UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA (ALLENTOWN)

DANIEL BINDERUP, Plaintiff, vs. ERIC H. HOLDER, JR., Attorney General of the United States, and B. TODD JONES, Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, Defendants.

Case No: 5:13-cv-06750-JKG

June 16, 2014
10:08 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JAMES KNOLL GARDNER
UNITED STATES DISTRICT JUDGE

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I N D E X

E X H I B I T S

NUMBER	DESCRIPTION	MARKED	ADMITTED

(None marked.)

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ESR OPERATOR: All rise. The United States District Court for the Eastern District of Pennsylvania is now in session. The Honorable James Knoll Gardner presiding. Please be seated.

THE COURT: Good morning, ladies and gentlemen.

MULTIPLE SPEAKERS: Good morning, Your Honor.

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(Pause)

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THE COURT: I want to apologize for the delay in getting started this morning. My 8:45 status conference in another case took considerably longer than anticipated, and I thank you for your patience.

The matter before the court this morning are cross motions in the case of Daniel Binderup versus Eric H. Holder, Jr. and B. Todd Jones, the Attorney General of the United States and the director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, respectively. The Case Number is 13-cv-06750.

The case is before the court for

argument, as I said, on defendants' motion to dismiss or for summary judgment, filed February 20, 2014, and for plaintiff's motion for summary judgment, filed March 10, 2014. And, of course, there were responses filed to each of the motions by the opponent.

I note the presence for plaintiff of Alan Gura, Esquire.

MR. GURA: Good morning, Your Honor.

THE COURT: Good morning, Mr. Gura.

And Douglas T. Gould, Esquire.

MR. GOULD: Good morning, Your Honor.

THE COURT: Good morning, Attorney Gould.

Mr. Gura, which one of you will be arguing this morning for plaintiff?

MR. GURA: Your Honor, I'll be arguing. And I should note for the record the plaintiff is present in the courtroom.

THE COURT: All right. Where is Mr. Binderup?

MR. BINDERUP: Right here, Your Honor.

THE COURT: Good morning, Mr. Binderup. You may be seated. Thank you.

I note the presence for defendant of Daniel Riess.

MR. RIESS: Yes, Your Honor.

THE COURT: Am I pronouncing your name correctly, Attorney Riess?

MR. RIESS: You are, Your Honor. Good morning.

THE COURT: And, also, Attorney Lindsey Farby.

MS. FARBY: Leslie Farby, Your Honor.

THE COURT: Leslie. I am sorry. Yes, it says Leslie. I don't know why I read Lindsey. Leslie Farby. Good morning, Attorney Farby.

MS. FARBY: Good morning.

THE COURT: And, Mr. Riess, who will be lead -- who will be the counsel arguing for defendant this morning?

MR. RIESS: I will, Your Honor.

THE COURT: All right. Very well.

Now, we've got cross motions here, as I indicated. I suggest that what would be the most expedient and efficient would be for us to have one joint argument from each counsel rather than -- for a total of two, rather than two separate arguments, which would result in hearing four oral arguments this morning rather than two.

And I propose, for no other reason that

the defendants' motion was filed earlier than the plaintiff's motion, that the defendant argue first and that Mr. Riess, in his oral argument, argues on the offense in support of defendants' motion to dismiss and -- or for summary judgment and on the defense contra plaintiff's motion for summary judgment as part of one unified argument, followed by plaintiff doing the same thing in reverse, arguing on the offense in support of his motion for summary judgment and defending against defendants' motion to dismiss or for summary judgment in one unified plaintiff's oral argument.

Is that procedure satisfactory to the defendants, Mr. Riess?

MR. RIESS: Yes, it is, Your Honor.

THE COURT: Is that procedure satisfactory to the plaintiffs, Mr. Gura?

MR. GURA: Yes, Your Honor.

THE COURT: All right. Now, Mr. Riess, how much time would you like to have for your joint argument?

MR. RIESS: Do I understand correctly that the limit is 20 minutes, Your Honor?

THE COURT: That's what it says in my policies and procedures, but every rule has its

exceptions. I want to know what your wish list is before I shoot you down. No, no, just a little lame effort at some judicial humor.

No. Tell me how much time you think would be reasonable but not excessive to handle both matters in one argument.

MR. RIESS: I think I could -- I think no more than 25 minutes should be fine.

THE COURT: All right. And the same question for you, Mr. Gura. How much time would you like to have to argue sides of your coin in your argument?

MR. GURA: No more than 25 should suffice, Your Honor. If it's less than that, then all the better.

THE COURT: All right. We'll give each of you 25 minutes and -- and defendant will go first, as I said. Plaintiff will go second.

And there will be no rebuttal or surrebuttal arguments unless I invite or direct it or invite [sic] it or allow it. But those, I think, are all four of the theoretical possibilities. But if I do permit rebuttal and surrebuttal arguments, we'll set additional time deadlines for those, and they won't be against your 25 minutes.

I'll be the timekeeper. At the end of the 25 minutes, if either of you is still talking, I'll wait a minute or so and then politely remind you that your time is up and ask you to conclude. And then I'll wait another minute or so. And if either of you are still talking, I'll direct you to sit down.

Is that procedure satisfactory to the plaintiff?

MR. GURA: Yes, Your Honor.

THE COURT: Is that satisfactory to the defense?

MR. RIESS: Yes, Your Honor.

THE COURT: All right. Then I think that takes care of all the housekeeping details. Mr. Riess, you may approach the podium and make your argument.

MR. RIESS: Thank you, Your Honor. And may it please the court.

THE COURT: Mr. Riess.

MR. RIESS: 18 U.S.C. 922(g)(1) prohibits firearms possession by persons convicted of a crime punishable by a term of imprisonment that exceeds one year.

Courts have uniformly upheld this law as

constitutional, including as applied to offenders whose crimes were not inherently violent in nature.

It is similarly constitutional as applied to plaintiff, who engaged in predatory sexual contact with a teenaged employee 25 years his junior and was convicted of corruption of a minor, punishable by up to five years in prison.

The court should decline plaintiff's invitation today to be the first court to hold 922(g)(1) unconstitutional as applied.

Now, my plan today is to respond to the two counts in plaintiff's Complaint; first, the statutory question, Count 1, and then the constitutional question, Count 2.

In Count 1, plaintiff claims that Section 922(g)(1) doesn't prohibit him from possessing firearms. Now, that claim is barred by Third Circuit precedent.

Plaintiffs ask the court to adopt a statutory reading of (g)(1) that's at odds with the Third Circuit's decision in U.S. v. Essig. That case, the criminal defendant had been convicted of the very same corruption of minor statute that plaintiff's been convicted of and had also received probation, like plaintiff.

The Third Circuit held that (g)(1) prohibited Essig's possession of a firearm because, quote, his state conviction is punishable by imprisonment of up to five years.

Essig forecloses plaintiff's argument supporting Count 1 of the Complaint. It is also contrary to holdings by the D.C. Circuit in Schrader, by the Fourth Circuit sitting in Banks and Coleman, to the legislative history of the statute, and it is contrary to the maxim that Congress doesn't hide elephants in mouse holes, as was mentioned in one case.

Now, as to Count 2, which claims that the law is unconstitutional as applied to plaintiff, that claim has no merit regardless of whether the court follows the Third Circuit's decision in Barton or whether it evaluates the law under means-end scrutiny as in Marzzarella.

My plan is to discuss why plaintiff doesn't succeed under Barton and then very briefly to explain why, for similar reasons, he doesn't succeed under the Marzzarella standard.

Now, Barton upheld (g)(1) as constitutional both on its face and as applied to Mr. Barton. It left the door open to the possibility

of an as-applied challenge. Someone might be able to succeed, but then again, he/she might not.

Barton says, quote, to raise a successful as-applied challenge, Barton must present facts about himself and his background that distinguish his circumstances from those of persons historically barred from Second Amendment protections, and then gave two possible examples.

For instance, a felon convicted of a minor nonviolent crime might show he's no more dangerous than a typical law-abiding citizen. Similarly, a court might find a felon whose crime of conviction is decades old poses no continuing threat to society.

However, the Third Circuit said Barton has failed to demonstrate that his circumstances place him outside the intended scope of (g)(1) and, thus, upheld the statute as applied.

The burden is on plaintiff under Barton to show his circumstances place him outside the intended scope of (g)(1). He has not met that burden for five reasons.

First, courts, since the landmark decision of the Supreme Court in D.C. v. Heller, have uniformly upheld 922(g)(1) as constitutional even as

applied to offenders whose crimes weren't necessarily violent in nature.

The Fourth Circuit in the Pruess case said, quote, our sister circuits have consistently upheld applications of (g)(1) even to nonviolent felons.

That includes offenses such as failure to pay child support, mail fraud, theft of government property. And since the filing of our briefs, the Northern District of Texas also upheld (g)(1) as applied to mail fraud. The case is 2014 Westlaw 2445788.

Now, the Fourth Circuit in Pruess itself cited a number of examples, including Barton itself. Barton was only convicted of a prior drug conviction and receipt of stolen property. It also cited Rozier, an Eleventh Circuit case where the felon had only prior drug convictions, and similar examples from the Ninth Circuit and supporting language from the Fifth through Seventh Circuits.

And then there is Dutton, where the Third Circuit upheld a determination by this court that the Second Amendment -- a Second Amendment challenge to (g)(1) would fail as applied to an offender convicted of two first-degree misdemeanors

under Pennsylvania law; namely, carrying a firearm on a public street and carrying a firearm without a license.

THE COURT: Which -- what degree misdemeanors were those two under Pennsylvania law?

MR. RIESS: I beg your pardon, Your Honor?

THE COURT: The two that you just cited about the firearms under Pennsylvania law, what degree misdemeanors did you say they were under Pennsylvania law?

MR. RIESS: First-degree misdemeanors.

THE COURT: Both were first degree?

MR. RIESS: Yes, Your Honor.

THE COURT: And, again, what were those two firearms offenses?

MR. RIESS: Carrying a firearm on a public street and carrying a firearm without a license.

THE COURT: Okay.

MR. RIESS: On the two that the -- there was no indication in the case history that the -- Mr. Dutton intended to use the weapons or that it was an inherently violent crime.

Second -- the second reason why

plaintiff has not met his burden is that underlying the federal gun prohibitors is a reasonable concern that people who have shown a lack of good judgment and inability to control themselves should not be entrusted with the responsibilities of possessing a firearm.

That's not just (g)(1). There's also (g)(3), which bars unlawful users of or persons addicted to controlled substances; (g)(6), persons who are dishonorably discharged. Past serious criminal behavior goes along with this.

So let's look at the crime here. It's premised on the fact that there is a power imbalance between adults and underage persons. The law says that underage persons cannot legally consent because there's an inherently coercive nature of that power imbalance.

Now, that is especially the case if the adult is in a position of trust, like an employer. The Pennsylvania Superior Court in the Decker case recognized, quote, it requires no stretch of reason to understand an immature female can easily be seduced or mentally overpowered by an adult to engage in a large range of activity, the consequences of which she neither understands nor which she's capable

of dealing and which can have long-range, if not permanent, adverse effects.

Now, here, we had a 41-year-old employer and a teenaged employee. Plaintiff knew that the employee was underage and, thus, that at the time, his conduct was criminal. Despite that, he continued his conduct for a period of 14 months. This was not just a single instance of a lapse of judgment.

And this ties back to the core of the Second Amendment, which, as stated in Heller, is, quote, the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

THE COURT: I'm sorry. Just a minute.

Did you now move to the third reason why plaintiff has not satisfied his burden?

MR. RIESS: About to.

THE COURT: Okay. I misunderstood. So you can finish up what you were trying to tell me about the second one.

MR. RIESS: Okay. Sure, Your Honor. It's just that it's reasonable to conclude that someone who has displayed a long-term inability to control his criminal behavior to the point of criminal misjudgment is not a law-abiding, responsible person, as described in Heller, who can

be entrusted with the use of a firearm.

Now as to the third point, the mere fact that Pennsylvania characterizes this crime as a first-degree misdemeanor doesn't suggest it's a minor crime. It's punishable by up to five years in prison. Plus, as we noted in our briefs, Congress specifically considered and then rejected applying (g)(1)'s prohibition only to certain crimes labeled by states as felonies, with good reason.

As the Supreme Court's explained, while at common law there is a huge distinction, the modern-day distinction between misdemeanors and felonies is, quote, minor and often arbitrary given that numerous misdemeanors involve conduct that's more dangerous than many felonies.

That's true in Pennsylvania. Other first-degree misdemeanors include involuntary manslaughter, negligent homicide while hunting, throwing a fire bomb into an occupied vehicle. All this is just to say, this was a serious offense.

Fourth, just because plaintiff has not been convicted of another crime in the years since his 1998 conviction, that doesn't distinguish him any more than it did Mr. Dutton or Mr. Barton, both of which as to whom 922(g)(1) was upheld as

constitutional.

THE COURT: I'm sorry. I didn't get your fourth point. What are you saying? Just because what?

MR. RIESS: Just because plaintiff hasn't been convicted of another crime in the years since his conviction in 1998, that doesn't distinguish him from Dutton or Barton, where (g)(1) was upheld.

Dutton was decided in 2012, and the plaintiff there had been convicted in 1995. Barton was decided in 2011, and he had been convicted in 1993 and 1995, respectively. So the simple lapse of time didn't matter to the Third Circuit in those cases and should not matter here to distinguish --

THE COURT: What was the date of the conviction in Dutton?

MR. RIESS: In Dutton, the conviction was 1995.

THE COURT: And were both cases decided in 2012, or was Barton decided in 2013?

MR. RIESS: Barton was decided in 2011.

THE COURT: Oh, 2011. Okay.

MR. RIESS: Yes.

THE COURT: All right.

MR. RIESS: First, Your Honor, in a Second Amendment case, the -- the Drake case, the Third Circuit has held, when we review the constitutionality of statutes, courts accord substantial deference to the legislators' predictive judgments. And those predictive judgments demonstrate the reasonableness of (g)(1)'s application here.

The Supreme Court in Huddleston said, the principal purpose of federal gun control legislation was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of, among other things, criminal background. That's the Huddleston case.

And in the Dickerson case, the Supreme Court explained that in order to accomplish this goal, Congress obviously determined firearms must be kept away from persons such as those convicted of serious crimes who might be expected to misuse them.

THE COURT: What case did you just cite?

MR. RIESS: Huddleston.

THE COURT: No, I got Huddleston. What's the second one you -- you recited?

MR. RIESS: Dickerson.

THE COURT: Dickerson. Thank you.

MR. RIESS: And, lastly, in the Dickerson case, it also stated Congress's intent in enacting 922(g) was to keep firearms out of the hands of presumptively risky persons.

So taking all this, when it enacted (g)(1), Congress found the misuse of firearms by persons that are convicted of serious crimes, regardless of whether they're labeled misdemeanors or felonies by the state in which the crime occurred, is a serious problem.

It also specifically found restricting firearms possession by persons that are already convicted of these offenses would help reduce crime.

Now, under the Third Circuit's decision in Drake, those are predictive judgments that receive substantial deference here.

Finally, we'd just like to point out the burden is not on us under Barton. It's on plaintiff. Now, regardless of that, we've submitted empirical evidence linking persons convicted of sexual misconduct crimes with a higher rate of recidivism than the general population.

We've submitted five empirical studies showing that persons convicted of sexual misconduct crimes, as a class, are much more likely --

THE COURT: Now, you say, "We've submitted." This is not a hearing. This is an argument. In what fashion did you get anything on the record of a factual nature?

MR. RIESS: We submitted those as exhibits to our motion to dismiss for summary judgment.

THE COURT: All right. Go ahead.

MR. RIESS: I just point out that the most pertinent of those was an Illinois study showing that 37 percent of sex offender arrestees -- not just those who had served jail times, but arrestees -- over a seven-year period whose victims, like plaintiff, were between 13 and 18 years of age, were rearrested within five years.

And, also, a Delaware study, in which 73 percent of statutory rapists, which is defined as sexual activity with the victim's consent but that the victim was too young to legally consent, who were released from prison were rearrested for a new felony or misdemeanor within three years, 46 percent of those for a new felony offense.

THE COURT: What study is that one?

MR. RIESS: That was a study from the state of Delaware.

THE COURT: Tell me again what percentages you were talking about in the Delaware study. 46 percent of what?

MR. RIESS: 46 percent of persons who had been convicted of statutory rape, which was defined by the study as sexual activity with the victim's consent but the victim was too young to legally consent, who were released from prison were rearrested for a felony offense within three years.

THE COURT: And was there some other percentage figure in another category in the Delaware study?

MR. RIESS: Yes. 73 percent were arrested for either a new felony or a misdemeanor within three years.

THE COURT: Okay.

MR. RIESS: And so, Your Honor, for these five reasons, under the factual circumstances of this case, there is no question that Section 922(g)(1) is constitutionally applied to plaintiff. Plaintiff hasn't met his burden to show otherwise.

Now, very last, I'd like to turn very briefly to the standard under the Marzzarella case in case that is the standard that controls here.

In that case, the Third Circuit set out

a general analysis for analyzing Second Amendment challenges. It said, first, we look to whether the law burdens conduct within the scope of the Second Amendment's guarantee. If it does, we evaluate the law under some form of means-end scrutiny. If it passes muster, it's constitutional; if it doesn't, it's not.

Now, here, even if 922(g)(1) did burden conduct within the Second Amendment scope, which we do not concede, at most, intermediate scrutiny applies. Plaintiff has cited no case that applies strict scrutiny in an as-applied challenge, and it wouldn't make sense to apply strict because we're outside the core right identified in Heller dealing with law-abiding, responsible citizens.

Now, under that standard, plaintiff's challenge fails because there's at least a reasonable fit between applying (g)(1) to a person convicted of plaintiff's crime and the compelling government interest in protecting public safety and combatting crime.

The Supreme Court in Salerno has said that the government's general interest in preventing crime is compelling. We've already discussed the predictive judgments of Congress as to which, under

Drake, court's must afford deference to. And, moreover, the fit here is reasonable.

(g)(1) applies to a person who's been convicted of a crime that's punishable by imprisonment for more than one year. It doesn't apply if the offense is a state misdemeanor only punishable by two years or less imprisonment.

It doesn't apply to certain antitrust or unfair trade practices offenses or any conviction that's been expunged, set aside, or for which a person has been pardoned or had civil rights restored, unless those statements provide that the person may not possess firearms.

As mentioned earlier, we've submitted a number of empirical studies showing that convicted offenders, as a group, including those convicted of crimes that didn't involve violence, present a significant risk of recidivism for crime.

So if the Marzzarella test were to apply, we've shown a reasonable fit between (g)(1), as applied to persons convicted of crimes like plaintiff's, and the government's interest in protecting public safety and reducing crime. So the law passes muster under immediate scrutiny, as in the D.C. Circuit Schrader case.

In conclusion, Your Honor, plaintiff's statutory claim is foreclosed by binding precedent. That binding precedent was not overturned implicitly by Heller, as plaintiff claims, because the Third Circuit precedent only discussed statutory arguments. It did not discuss the Second Amendment. And so it was not overturned in the Heller case.

As for the constitutional claim, rights, even constitutional rights, come with responsibilities, and the core of the Second Amendment is its protection of the rights of law-abiding, responsible citizens.

922(g)(1) has repeatedly been held constitutional as applies to offenses that were not inherently violent in nature; mail fraud, receiving stolen property. It is constitutional as applied to the crime that plaintiff committed, which demonstrates a severe lack of judgment and self-control over an extended period of time and is punishable by up to five years in prison.

We would ask the court grant our motion to dismiss or enter summary judgment for the defendants.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

All right. Mr. Gura, you may approach the podium and make plaintiff's argument.

MR. GURA: Thank you, Your Honor.

It's important to begin every case with an examination of what it is that the plaintiff actually claims, and only then do we apply the law, beginning with those rules that are either fixed by statute or precedent, whether either side or the court believes them to be the most optimal.

So let's clarify what it is exactly that Mr. Binderup is claiming here and what he is not claiming.

First, there is no claim in this case that the length of the Binderup sentence determines the outcome of this -- of the application of Section 922(g)(1). There was some argument to that effect in the government's brief, but that simply is a misreading of the Complaint.

Second, there is no official challenge here to Section 922(g)(1). There is no categorical challenge to Section 922(g)(1) either. There is no claim that the statute is overbroad. There is no claim that the statute is unconstitutional with respect to all misdemeanors or all violent -- nonviolent misdemeanors or even all violations of

this particular Pennsylvania statute.

Accordingly, while the discussion of cases such as Salerno and Huddleston and Dickerson is well taken, it's also completely irrelevant.

Also irrelevant is Congress's predictive judgment about the utility and benefits of applying Section 922(g)(1) generally to misdemeanors. The Congress made no predictive judgments about Mr. Binderup, and Mr. Binderup's personal circumstances are the only things that are here at issue.

Barton thus controls, and in that case, the government conceded something that the Third Circuit accepted which is far too late to take back now. And I know that the court has probably read Barton and will probably do so again, but if the court will indulge me, I think it's useful to frame the argument by focusing on Barton's language.

To quote, the government conceded that Heller's statement regarding the presumptive validity of felon gun disposition statutes does not foreclose an as-applied challenge. By describing the felony disarmament ban as presumptively lawful, the Supreme Court implied that the presumption may be rebutted, close quote.

Now, how does that happen? What guidepost did the Third Circuit give this court in evaluating such a challenge? There was no means-end scrutiny, there was no intermediate scrutiny applied, which should not be surprising for two reasons.

First, there was no means-end scrutiny -- intermediate, strict, or otherwise -- in Heller itself, which is a shining example of how sometimes laws are simply invalid for conflicting with the Second Amendment's guarantee. That is not the issue that we have here today.

The second reason for the Third Circuit's refusal or lack of interest in applying the Marzzarella balancing test in Barton is as follows: It simply does not make sense.

We are not dealing with how the law generally fits the government's interest. We are asking whether there is a government interest extending to the particular plaintiff. Again, Congress has made no predictive judgment regarding this particular person, however beneficial or useful that law is generally applied.

And so the Third Circuit told us that the following factors are to be considered. Quoting again, to raise a successful as-applied challenge,

Barton -- and here, I suppose, Binderup -- must present facts about himself and his background to distinguish the -- his circumstances from those of persons historically barred from Second Amendment protections. For instance, a felon convicted of a minor nonviolent 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.

Again, the key word there is "historically," and the rule of Barton is that a plaintiff prevails when he is, quote, no more dangerous than a typical law-abiding citizen and, quote, poses no continuing threat to society.

In the government's combined response, page 10 provides -- and I'm quoting here from the government's brief -- if anything, Barton actually shows that plaintiff is categorically excluded from the Second Amendment's protection.

This is simply not what Barton stands for. Barton goes on at length to show that there are as-applied challenges, and it gives us guideposts as to how to determine them.

In Barton, the Third Circuit was not

veering too far off from Congress's intent. Let's recall that Congress also enacted Section 925(c), which provides as follows, allowing for relief from disability, quote, where the circumstances regarding the disability and the applicant's record and reputation are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest, close quote.

That's Congress's language recognizing that while the statute they enacted in 922(g) is generally applicable and valid and wholesome, there are going to be exceptions, where people are not dangerous, and therefore, relief should be granted.

And here, we submit that the Barton factors are all satisfied. We have the following facts about Binderup personally in the record:

First, he is a peaceful, law-abiding member of the community and has been for many years.

Second, he is a family man. He's a successful entrepreneur.

Third -- and this is very important if your read Barton's language and take it seriously -- his crime did not involve violence or the misuse of firearms.

I suppose that Binderup's crime, of course, like all crimes, indicated a -- a -- an episode of poor judgment. But if poor judgment is going to be the reason for denying people relief, then Barton must be overruled or must not be binding, and there cannot be any as-applied claims.

That cannot be. Barton specifically stated that we look to whether the crime itself was violent, whether it suggests that there is a risk to society from the person having firearms.

And here, the crime, while regrettable, is certainly not one that involved any violence or misuse of violence [sic].

I should also add that plaintiff does object for the record to the repeated statements by the government that Mr. Binderup engaged in predatory behavior. There is nothing in the record suggesting that at all, and we have stayed away from redigging up the facts of what happened many years ago.

But, finally, the one thing, which the government omits mentioning, which I think is extremely important here, Your Honor, is that the -- is that the state government here, with the blessing of the prosecutor and the local judge, granted Mr. Binderup relief from Pennsylvania's prohibition

on the possession and use of firearms.

So we have a determination by that level of government, which in our federal system is most responsible for ensuring public safety, that Binderup's possession and use of firearms is not contrary to public safety.

In contrast to the evidence that we submitted about Mr. Binderup, the government has given us absolutely nothing about Mr. Binderup personally. Rather, the government speaks about generalized statistics and evidence about recidivism.

There is a problem here. The government goes so far as to say that even nonviolent property offenders have a high risk of recidivism and, therefore, might be banned from getting as-applied relief.

If even a nonviolent property offender is at an unacceptable risk of recidivism such that that person cannot obtain relief, then, again, this is an argument for overruling Barton, because then no one can get relief. But we know that under Barton, somebody might, at least in theory, get relief.

And as far as these studies go that the government has submitted, I won't belabor the point. We've addressed them all in the record.

But with respect, at least to the Delaware study, again, these are studies that followed people who were released from prison. There is a selection bias issue here, Your Honor.

Mr. Binderup was not sent to state prison. I submit that he was not sent to state prison because the judge in that case realized that the facts of the case and Mr. Binderup's circumstances and background did not warrant that type of punishment.

Obviously, people who are sent to prison are viewed differently by their sentencing judges. That's why they're in prison. And that's why, perhaps, criminologists prefer to study them much more than those people who are given probation and therefore -- and thereafter lead a crime-free life.

So we submit that we have, on the one side of the scale, individualized facts about Mr. Binderup. That's what Barton requires. That's what Barton establishes is going to be binding. The government has not responded to that.

It is true that in other cases people have not been able to get relief, but, again, this is a sui generis issue. Every case has its own facts. Every person has his or her own personal

circumstances.

Dutton, for example, a case -- an unpublished Third Circuit opinion upon which the government relies very heavily, involved a person who made no -- who submitted no evidence whatsoever of their personal circumstances.

And all the court held in Barton was that it is not unconstitutional to apply Section 922(g)(1) to a person who has not submitted any evidence that -- that distinguished their personal circumstances from those of other felons who are categorically unprotected by the Second Amendment. That's almost a direct quote.

Again, in Dutton, we had a pro se plaintiff who filed an apparently incomprehensible Complaint that, quote, did not seem to allege either of the appellees violated his Second Amendment rights or that Section (g)(1) violates the Second Amendment, and he, again, quote, presented no facts distinguishing his circumstances, close quote.

We here have presented facts. Now, does all this mean that we should be entitled to prevail on the constitutional claim? I suppose, Your Honor, that -- that it does, and we would be comfortable with prevailing on that theory, but we do have the

constitutional avoidance doctrine in play here.

As we have learned time and time again, most recently in the Bond case just last week, the Supreme Court does not want federal courts reaching constitutional claims where there is a fairly possible -- that's Chief Justice Roberts' argument -- a fairly possible ground upon which to decide the case in some other fashion.

And here, we submit that there is a fairly possible statutory interpretation that would provide Mr. Binderup with relief.

The government claims on page 2 of the combined response that theirs is, quote, the most logical reading of the statute. But, again, that is precisely what Chief Justice Roberts has explained is not the standard when it comes to the constitutional avoidance doctrine. Rather, the standard is whether there is a fairly possible alternative, and here, we do have one.

Section 921(a)(20) defines what it means to have a crime punishable by imprisonment for a term exceeding one year. It, quote, does not include any state offense classified by the laws of the state as a misdemeanor and punishable by a term of imprisonment of two years or less, close quote.

Now, there are some limiting principles that jump out at us right away. First of all, contrary to the suggestions that the government makes in its combined response, this does not mean that in any case, until sentencing has been passed down, there is an issue of whether (g)(1) applies.

We are only dealing here with state offenses classified as misdemeanors. So federal crimes of any nature and state felonies are not going to be subject to the exception of Section 921(a)(20).

So what -- so what does "punishable by" mean? Well, if "punishable by" means subject to a specified punishment, then Mr. Binderup would lose his statutory argument.

But there's another way to interpret Section 921(a)(20)(B), which is to see that "punishable by" means capable of being punished, which is precisely the way that that language, "punishable by," is understood in this circuit and every circuit to explain Section 922(g)(1)'s operative clause, "capable of being punished."

Well, Mr. Binderup's offense, while it calls for a possible five-year sentence, is certainly capable of being punished by a term of imprisonment of two years or less.

If we were to adopt the government's interpretation, which would mean the reference here is to a specified punishment, we'd have to add words to the statute. We'd have to say that that means that the crime is punishable only by a term of imprisonment of two years or less in order to come within Section 921(a)(20)'s exception.

Again, we do have an alternative reading of the statute, and that is one which works fairly well.

The Schrader case accepted this definition in terms of 921(a)(20)(B)(2), but then misapplied it. It's a very strange case in that it adopted the, quote, common sense meaning of this term, "punishable" refers to any punishment capable of being imposed, but then it read 921(a)(20)(B)(2) as being inclusive rather than exclusive. The statute actually defines "punishable by over one year" in order to limit that, the reach of that statute.

So if we use "punishable by," we see that Mr. Binderup's crime is actually excluded.

The Essig case, of course, does -- does adopt the more restrictive definition; however, Essig was decided a long time ago. There is no way to

imagine that if Essig were decided today, there would be no discussion whatsoever of how Heller impacts the statutory interpretation or no discussion whatsoever of the Second Amendment, as it comes to us in a pre-Heller, pre-Second Amendment time.

And that case has been superseded by Heller. The fact is that these days, we understand and the court must recognize, as I'm sure it does, that there is a fundamental individual right at stake, and that case would be decided differently.

We've seen that type of approach occur in other circuits post-Heller. For example, as we explained, in the First Circuit, the First Circuit, without going on Bond, disregarded its prior interpretation of 922(g)(4) and gave it a more limiting construction in U.S. versus Rehlander precisely to avoid a constitutional problem under the Second Amendment.

And so we would submit that that, of course, also is something that would apply here.

In conclusion, Your Honor, we have two arguments, a statutory argument and a constitutional argument. We submit that both warrant relief.

The Supreme Court tells us that we should look first to the statutory argument to avoid

the constitutional issue, but we are quite comfortable that, given the historical pedigree of the crime of which Mr. Binderup was convicted, as well as 922(g) itself with its concern for crimes of violence, as well as all of the personal factors that we've submitted in this case, most especially the fact that a state court has already determined that Mr. Binderup should not be disarmed, Mr. Binderup is entitled to relief.

And with that, Your Honor, I submit. Thanks.

THE COURT: All right.

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(Pause)

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THE COURT: Mr. Gura, under Barton, even if we assume that the prior offense here was nonviolent, how and what authority suggests that it was a minor offense as contemplated in Barton?

MR. GURA: Your Honor, our argument does not turn on whether the offense is minor, major, or anything in between. Barton tells us, actually, that the -- that the concern was with crimes of violence, and Barton spends some time discussing that particular concern. I mean, this was not a crime of

violence.

And so we would not say the crime itself is minor. We -- we defer to the Pennsylvania legislature's determination and, also, the state judge's determination of how serious this crime was.

There were two determinations made here. First of all, Pennsylvania has chosen to classify this as a first-degree misdemeanor. This is not a case of child molestation. This is not a case of somebody who -- who is abusing children.

If, in fact, Mr. Binderup had committed that crime, he would have been convicted of a felony, of a very serious felony. He would absolutely have gotten jail time before any state judge in this state. That's not what occurred. He was convicted of a Class 1 misdemeanor.

And, of course, the judge had the discretion, if the judge wanted to, to sentence Mr. Binderup to up to five years in jail. But looking at the facts of the case and what occurred there -- that court was closer to the situation, it was better able to see what the facts were, and determined that a sentence of probation was sufficient.

And then we have the judgment of another

state court several years later, which, with the prosecution's blessing, reviewed the facts and came to the conclusion that there is no risk of harm to the community from Mr. Binderup's possession and use of firearms, and then he was given relief from disability.

Barton teaches us that not only is violence or the potential for violence the -- the largest factor that we look to when it comes to seeing what the conviction -- underlying conviction was -- Barton also tells us that we look to the other circumstances surrounding the plaintiff.

Again, the ultimate analysis in Barton is to see whether, here, Mr. Binderup is no more dangerous than a typical law-abiding citizen and poses no continuing threat to society.

And there is nothing here in the record that indicates that Mr. Binderup is more dangerous than a typical law-abiding citizen. There is nothing that indicates that he poses any continuing threat to society. In fact, if Mr. Binderup posed some threat to society even back in 1998, one would imagine that he would have received a much stiffer sentence.

THE COURT: All right. Thank you.

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(Pause)

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THE COURT: Mr. Riess, plaintiff -- plaintiff submitted a notice of supplemental authority regarding the Supreme Court's recent decision in the Bond case and also referred to it in his argument briefly. Do you care to comment on the impact of that opinion on this case?

MR. RIESS: Certainly, Your Honor.

I guess, first, we disagree with plaintiff's statement in the supplemental authority that Bond is highly relevant to the case.

It involved the construction of an international chemical weapons treaty, and it determined that because a woman who had been prosecuted under the chemical weapons treaty for what was described by that court as an amateur attempt by a jilted wife to injure her husband's lover by putting chemicals on a doorknob and ended up causing only a minor thumb burn does not -- does not -- it construed it as not reaching that particular activity.

Now, plaintiff claims the Bond case bolsters his constitutional avoidance and rule of lenity arguments, and we disagree.

Constitutional avoidance, I'd note first that the court in the NFIB case, v. Sebelius, which the plaintiff quotes, talking about the fairly possible standard -- I believe it used that in upholding the Affordable Care Act.

What precedent from this circuit has said, and from the Supreme Court, is, there have to be serious constitutional questions. That's the Northwest Austin Municipal Utility District case from the Supreme Court.

And in the Reno v. Flores case, statutes should be interpreted to avoid serious constitutional doubts, not to eliminate all possible contentions that the statute might be unconstitutional. But we would suggest that that is not the case here.

As for the rule of lenity, which plaintiff claims Bond bolsters, that's only if there is a grievous ambiguity, and we would submit that there is none such here.

Even if the interpretation plaintiff wants weren't foreclosed by the Third Circuit in Essig -- which, by the way, Essig said nothing about the Second Amendment and collective rights, and therefore, there's no indication that Heller would have any bearing -- the -- it would be at odds with

common sense, because the reading would eliminate 922(g)(1) from applying to any misdemeanor as long as there was no mandatory minimum. If it were capable of being punished by 10 years, 25 years, life, it would fall within the exception. And as I quote in my opening statement, it's a dictum that Congress doesn't hide elephants in mouse holes. That's a pretty big elephant.

As to the final point with -- as to -- for which plaintiff cites Bond, that here, Pennsylvania restored his rights, we would submit that the subsequent case brought by Mr. Binderup actually shows very little.

Under Pennsylvania C.S.A. 6105(d), under which the plaintiff was granted relief, it says if you're convicted of certain enumerated offenses, the court, quote, shall grant such relief, the firearms disability relief, if ten years have elapsed since the conviction.

The offenses include the corruption of minors statute of which plaintiff was convicted. It includes [indiscernible] murder, voluntary manslaughter, rape, kidnapping, arson. But the point is, there's no discretion for the court to award a firearms disability relief.

And we've looked at the docket sheet, which we'd be happy to submit, if the court wishes to review. It shows no involvement of any counsel except for counsel for the plaintiff.

So we would submit that the -- the subsequent case brought by the plaintiff here actually shows very little, and therefore, we would disagree with plaintiff's statement that the Bond case is highly -- both highly relevant here and that it indicates that plaintiff should prevail.

THE COURT: Thank you.

MR. RIESS: Thank you, Your Honor.

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(Pause)

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THE COURT: Mr. Riess, does your order of argument, with Barton coming first and Marzzarella argued as a second alternative option, reflect your assessment and prediction that the Third Circuit would find Barton to be controlling in plaintiff's as-applied challenge here?

MR. RIESS: To be honest, Your Honor, we're not certain. Our guess is that Barton would because it speaks to -- to what -- it talked about, to proceed on an as-applied challenge.

But we have conflicting panel decisions. Marzzarella didn't say that it was either -- didn't say that it was a facial decision, and it set forth a general standard for applying the two-step test to -- to cases. Also, Marzzarella actually set forth a standard, whereas it's difficult to discern some sort of judicially manageable standard from Barton.

So to answer your question, Your Honor, in an abundance of caution, we did it under both. Since Barton talks about, to succeed on as-applied, we briefed it under that. We think it's probably Barton over Marzzarella, but we are honestly not sure.

THE COURT: Okay. Well, that's honest. I appreciate it.

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(Pause)

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THE COURT: All right. I'm going to declare a recess for deliberations of 30 minutes. And then it's my intention to return to court and either decide the case from the bench, if I -- the argument from the bench, if I am able, or to take the matter under advisement, if that's more appropriate.

You may declare a 30-minute recess.

ESR OPERATOR: Please remain seated. This court is in recess for 30 minutes.

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(Whereupon, a recess was had between 11:09 a.m. and 12:10 p.m.)

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ESR OPERATOR: Please remain seated. This court is again in session.

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THE COURT: Let the record reflect that the participants in this matter of Binderup versus Holder who were identified on the record at the beginning of the argument on the cross motions for summary judgment are once again present, two counsel for each side. And plaintiff, I believe, is not at the moment in the courtroom -- oh, he just came in. Okay. Mr. Binderup is here as well.

After deliberating for an hour on the matter of the cross motions -- that is, plaintiff's motion for summary judgment and defendants' motion to dismiss or for summary judgment -- and considering the briefs and the oral arguments of the parties -- that it would be fairer to the parties in this case and their counsel and will result in a more appropriately accurate and correct outcome under the

facts and the law to take this matter under advisement so that my law clerk and I can further study, research, and discuss the interesting and sometimes complex issues involved here, as presented by each side from both perspectives in an articulate and -- and persuasive and rationale way.

And so we will take the matter under advisement, and we will advise the parties and counsel by issuing an order and opinion or a footnoted order, as appropriate.

And you may adjourn court.

ESR OPERATOR: All rise. This honorable court is adjourned.

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(Whereupon, the proceeding was concluded at 12:13 p.m.)

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C E R T I F I C A T I O N

I, Judi Y. Olsen, do hereby certify that the foregoing is a true and correct transcript from the electronic sound recordings of the proceedings in the above-captioned matter.

Date

Judi Y. Olsen