

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF PENNSYLVANIA (ALLENTOWN)

3 DANIEL BINDERUP,) Case No:
4 Plaintiff,) 5:13-cv-06750-JKG
5 vs.)
6 ERIC H. HOLDER, JR., Attorney)
7 General of the United States,)
8 and B. TODD JONES, Director of)
9 the Bureau of Alcohol, Tobacco,)
10 Firearms, and Explosives,) June 16, 2014
11 Defendants.) 10:08 a.m.

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

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I N D E X

PAGE

COLLOQUY

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ARGUMENT

By Mr. Riess

9, 42

By Mr. Gura

26

E X H I B I T S

NUMBER

DESCRIPTION

MARKED

ADMITTED

(None marked.)

1 - - -

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

6 THE COURT: Good morning, ladies and
7 gentlemen.

8 MULTIPLE SPEAKERS: Good morning, Your
9 Honor.

10 - - -

11 (Pause)

12 - - -

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

18 The matter before the court this morning
19 are cross motions in the case of Daniel Binderup
20 versus Eric H. Holder, Jr. and B. Todd Jones, the
21 Attorney General of the United States and the
22 director of the Bureau of Alcohol, Tobacco, Firearms
23 and Explosives, respectively. The Case Number is
24 13-cv-06750.

25 The case is before the court for

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

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

8 MR. GURA: Good morning, Your Honor.

9 THE COURT: Good morning, Mr. Gura.

10 And Douglas T. Gould, Esquire.

11 MR. GOULD: Good morning, Your Honor.

12 THE COURT: Good morning, Attorney
13 Gould.

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

16 MR. GURA: Your Honor, I'll be arguing.

17 And I should note for the record the plaintiff is
18 present in the courtroom.

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

21 MR. BINDERUP: Right here, Your Honor.

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

24 I note the presence for defendant of
25 Daniel Riess.

1 MR. RIESS: Yes, Your Honor.

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

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

6 THE COURT: And, also, Attorney Lindsey
7 Farby.

8 MS. FARBY: Leslie Farby, Your Honor.

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

12 MS. FARBY: Good morning.

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

16 MR. RIESS: I will, Your Honor.

17 THE COURT: All right. Very well.

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

25 And I propose, for no other reason that

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

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

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

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

18 MR. GURA: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

8 Is that procedure satisfactory to the
9 plaintiff?

10 MR. GURA: Yes, Your Honor.

11 THE COURT: Is that satisfactory to the
12 defense?

13 MR. RIESS: Yes, Your Honor.

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

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

20 THE COURT: Mr. Riess.

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

25 Courts have uniformly upheld this law as

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

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

8 The court should decline plaintiff's
9 invitation today to be the first court to hold
10 922(g)(1) unconstitutional as applied.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 That includes offenses such as failure
8 to pay child support, mail fraud, theft of government
9 property. And since the filing of our briefs, the
10 Northern District of Texas also upheld (g)(1) as
11 applied to mail fraud. The case is 2014 Westlaw
12 2445788.

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

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

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

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

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

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

12 MR. RIESS: First-degree misdemeanors.

13 THE COURT: Both were first degree?

14 MR. RIESS: Yes, Your Honor.

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

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

20 THE COURT: Okay.

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

25 Second -- the second reason why

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

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

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

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

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

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

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

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

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

16 MR. RIESS: About to.

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

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

1 be entrusted with the use of a firearm.

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

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

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

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

1 constitutional.

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

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

10 Dutton was decided in 2012, and the
11 plaintiff there had been convicted in 1995. Barton
12 was decided in 2011, and he had been convicted in
13 1993 and 1995, respectively. So the simple lapse of
14 time didn't matter to the Third Circuit in those
15 cases and should not matter here to distinguish --

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

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

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

22 MR. RIESS: Barton was decided in 2011.

23 THE COURT: Oh, 2011. Okay.

24 MR. RIESS: Yes.

25 THE COURT: All right.

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

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

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

20 THE COURT: What case did you just cite?

21 MR. RIESS: Huddleston.

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

24 MR. RIESS: Dickerson.

25 THE COURT: Dickerson. Thank you.

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

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

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

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

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

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

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

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

8 THE COURT: All right. Go ahead.

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

16 And, also, a Delaware study, in which
17 73 percent of statutory rapists, which is defined as
18 sexual activity with the victim's consent but that
19 the victim was too young to legally consent, who were
20 released from prison were rearrested for a new felony
21 or misdemeanor within three years, 46 percent of
22 those for a new felony offense.

23 THE COURT: What study is that one?

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

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

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

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

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

16 THE COURT: Okay.

17 MR. RIESS: And so, Your Honor, for
18 these five reasons, under the factual circumstances
19 of this case, there is no question that Section
20 922(g)(1) is constitutionally applied to plaintiff.
21 Plaintiff hasn't met his burden to show otherwise.

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

25 In that case, the Third Circuit set out

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

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

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

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

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

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

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

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

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

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

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

13 922(g)(1) has repeatedly been held
14 constitutional as applies to offenses that were not
15 inherently violent in nature; mail fraud, receiving
16 stolen property. It is constitutional as applied to
17 the crime that plaintiff committed, which
18 demonstrates a severe lack of judgment and
19 self-control over an extended period of time and is
20 punishable by up to five years in prison.

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

24 Thank you, Your Honor.

25 THE COURT: Okay. Thank you.

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

3 MR. GURA: Thank you, Your Honor.

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

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

13 First, there is no claim in this case
14 that the length of the Binderup sentence determines
15 the outcome of this -- of the application of Section
16 922(g)(1). There was some argument to that effect in
17 the government's brief, but that simply is a
18 misreading of the Complaint.

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

1 this particular Pennsylvania statute.

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

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

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

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

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

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

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

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

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

1 Barton -- and here, I suppose, Binderup -- must
2 present facts about himself and his background to
3 distinguish the -- his circumstances from those of
4 persons historically barred from Second Amendment
5 protections. For instance, a felon convicted of a
6 minor nonviolent crime might show that he is no more
7 dangerous than a typical law-abiding citizen.
8 Similarly, a court might find that a felon whose
9 crime of conviction is decades old poses no
10 continuing threat to society.

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

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

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

25 In Barton, the Third Circuit was not

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

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

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

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

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

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

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

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

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

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

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

1 on the possession and use of firearms.

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

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

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

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

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

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

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

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

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

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

1 circumstances.

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

7 And all the court held in Barton was
8 that it is not unconstitutional to apply Section
9 922(g)(1) to a person who has not submitted any
10 evidence that -- that distinguished their personal
11 circumstances from those of other felons who are
12 categorically unprotected by the Second Amendment.
13 That's almost a direct quote.

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

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

1 constitutional avoidance doctrine in play here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 THE COURT: All right.

13 - - -

14 (Pause)

15 - - -

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

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

1 violence.

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

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

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

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

25 And then we have the judgment of another

1 (Pause)

2 - - -

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

9 MR. RIESS: Certainly, Your Honor.

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

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

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

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

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

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

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

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

1 common sense, because the reading would eliminate
2 922(g)(1) from applying to any misdemeanor as long as
3 there was no mandatory minimum. If it were capable
4 of being punished by 10 years, 25 years, life, it
5 would fall within the exception. And as I quote in
6 my opening statement, it's a dictum that Congress
7 doesn't hide elephants in mouse holes. That's a
8 pretty big elephant.

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

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

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

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

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

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

16 - - -

17 (Pause)

18 - - -

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

25 You may declare a 30-minute recess.

1 ESR OPERATOR: Please remain seated.

2 This court is in recess for 30 minutes.

3 - - -

4 (Whereupon, a recess was had between
5 11:09 a.m. and 12:10 p.m.)

6 - - -

7 ESR OPERATOR: Please remain seated.

8 This court is again in session.

9 - - -

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

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

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

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

11 And you may adjourn court.

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

14 - - -

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

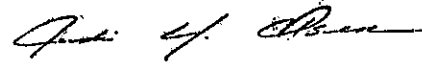
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C E R T I F I C A T I O N

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

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