IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No 19-CV-062-FHM**
	)	
FOUR FIREARMS AND	)	
ONE HUNDRED FIFTY-TWO	)	
ROUNDS OF ASSORTED	)	
AMMUNITION,	)	
	)	
Defendants.	)	

GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

The United States of America, by its counsel, moves pursuant to Rule 56, F.R.Civ.P., for summary judgment on its complaint for forfeiture. In support of its Motion, the Government says the following:

I. INTRODUCTION

This is a civil forfeiture action brought by the United States to forfeit four firearms and assorted ammunition ("the firearms") pursuant to 18 U.S.C. § 924(d)(1) because they were involved in a knowing violation of 18 U.S.C. § 922(g)(4). Specifically, the Government alleges that the firearms are subject to forfeiture because they were found in the possession of Derek Braswell, a person who has been found to be a danger to himself and has been committed to a mental institution, and who therefore was barred from possessing firearms by Section 922(g)(4).

Braswell filed a timely claim to the firearms and a timely answer to the Government's complaint (Docs. 11 and 12, respectively), and the parties have completed

discovery, which included the deposition of Braswell on April 25, 2019. Accordingly, the case is ripe for disposition on a motion for summary judgment.

II. SUMMARY OF THE ARGUMENT

Title 18, Section 924(d)(1), authorizes the forfeiture of any firearm or ammunition involved in any knowing violation of 18 U.S.C. § 922(g). Section 922(g)(4) provides that it is unlawful for any person "who has been adjudicated as a mental defective or who has been committed to a mental institution" to possess a firearm.

On May 15, 2009, a judge of the District Court for Cherokee County, Oklahoma, issued an Order of Admission to Medical Facility finding that there was clear and convincing evidence that Derek Braswell "is a person requiring treatment/medication and who should be admitted to a medical facility as a patient." *Id.* Moreover, upon finding that Braswell was "incompetent to consent to or refuse treatment," the court Ordered that Braswell "be committed to the custody of the Department of Mental Health / Tulsa Center for Behavioral Health," which is a mental institution within the meaning of 18 U.S.C. § 922(g)(4).

On August 22, 2018, the same Derek Braswell met with a Special Agent of the Bureau of Alcohol, Tobacco and Firearms and voluntarily turned over four firearms and 152 rounds of ammunition that had been in his possession. Because Braswell's possession of the firearms following his involuntary commitment to a mental institution was a knowing violation of Section 922(g)(4), the firearms are subject to forfeiture to the United States pursuant to Section 924(d)(1). And because there are no issues of material

fact concerning either the violation of Section 922(g)(4) or the involvement of the firearms in that offense, the court should grant summary judgment for the Government.

III. FACTS

A. Braswell's Involuntary Commitment to a Mental Institution in 2009.

1. The Encounter in Sequoyah State Park.

In the early evening of May 14, 2009, Lt. Barry Hardaway, a Park Ranger at Sequoyah State Park, had an encounter with Derek Braswell ("Braswell"), age 21, within the park campground. Braswell approached Hardaway and asked "what would happen if he shot a deer in the park." (Ex. 1). Hardaway answered that Braswell "would be in trouble" if he did so. *Id.*

After conversing with other campers who had encountered Braswell earlier in the evening, Hardaway approached Braswell again and asked permission to search his vehicle. Permission was granted, and Hardaway found a .22 caliber magazine in the glove compartment. In response to questioning, Braswell stated that he had a handgun on his person. Hardaway secured the weapon and placed Braswell in handcuffs for his safety. *Id.*

Hardaway then obtained statement from another camper at the campground, who related that he heard Braswell say that he was "going to have to kill a cop." *Id.* At that point, Hardaway told Braswell that he was under arrest, to which Braswell responded, "I might as well blow his head off, or he would [do it] himself." *Id.* Braswell also said several times that he "wanted to die." *Id.*

Hardaway decided to transport Braswell to the Emergency Room (ER) at Wagoner Community Hospital for a mental evaluation. At the ER, Braswell said that he "wanted to end it all and even tried to hang himself before and had put his gun barrel in his mouth before." *Id.;* Ex. 2.

2. **The Evaluation at Wagoner Community Hospital.**

At the hospital, Braswell was examined by ER Physician Jillian Riley. (Ex. 3) Dr. Riley's notes recite the events that occurred earlier that evening at the state park as related to her by Lt. Hardaway. *Id.* at 1. She then notes that Braswell "presents with flat and depressed affect" and that he reported "symptoms of depression, anxiety, and PTSD on [a] daily basis" stemming from an industrial accident that occurred less than a year earlier (in August 2008) in which Braswell, then age 20, lost his right arm and was given a prosthetic device. *Id.*

Braswell told Dr. Riley that he had experienced "thoughts of hopelessness" on a daily basis since the accident, and said that, "I have no reason to live." *Id.* He also reported having a "history of auditory and visual hallucinations," and that he had been hospitalized three months earlier "for suicidal ideation" and "one prior attempt via hanging." *Id.* at 1-2.

Based on this information, Dr. Riley diagnosed Braswell with PTSD, recommended "in-patient hospitalization for stabilization," and admitted Braswell into Wagoner Community Hospital where he remained overnight. *Id.* at 2. She also signed a Petition for Involuntary Commitment reciting, *inter alia*, that Braswell "has a mental illness . . . requiring treatment," that he presented a "risk of harm to self or others based

on suicidal ideations . . . and [a] loaded firearm in [his] possession," and that he was being held "in emergency detention." (Ex. 4 at 1) She recommended that the court "order [Braswell] involuntarily committed to hospitalization or the least restrictive treatment necessary." *Id.* at 2.

The next day, May 15, 2009, two licensed mental health professionals at Wagoner Community Hospital, Shalini Sangal and Robin Luellen, conducted a "clinical interview" of Braswell and signed a Report of Evaluation finding that Braswell was "a risk of harm to self and others," and that hospitalization for treatment as an inpatient was required. *Id.* at 3-4. Specifically, the Report of Evaluation recited that, "After a thorough consideration of less restrictive alternatives to inpatient treatment, the condition of the person is such that less restrictive alternatives are unlikely to meet the needs of the person." *Id.* at 3.

The Report of Evaluation was dated May 15, 2009, and was appended to Dr. Riley's Petition for Involuntary Commitment. *Id.* The accompanying Certificate of Evaluation, also signed by Sangal and Luellen on May 15, states that Braswell was "informed of this evaluation and has been advised of, but has not been able or willing accept referral to, . . . Tulsa Center for Behavioral Health" for treatment as an inpatient. *Id.* at 4.

3. **The Hearing and Order of Involuntary Commitment.**

On the same day, May 15, 2009, a judge of the District Court of Cherokee County signed an order scheduling a hearing on the Petition for Involuntary Commitment. (Ex.

5)[1] The Order recites that Braswell had been held overnight at Wagoner Community Hospital, "a secure treatment facility," since May 14, that there was probable cause to detain him there until a hearing on the Petition could be held, and that the hearing would take place at 1:15 pm that day. *Id.*

The hearing was held before Hon. Mark Dobbins, Judge of the District Court for Cherokee County, with Braswell represented by attorney Karen Youree. *In Re: The Mental Health of Derrick Braswell,* Case No. PMH-2009-039. At the conclusion of the hearing, the court entered an Order of Admission to Medical Facility (Ex. 6), finding that Braswell had been committed to Wagoner Community Hospital on May 14, 2009 "on the basis of an Emergency Detention Order," and that on the basis of the reports prepared by the hospital staff, "and having heard evidence of the parties," there was clear and convincing evidence that Braswell "is a person requiring treatment/medication and who should be admitted to a medical facility as a patient." *Id.* Moreover, the court found that Braswell was "incompetent to consent to or refuse treatment that be ordered." *Id.*

Accordingly, the court ordered that Braswell "be committed to the custody of the Department of Mental Health / Tulsa Center for Behavioral Health," and that he should be transported to that facility by Park Ranger Hardaway. *Id.* (emphasis added).

[1] Due to what appears to be a scrivener's error, both the Petition for Involuntary Commitment (Ex. 4) and the Order scheduling the hearing (Ex. 5) state that the matter will be presented to the District Court for Wagoner County. The case number, however, is the same as the case number on the Order of Admission to Medical Facility (Ex. 6), which was undoubtedly issued by the District Court for Cherokee County. Exhibits 4 and 5 were likely prepared by someone at the Wagoner Community Hospital who incorrectly assumed that the matter would be presented to the District Court for Wagoner County.

Pursuant to the court order, Braswell was discharged from Wagoner Community Hospital on May 15, 2009 (Ex. 7), and was transported by the Tulsa Center for Behavioral Health (TCBH) by Hardaway. (Ex. 1)

Braswell was admitted to TCBH on May 15, 2009 at 5:45 pm and remained there as an inpatient until May 18, 2009. (Exs. 8-12). Upon arrival at the facility, Braswell was "cooperative and calm." (Ex. 8 at 1) He stated that the incident at Sequoyah State Park was "blown out of proportion," and denied having any suicidal or homicidal ideation. He admitted having dealt with depression since the accident in which he lost his arm but denied having had any auditory or visual hallucinations other than when he was on pain medication. (Ex. 10 at 1) Nevertheless, the examining physician, Dr. Chris Johnson, found that despite his appearing "to be doing rather well," because Braswell had been sent to TCBH by court order, "he will be admitted and monitored for the time being." *Id.* at 2.

The Discharge Summary dated May 18, 2009, indicates that Braswell was observed for three days and was released upon showing "no suicidality or other dangerous ideation." (Ex. 11) The Discharge Plan indicates that Braswell was referred for outpatient counseling. (Ex. 12)

Braswell was given copies of all of documents relating to his commitment at TCBH. (Exs. 8-12) (each page stamped "This information has been disclosed to you . . . .").

4. **The Revocation of Braswell's Self-Defense Act License.**

On February 27, 2009 – approximately ten weeks before the incident at Sequoyah State Park that led to Braswell's involuntary commitment to TCBH – Braswell applied for a license to carry firearms under the Oklahoma Self-Defense Act ("SDA"). (Ex. 13) The license was issued on May 2, 2009 – two weeks before the involuntary commitment.

Upon being apprised of the involuntary commitment, the Oklahoma State Bureau of Investigation commenced an investigation to determine whether the license should be revoked (Ex. 14), and on August 28, 2009, it initiated an administrative action to do so. *Oklahoma ex rel. Oklahoma State Bureau of Investigation v. Braswell,* SDA No. 9063113. (Ex. 15) A copy of the Bureau's Application and Notice of Hearing was sent to Braswell at his home address. *Id.*

A hearing was held on September 16, 2009, but Braswell did not appear. (Ex. 16 at 1). On September 29, 2009, the Hearing Officer issued a Decision finding that on May 15, 2009, Braswell "was involuntarily committed to a mental institution by the District Court of Cherokee County," and that accordingly, Braswell's SDA license would be revoked. *Id.* at 1-2.

B. Seizure of the Defendant Firearms in 2018.

On April 6, 2018, the Broken Arrow Police Department received an anonymous tip that Derek Braswell was making threats to harm others. Affidavit of SA Brett Williams (Ex. 17). After conducting a preliminary investigation, the police turned the matter over to FBI Special Agent R. Davis, who interviewed Braswell at his Tulsa residence on April 20.

Braswell admitted to Davis that he knew that he had been involuntarily committed to a mental institution, and that his permit to carry a firearm had been revoked (or never issued) for that reason. Nevertheless, Braswell told Davis that in his view he was not prohibited from possessing firearms, and admitted that he had multiple firearms and hunted deer. *Id.* at 2-3.

On August 14, 2018, after obtaining the records of the Cherokee County District Court regarding Braswell's 2009 involuntary commitment, SA Brett Williams of the Bureau of Alcohol, Tobacco and Firearms (ATF) obtained a search warrant for Braswell's residence. (Ex. 17 at 4). SA Williams contacted Braswell, explained the nature of the warrant, and agreed to meet Braswell at the ATF office in Tulsa, where Braswell voluntarily turned over four firearms and 152 rounds of ammunition. *Id.*at 5. The firearms included one Marlin, Model 70, .22 caliber rifle; one Walther, Model P22, .22 caliber pistol; one Springfield Savage, Model 67E, 12-gauge shotgun; and one Taiyojuki, .22 caliber rifle ("the defendant firearms"). *Id.* At 8.

The Government commenced this civil forfeiture action against the defendant firearms by filing a Complaint on February 4, 2019. (Doc. 2).

C. The Deposition of Derek Braswell.

Braswell filed a Claim to the defendant firearms on March 19, 2019 (Doc. 11) and an Answer to the Government's Complaint on April 1, 2019 (Doc. 12). The Government noticed Braswell's deposition and the deposition was taken on April 25, 2019 with Braswell represented by his counsel. The deposition transcript is attached as Exhibit 19.

Regarding the incident at Sequoyah State Park in May 2009, Braswell admitted that he had told another camper that he might have to kill a park ranger if he got in trouble for shooting a deer, but asserted that he had been "joking." Depo. Transcript (hereafter "T.") at 25. He admitted that he had one of the defendant firearms – the Walther P22 – in his waistband when his was arrested. *Id.* He also admitted that he has owned a variety of firearms in the years since 2009, including an AK-47, an AR-15 and an AR-10, all of which are military-style assault weapons. T. 26-29.

Braswell denied making any statements to Lt. Hardaway on the night of his arrest that would indicate that he was suicidal, and denied that he had ever been suicidal at any time in his life. T. 32-33, 54. He admitted that he was transported by Hardaway to Wagoner Community Hospital on May 14, 2009, and stayed there one night before being transferred to TCBH. T. 33. He denied telling Dr. Riley that he had ever considered or attempted suicide, T. 38-39, and denied that he ever admitted to having auditory or visual hallucinations. T. 42, 54.

Regarding the Certificate of Evaluation prepared at Wagoner Community Hospital on May 15, 2009, Braswell disputed the findings of Sangal and Luellen that he was a danger to himself or others. T. 44.

Regarding the hearing before Judge Dobbins in the District Court for Cherokee County, Braswell disputed the court's finding that he was in need of treatment at a mental health facility and that he was incompetent to refuse or to consent to such treatment. T. 47-49. He acknowledged that "they committed me," but maintained that it was done on

the basis of false information. T. 60-61. Furthermore, he acknowledged that the commitment was involuntary. T. 61.

Finally, regarding the revocation of his SDA license to carry a firearm, Braswell acknowledged that he was aware of the Hearing Officer's finding that his license would be revoked. T. 67. He maintained, however, that it was still proper for him to possess a firearm both because he has a Second Amendment right to do so, and because he has no history of mental illness. T. 67-68, 71-72.

When asked to acknowledge that he had admitted to SA Davis that he knew that he had been involuntarily committed to a mental institution, and that his permit to carry a firearm had been revoked (or never issued) for that reason, Braswell invoked the Fifth Amendment and refused to answer. T. 84-85.

IV. ARGUMENT

A. Introduction

"Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *United States v. $148,840 in U.S. Currency*, 521 F.3d 1268, 1273 (10th Cir. 2008), quoting Rule 56(c), F.R.Civ.P.

In this case, the documentary evidence and the deposition testimony of Derek Braswell establish that Braswell was involuntarily committed to a mental institution on May 15, 2009, that he was fully aware that he had been so committed, and that thereafter, on August 22, 2018, he knowingly possessed the defendant firearms in violation of 18

U.S.C. § 922(g)(4). Because a knowing violation of Section 992(g)(4) is grounds for the forfeiture of the firearms involved in the violation, and because there is no genuine issue as to any material fact needed to establish either the violation or the involvement of the firearms in the violation, the Government is entitled to summary judgment as to the forfeiture of the firearms as a matter of law.

B. Section 924(d)(1) Authorizes the Forfeiture of the Firearms

Section 924(d)(1) provides that "Any firearm or ammunition involved in or used in any knowing violation of [section 922(g)] . . . shall be subject to seizure and forfeiture . . . ." 18 U.S.C. § 924(d)(1). In turn, Section 922(g)(4) provides that "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 possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(4). Accordingly, to establish that the firearms are subject to forfeiture, the Government need establish only that a person who has been adjudicated as a mental defective or who has been committed to a mental institution knowingly possessed the firearms. It is not necessary to show that the firearms were used to commit any offense, or that they were otherwise connected to the events that led to the person's commitment to a mental institution. *Cf. United States v. Cheeseman,* 600 F.3d 270, 278 (3d Cir. 2010) (to show that firearms were "involved in" a violation of § 922(g)(3) – possession of a firearm by a drug user – the Government only has to show that the guns were in defendant's possession, not that he used them to facilitate his drug use); *United States v. 13 Firearms and Ammunition*, 2006 WL 1913360, *2 (E.D. Ky.

July 11, 2006) ("The term "involved in or used in" as provided in § 924(d) includes firearms possessed by prohibited persons . . . .").

As in virtually all civil forfeiture cases, the Government's burden is to establish the necessary elements by a preponderance of the evidence. 18 U.S.C. § 983(c)(1); *United States v. 1,679 Firearms*, 2009 WL 3233518, *3 (C.D. Cal. Sept. 30, 2009) (applying the preponderance standard in finding that firearms possessed by a convicted felon were subject to forfeiture under §§ 924(d)(1) and 922(g)(1)). *Cf. United States v. 477 Firearms*, 698 F. Supp.2d 890, 892 (E.D. Mich. 2010) (the preponderance standard applies to all forfeitures under § 924(d)(1) except where the Government's theory is that the firearm was intended to be used to commit an offense in the future).

C. The Elements of Section 922(g)(4) are Satisfied

Under Section 922(g)(4), it is unlawful for a person to possess a firearm in either of two situations: 1) if the person has been adjudicated a mental defective, or 2) if the person has been committed to a mental institution. Braswell was ineligible to possess a firearm under either of these provisions.

1. Braswell has been adjudicated as a "mental defective"

The term "adjudicated as a mental defective" is defined by regulation as follows: "(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of . . . mental illness, incompetency, condition or disease: "(1) is a danger to himself or others; …" 27 C.F.R. § 478.11(a) (2019).

On May 14, 2009, Dr. Jillian Riley, an Emergency Room physician at Wagoner Community Hospital filed a Petition for Involuntary Commitment based on her finding

that Derek Braswell was suffering from depression and post-traumatic stress disorder (PTSD) stemming from the loss of his right arm (Ex. 3), and that he was "risk of harm to self or others based on suicidal ideations . . . and [a] loaded firearm in [his] possession." (Ex. 4). Two licensed mental health professionals at Wagoner Community Hospital, Shalini Sangal and Robin Luellen, conducted a "clinical interview" of Braswell and signed a Report of Evaluation finding that Braswell was "a risk of harm to self and others," and that hospitalization for treatment as an inpatient was required. *Id.* at 3-4.

Based on these findings, the District Court for Cherokee County entered an Order of Admission committing Braswell to the Tulsa Center for Behavioral Health (TCBH). Ex. 7. The entry of that order ratified and adopted the findings by the medical professionals at Wagoner Community Hospital that as a result of "condition or disease," Braswell was "a danger to himself or others," and thus constituted an adjudication that Braswell was a "mental defective" within the meaning of the Section 922(g)(4) and the applicable regulation.

2. Braswell has been committed to a mental institution.

The Order of Admission committing Braswell to TCBH was an order committing Braswell to a "mental institution" within the meaning of Section 922(g)(4).

Whether a person has been committed to a mental institution for the purposes of Section 922(g)(4) "is a question of law to be determined by the court rather than a question of fact to be reserved for the jury." *United States v. v. McLinn,* 896 F.3d 1152, 1156 (10th Cir. 2018). Thus, if the court finds, based on the documentary evidence in the

record, that Braswell was committed to a mental institution, there can be no material issue of fact requiring trial on this issue.

The regulations define "committed to a mental institution" as follows:

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

27 C.F.R. § 478.11.

Courts have emphasized that the definition, by its terms, requires a formal adjudication "by a court, board, commission, or other lawful authority" in an adversarial proceeding where the person is represented by counsel and has the opportunity to present evidence and question witnesses. *See, e.g., United States v. Rehlander*, 666 F.3d 45, 50 (1st Cir. 2012); *United States v. McIlwain*, 772 F.3d 688, 694-96 (11th Cir. 2014) (collecting cases). An *ex parte* determination by a police officer or physician, resulting in an overnight stay in a hospital on an emergency basis, without any formal hearing or determination "by a court, board, commission, or other lawful authority," is not a commitment to mental institution for the purposes of Section 922(g)(4). *See Franklin v. Sessions*, 291 F. Supp. 3d 705, 708, 715 (W.D. Pa. 2017) (following *Rehlander* and other cases). Thus, Braswell's overnight stay at Wagoner Community Hospital prior to his appearance before the judge in the District Court for Cherokee Country *would not* constitute a "commitment to a mental institution" for the purposes of Section 922(g)(4).

On the other hand, if a person appears before a court, is represented by counsel, and has the opportunity to present witnesses and ask questions, and the court then, upon its consideration of the record, finds that there is clear and convincing evidence that the person suffers from a mental illness and requires involuntary commitment to a mental institution, the ensuing commitment *does constitute* a "commitment to a mental institution" for the purposes of Section 922(g)(4).

For example, in *McIlwain,* the person alleged to be in violation of Section 922(g)(4) received a formal hearing and which he was represented by an attorney, and the court made substantive findings that were included in its formal commitment order. 772 F.3d at 697. Among other things, the court in that case found that the person posed a threat of substantial harm to himself and others, that confinement was necessary for his safety, and that such commitment was the best and least restrictive alternative necessary for the person's treatment. *Id.* Thus, the Eleventh Circuit held that he had been committed to a mental institution within the meaning of Section 922(g)(4). *Id.*

Similarly, in *United States v. Dorsch,* 363 F.3d 784 (8th Cir. 2004), the person alleged to be in violation of Section 922(g)(4) appeared at a hearing before a county board where he was represented by counsel and was given the opportunity to present evidence and cross-examine witnesses. 363 F.3d at 786. At the conclusion of the hearing, the board found that he suffered from a mental illness and ordered that he be involuntarily committed to a mental institution for a period of three weeks. 363 F.3d at 785. Just as the Eleventh Circuit held in *McIlwain,* the Eighth Circuit held that the involuntary commitment in these circumstances constituted a commitment to a mental

institution for the purposes of Section 922(g)(4). 363 F.3d at 786. *See also United States v. Whiton*, 48 F.3d 356, 358 (8th Cir. 1995) (affirming application of § 922(g)(4) where state court conducted a hearing before committing the defendant to a mental institution "for temporary mental health services" resulting in his admission for 15 days).

In Braswell's case, the Order of Admission recites that Braswell appeared before District Court for Cherokee County for a hearing on May 15, 2009, at which Braswell was represented by attorney Karen Youree. (Ex. 6). Moreover, the Order recites that the court "examined the file" which contained the Petition for Involuntary Commitment prepared by Dr. Riley and the Report and Certificate of Evaluation prepared by Sangal and Luellen (Ex. 4), and found that, "after having examined said staff report and having heard the evidence of the parties," the evidence was "clear and convincing that [Braswell] is a person requiring treatment/medication and who should be admitted to a medical facility as a patient," and that he was "incompetent to consent to or refuse treatment." (Ex. 6) Accordingly, the court directed that Braswell be "committed to the custody of the Department of Mental Health / Tulsa Center for Behavioral Health." *Id.* (emphasis added).

As a result of that Order, Braswell was taken by a police officer from Wagoner Community Hospital (Ex. 7) to TCBH where he was involuntarily admitted as an inpatient. (Ex. 10-12). Because his admission was the product of an adjudication by a court following a hearing where Braswell was afforded due process, his commitment to TCBH satisfies the definition of the term "committed to a mental institution" for

purposes of Section 922(g)(4) and 27 C.F.R. § 478.11. *See McIlwain, Dorsch,* and *Whiton, supra.*

Finally, the entire proceeding culminating in Braswell's commitment to TCBH was recognized as an involuntary commitment to a mental institution as a matter of Oklahoma law in the proceeding that resulted in the revocation of Braswell's firearms license. *See* Decision of Hearing Officer, *Oklahoma ex rel. Oklahoma State Bureau of Investigation v. Braswell,* SDA No. 9063113 (finding that on May 15, 2009, Braswell "was involuntarily committed to a mental institution by the District Court of Cherokee County") (Ex. 16).

Based on statements he made during the deposition taken on April 25, 2019, it appears that Braswell intends to argue that he was not "committed to a mental institution" within the meaning of Section 922(g)(4) because he was held only "for observation" and was released after only three days. *See* T. 69 Apparently, he intends to invoke the exception to the definition of "committed to a mental institution" in 27 C.F.R. § 478.11 that applies when a person is in a mental institution "for observation." But that exception does not apply in this case, for Braswell's contention that he was committed to TCBH only for observation is belied by the text of the Order of Admission.

The Order expressly states that Braswell "is a person requiring treatment/medication and who should be admitted to a medical facility as a patient," and that the commitment was for the purpose of receiving "treatment as deemed necessary by the attending physician." (Ex. 6). That the attending physician determined after only three days that no further inpatient treatment was necessary and that Braswell could seek

future treatment or counseling as an outpatient (Ex. 12) is beside the point. What treatment was provided and how long the treatment lasted *after the commitment occurred* does not change the fact that Braswell was "committed to the custody" of TCBH for the purpose of receiving treatment. Indeed, the facts in this case differ little from those in *Whiton* where the court committed the person to a mental hospital "for temporary mental health services," 48 F.3d at 358, but he was determined to be capable of participating in outpatient therapy and was discharged after only 15 days. *See also Dorsch*, 363 F.3d at 786 (rejecting contention that the commitment to a mental institution was for "observation" rather than "treatment"). In both of those cases, the courts found that the person had in fact been committed to a mental institution for the purposes of Section 922(g)(4).

Accordingly, the court should find as a matter of law that Braswell is a person who has been committed to a mental institution, and that the elements of Section 922(g)(4) have been satisfied.

D. The Firearms were Involved in a Knowing Violation of Section 922(g).

As discussed in Section IV.B, *supra*, firearms are subject to forfeiture pursuant to Section 924(d)(1) if they have been involved in a knowing violation of Section 922(g)(4). To show that the firearms were involved in such a violation, it is only necessary to show that they were found in the possession of a person who, like Derek Braswell, "has been adjudicated as a mental defective or who has been committed to a mental institution." 18 U.S.C. § 922(g)(4). Because Braswell personally turned the defendant firearms over to the ATF, admitting that they had been in his possession, there is no doubt that the

firearms were "involved in" a violation of Section 922(g)(4) within the meaning of the forfeiture statute. Moreover, because he personally surrendered the firearms, there is no doubt that his possession of them was "knowing."

There is some question as to whether the *mens rea* requirement in the forfeiture statute applies not only to the possession element of Section 922(g)(4) but also to the status element. That is, there is some question as to whether the Government must show that Braswell not only knew that he was in possession of the firearms but also that he had been adjudicated as a mental defective or that he had been committed to a mental institution. For the following reasons, even if the *mens rea* requirement does apply to the status element of Section 922(g)(4), the evidence is clear that Braswell was aware that he had been committed to a mental institution.

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme Court held that for purposes of the criminal provision in Section 924(a)(2), a defendant could be convicted of unlawfully possessing a firearm while an alien illegally in the United States only if the Government proved both that he knew he was in possession of a firearm and that he was illegally in the United States. *See* 18 U.S.C. § 922(g)(5) (providing that it is unlawful for an alien illegally in the United States to possess a firearm). That ruling does not apply to the instant case for two reasons.

First, the *Rehaif* Court emphasized that the scienter requirement is an essential component of the criminal law because it separates "those who understand the wrongful nature of their act from those who do not." 139 S. Ct. at 2196. But the instant case is not a criminal case; it is a civil forfeiture action the purpose of which is not to punish

Braswell or anyone else but to protect the public by ensuring that firearms are not in hands of persons whose history of mental instability renders them a danger to themselves and others. The civil forfeiture action is in essence a regulatory or remedial action, and the courts have long recognized that requirements deemed essential in criminal proceedings do not always apply to remedial proceedings. *See, e.g., United States v. Bajakajian*, 524 US. 321, 341-43 (1998) (distinguishing forfeiture cases considered remedial from those considered punitive for purposes of applying the Excessive Fines Clause of the Eighth Amendment); *United States v. Davis*, 648 F.3d 84, 96 (2d Cir. 2011) (rejecting Eighth Amendment challenge to forfeiture of stolen artwork under 19 U.S.C. § 1595a because the statute is "remedial" and therefor is "outside the scope of the Excessive Fines Clause"); *United States v. Approximately 1,170 Carats of Rough Diamonds*, 2008 WL 2884387, *12 (E.D.N.Y. July 23, 2008) (forfeiture of diamonds imported in violation of the Clean Diamond Trade Act is a purely remedial action designed to control trade, not to punish the property owner; therefore, the Eighth Amendment does not apply).

Second, *Rehaif* involved the provision in Section 922(g) relating to persons who are aliens illegally or unlawfully in the United States. *See* 18 U.S.C. § 922(g)(5). While it may be sensible to require the Government to prove that such a person knew that he was an alien and knew that he was unlawfully in the United States, the same may not be true of requiring the Government to prove that a person knew that he has been adjudicated as a "mental defective" or that he has been committed to a mental institution. As Justice Alito pointed out in his dissent in *Rehaif*, it is unlikely that Congress intended

to allow persons found to be dangers to themselves or others due to mental illness or incompetency to possess firearms because they do not know or understand that a court has so found. 139 S. Ct. at 2207 (Alito, J., dissenting). In response, the Court simply stated that the application of the scienter requirement to Section 922(g)(4) was not before the Court in *Rehaif* and would be left for another day. 139 S. Ct. at 2200.

In all events, even if the knowledge requirement in Section 924(d)(1) does apply to the status element in Section 922(g)(4), it is clear that Braswell was aware that he had been committed to a mental institution.

When Braswell met SA Davis at his residence on April 20, 2018, he admitted that he knew that he had been involuntarily committed to a mental institution, and that his permit to carry a firearm had been revoked (or never issued) for that reason. (Ex. 18) When asked about that admission in his deposition, Braswell invoked the Fifth Amendment and refused to answer (T. 84-85) – an act that allows the court to draw an adverse inference regarding what his answer would have been. *See United States v. $13,000 in U.S. Currency*, 858 F. Supp. 2d 1194, 1205 (D. Col. 2012) (claimant's assertion of Fifth Amendment when asked, at deposition, if he served as a nominee for drug dealers entitled the Government to an adverse inference on that point, and allowed the court to enter summary judgment); *United States v. $9,630.00 in U.S. Currency*, 2007 WL 2572199 (D. Utah 2007) (basing entry of summary judgment, in part, on claimant's invocation of the Fifth Amendment in response to interrogatories concerning the source of the seized currency).

In any event, Braswell was present at the hearing in the District Court for Cherokee County when the court entered the ordering committing him to TCBH, he was provided with copies of all of the relevant paperwork, and when asked at his deposition about those events he said, "they committed me" (T.60) and acknowledged that the commitment was involuntary. (T.61).

Accordingly, all of the requirements necessary to establish the forfeitability of the defendant firearms have been established.

V. CONCLUSION

For all of these reasons, the court should enter summary judgment forfeiting the defendant firearms to the United States.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2019, a complete copy of the foregoing document was hand delivered to:

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