicated to suffer from mental illness once is more likely than other people to suffer from it in the future. This assumption is not only eminently plausible; it is empirically supported, as shown above. Only by rejecting this commonsense assumption could the court dismiss the study finding a 39-fold increased suicide risk on the ground that the study's follow-up period

20. *Depression Recovery: An Overview*, WEBMD, <http://www.webmd.com/depression/recovery-overview> (last visited Sept. 23, 2016). Most people whose depressive episode is severe enough to precipitate civil commitment are probably not experiencing depression for the first time.

21. *Id.* This percentage is likely higher for individuals committed for depression than for the vast majority of people whose depression never presents an imminent danger. See, e.g., Ala. Code § 22-52-10.4(a) (1991) ("A respondent may be committed to inpatient treatment if the probate court finds, based upon clear and convincing evidence that: . . . the respondent poses a real and present threat of substantial harm to self and/or others; . . .").

22. Vars & Young, *supra* note 4, at 21 (quoting E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders: A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205, 222 (1997)).

23. Angela Selvaggio & Fredrick E. Vars, "Bind Me More Tightly Still": *Voluntary Restraint Against Gun Suicide*, 53 HARV. J. LEGIS. 671, 699 (2016).

24. Robert M.A. Hirschfeld & James M. Russell, *Assessment and Treatment of Suicidal Patients*, 337 NEW ENG. J. MED. 910, 911 fig.1 (1997).

was too short. Yet, even under heightened levels of scrutiny, courts must take into account commonsense assumptions made by legislatures.

In this way *Tyler* creates a circuit split. The court's version of intermediate scrutiny, unlike other circuits', is nearly impossible to meet. *Tyler* implies that only a study finding an increased risk of suicide at every age after civil commitment could justify a lifetime ban. This is flatly inconsistent with the approach taken by other circuits.

Take, for example, the Ninth Circuit opinion rejecting both facial and as-applied challenges to the federal prohibition on gun possession by certain domestic violence offenders.²⁵ It cited three articles in support of its conclusion that the lifetime prohibition was substantially related to the government's interest in preventing domestic gun violence.²⁶ The first article cites one study with a five-year follow-up period and a second study with a sixmonth follow-up period.²⁷ The second article had a follow-up period of three years.²⁸ The third was a meta-analysis examining twenty-two studies.²⁹ The paper assessed the impact of follow-up length for sixteen of these studies: only three had a mean follow-up period longer than twelve months; the longest was thirty-six months.³⁰

Nonetheless, the court rejected an as-applied challenge by a defendant who claimed a clean record for fifteen years. The court reasoned that Congress "could have easily created a limited duration rather than lifetime ban," but "Congress did not do so" and instead "permissibly created a broad statute . . ."³¹ The Seventh and Fourth Circuits implicitly agree with the Ninth: "No matter how you slice these numbers, people convicted of domestic violence remain dangerous to their spouses and partners."³² Of course, these cases deal with domestic violence rather than mental illness, but the critical factor in both contexts is risk of future harm.

In sum, the district court on remand in *Tyler* should uphold § 922(g)(4), and the Sixth Circuit at its next opportunity should bring its intermediate scrutiny analysis back into line with the other circuit courts of appeals by allowing common sense to factor into the equation. It may be good policy

25. *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013).

26. *Id.* at 1140.

27. Carla Smith Stover, *Domestic Violence Research: What Have We Learned and Where Do We Go From Here*, 20 J. INTERPERSONAL VIOLENCE 448, 450 (2005) (citing Joel Garner, Jeffrey Fagan, & Christopher Maxwell, *Published Findings from the Spouse Assault Replication Program: A Critical Review*, 11 J. QUANTITATIVE CRIMINOLOGY 3 (1995); Melanie Shepard, *Predicting Batterer Recidivism Five Years After Community Intervention*, 7 J. FAMILY VIOLENCE 167 (1992)).

28. John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 31 (2001).

29. Julia C. Babcock, Charles E. Green, & Chet Robie, *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 CLINICAL PSYCHOL. REV. 1023 (2004).

30. *Id.* at 1037, 1043 tbl.3.

31. *Chovan*, 735 F.3d at 1142.

32. *United States v. Staten*, 666 F.3d 154, 166 (4th Cir. 2011) (quoting *United States v. Skoien*, 614 F.3d 638, 644 (7th Cir. 2010) (en banc)).

to restore gun rights to individuals who were civilly committed many years ago and can show they are no longer at heightened suicide risk, but the Second Amendment does not compel such a policy.