No. 19-2694

In the United States Court of Appeals for the Third Circuit

EDWARD A. WILLIAMS,

Plaintiff-Appellant,

v.

MERRICK B. GARLAND, ATTORNEY GENERAL, et al.,

Defendants–Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:17-cv-02641
The Honorable Robert F. Kelly

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The government argues that it is "settled law" that the controlling test from *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016) (en banc) is the multifactor test in Judge Ambro's opinion. At least some judges of this Court believe otherwise. And while many judges agree that the test from *Marks v. United States*, 430 U.S. 188 (1977) determines the controlling *Binderup* opinion, no judge has conducted a *Marks* analysis for *Binderup*.

As elucidated in Williams' opening brief and elaborated on here, the dangerousness test from Judge Hardiman's concurrence is the controlling *Binderup* opinion under *Marks* and should apply here.

But regardless of which test applies, Williams' challenge succeeds. Williams succeeds under Judge Hardiman's dangerousness test because he has successfully distinguished himself from the dangerous persons historically barred from possessing arms. Williams has no history of violence and a Board-certified clinical psychologist determined that his possession of firearms presents no risk to himself or others.

Williams succeeds under Judge Ambro's multifactor test because: (1) his DUI conviction was a misdemeanor; (2) his DUI did not involve the

use of force; (3) he received the lightest possible punishment; and (4) there is no cross-jurisdictional consensus regarding the seriousness of the crime, because his conduct would meet the traditional definition of a felony in only eleven other states.

While the government heavily relies on this Court's decision in *Holloway v. Attorney Gen. U.S.*, 948 F.3d 164 (3d Cir. 2020) to justify its ban as applied to Williams, the cases differ in two important respects. First, the *Marks* analysis in Williams' opening brief, unrefuted by the government, establishes that a different test—the dangerousness test—must apply here. Second, even if the multifactor test applies, the "risk of harm" factor applied exclusively in *Holloway* has no significance here—a series of psychological tests have demonstrated that Williams' possession of a firearm would pose no risk to himself or others.

Because Williams is not the type of person historically prohibited from keeping arms, he still has Second Amendment rights. Consequently, the government cannot forever deprive him of those rights, and 18 U.S.C. § 922(g)(1) is unconstitutional as applied to him.

ARGUMENT

I. This Court has not yet applied a *Marks* analysis to *Binderup*, and under *Marks* the dangerousness test controls.

A. Which *Binderup* opinion controls is unsettled.

The government derides Williams' assertion that the dangerousness test controls as "remarkable," "extraordinary," and "meritless." Ans. Br. at 9, 21. But judges of this Court have made similar assertions. For example, in *Holloway*, Judge Fisher stated, "despite the declaration in *Binderup* to the contrary, I do not think *Marks* requires us to treat the multifactor test as controlling authority." 948 F.3d at 180 (Fisher, J., dissenting). Likewise, in *Folajtar v. Attorney Gen. U.S.*, Judge Bibas determined that "[p]recedent does not settle" the historical limitations for firearms prohibitions for felons. 980 F.3d 897, 914 (3d Cir. 2020) (Bibas, J., dissenting). He explained that "*Beers [v. Attorney Gen. U.S.*, 927 F.3d 150 (3d Cir. 2019)] was vacated, so it is not precedent. And *Holloway* dropped a footnote, relying on the now-vacated decision in *Beers* to 'set forth the Binderup majority holdings.' So that footnote was built on sand that has since washed away. Plus, neither panel decision did a *Marks* analysis of the fractured opinions in *Binderup*." *Id.* at 913 (quoting *Holloway*, 948 F.3d at 170–71 & n.5).

When Holloway petitioned for rehearing en banc on the premise that the proper analysis had not been definitively defined and needed to be resolved, and further, that *Marks* supports the dangerousness test, Judges Jordan, Hardiman, Matey, and Phipps would have granted the petition. Sur Petition for Rehearing, *Holloway v. Attorney Gen. U.S.*, No. 18-3595 (3d Cir. July 9, 2020). This may or may not reflect a desire to rule in favor of the dangerousness test, but it does suggest that several judges recognize that the issue is unsettled.

By comparison, Judges Ambro, Smith, and Greenaway, Jr. formed the contingent that declared the multifactor test controlling in *Binderup*; Judges Fuentes and Shwartz applied the test in *Holloway*; and Judge Krause joined Judge Ambro's opinion applying the test in *Folajtar*.

In sum, despite the government's claims, it is far from "settled law" that the multifactor test applies. Ans. Br. at 24, 28. Indeed, the government largely relies on unpublished and vacated decisions from this Court as well as case law from sister Circuits for support. *See* Ans. Br. at 24 (citing *King v. Attorney Gen. U.S.*, 783 F. App'x 111, 113 (3d Cir. 2019) (unpublished); *Beers*, 927 F.3d at 156, *vacated*, 140 S. Ct.

2758 (2020); *Medina v. Whitaker*, 913 F.3d 152, 156 (D.C. Cir. 2019); *Hamilton v. Pallozzi*, 848 F.3d 614, 625 (4th Cir. 2017)). Presumably, the sister Circuits were merely accepting the three-judge contingent's declaration that theirs was the controlling *Binderup* opinion as true. To be sure, neither the D.C. Circuit nor the Fourth Circuit conducted their own *Marks* analysis.

What judges of this Court have agreed upon is the appropriateness of applying *Marks* to determine the controlling *Binderup* opinion. *See Binderup*, 836 F.3d at 356 (Ambro, J., opinion); *Holloway*, 948 F.3d at 170; *id.* at 180 (Fisher, J., dissenting); *Folajtar*, 980 F.3d at 913 (Bibas, J., dissenting). The confusion comes from the fact that no judge has applied the test yet.

As noted in Williams' opening brief, while the three-judge contingent in *Binderup* declared that *Marks* supported their opinion, 836 F.3d at 356 (Ambro, J., opinion), no judge of this Court has conducted a *Marks* analysis. In response to Williams' analysis demonstrating that at least three of the four *Marks* approaches favor the dangerousness test (and the fourth favors neither test), Op. Br. at 16–20, the government offers a meek rebuttal.

B. *Marks* supports the dangerousness test.

The government claims that "*Marks* indicates that Judge Ambro's opinion is controlling," because Judge Hardiman's "rule would invalidate a broader swath of § 922(g)(1) than Judge Ambro's opinion." Ans. Br. at 27. Specifically, the government argues, "Judge Hardiman's opinion would have held that all 'non-dangerous persons convicted of offenses unassociated with violence may rebut the presumed constitutionality of § 922(g)(1) on an as-applied basis,'" whereas "Judge Ambro's opinion . . . recognized that certain non-violent criminals can be constitutionally disarmed." *Id.* "For that reason," the government concluded, "Judge Ambro's test is the 'position taken by those Members who concurred in the judgment on the narrowest grounds.'" Ans. Br. at 27–28 (quoting *Marks*, 430 U.S. at 193).

The government does not explain why its argument satisfies any version of the *Marks* test, or even which version it purports to be applying. Rather, the government cites a decision that the United States Supreme Court reversed, which stated that "in a constitutional case where (1) there is a 5-4 split or there are only two opinions in the majority and (2) the majority strikes down a law as unconstitutional,

the authoritative standard will be that which would invalidate the fewest laws as unconstitutional." Ans. Br. at 28 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 694 (3d Cir. 1991), *rev'd in part*, 505 U.S. 833 (1992)) (brackets omitted). Aside from being nonauthoritative, this Court's *Casey* decision does not support the multifactor test—both tests invalidate *the same law*—18 U.S.C. § 922(g)(1)—only in different circumstances. Moreover, the multifactor test has "no fixed rules," *Binderup*, 836 F.3d at 351 (Ambro J., opinion), so it is impossible to say that either test would invalidate that one law in more circumstances.

Failing to find any binding authority from this Court, the government again resorts to citing the Fourth Circuit and D.C. Circuit opinions accepting Judge Ambro's declaration that his was the controlling opinion in *Binderup*. Ans. Br. at 28.

Lastly, in a footnote, the government asserts that "none of the . . . four *Marks* approaches" analyzed in Williams' opening brief "support recognizing Judge Hardiman's opinion as controlling." Ans. Br. at 29 n.4. But the government does not even address the Shared Agreement, Logical Subset, or Median Opinion approaches, nor Williams' analysis

of *Binderup* under each approach. The government disputes only that the All Opinions approach favors the dangerousness test. *Id.*

According to the government, the All Opinions approach works against Williams because "running the facts of Williams' case through the three Binderup opinions, a majority (the ten judges represented by Judge Ambro's and Judge Fuentes's opinions) would agree that Williams committed a serious offense and that his as-applied challenge accordingly fails." *Id.* That is not true. The multifactor test applied in *Binderup* favors Williams. Section 922(g)(1) was held constitutional in *Holloway* due *only* to the new factor, not applied in *Binderup* (or in any other case), that considered the "potential for danger and risk of harm to self and others." *Holloway*, 948 F.3d at 173. The *Binderup* multifactor test, by contrast, supports Williams, as the *Holloway* majority and dissent acknowledged. *See Holloway*, 948 F.3d at 179 (Fisher, J., dissenting) ("The majority appears to concede that at least three of the four *Binderup* factors are in Holloway's favor. . . ."). Thus, running the facts of Williams' case through the three Binderup opinions, a majority (the eight judges represented by Judge Ambro's

and Judge Hardiman's opinions) would agree that Williams is not the type of person historically prohibited from possessing arms.

The government seems to be trying to impose *Holloway*'s "risk of harm" factor into the multifactor test implemented in Judge Ambro's *Binderup* opinion. But that factor did not apply in *Binderup*, and there is no reason to believe that any of the judges joining Judge Ambro's *Binderup* decision would agree that the "risk of harm" factor is relevant. None of them endorsed or applied it in *Binderup* or in any other case. And Judge Ambro declined to apply it in *Folajtar*, which was decided after the factor's invention in *Holloway*.

The All Opinions approach supports Williams under the tests *applied in Binderup*, because (1) DUI is not a serious crime under the *Binderup* multifactor test,[1] and (2) because every judge agreed that modern-day firearm prohibitions must reflect historical prohibitions, 836 F.3d at 347 (Ambro, J., opinion); *id.* at 362 (Hardiman, J., concurring); *id.* at 389 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments), and historical prohibitions applied to those who were dangerous, Op. Br. at 22–26. For the reasons stated in Williams'

[1] *See Binderup*, 836 F.3d at 377 n.25 (Hardiman, J., concurring) and discussion *infra*, in section II.

opening brief and not seriously disputed by the government, the Logical Subset and Shared Agreement approaches support Williams as well. Op. Br. at 16–19. The Median Opinion approach does not appear to support any *Binderup* opinion, but it is the most problematic version of the *Marks* test, and for the reasons started in the opening brief, should not be adopted here. Op. Br. at 19–20.

In sum, three of the four *Marks* approaches require that the dangerousness test in Judge Hardiman's *Binderup* concurrence apply here, while the fourth test supports neither opinion. And even under the government's interpretation of the All Opinions approach, Williams' challenge succeeds.

II. Williams is not the type of dangerous person historically forbidden to bear arms.

According to the government, "even if dangerousness were the applicable standard, Williams' challenge would fail," because anyone "who has operated a vehicle at nearly three times the legal limit and who has since repeatedly disregarded the firearms laws is the kind of 'person who has demonstrated that he would present a danger to the public if armed.'" Ans. Br. at 31 (quoting *Binderup*, 836 F.3d at 369

(Hardiman, J., concurring)) (brackets omitted). The government claims that "Judge Hardiman and his concurring colleagues agreed that a DUI is a dangerous offense." *Id.* at 30.

To the contrary, the *Binderup* concurrence expressly stated that a "DUI conviction [i]s a dangerous act—but not in the sense of the traditional concerns motivating felon dispossession." 836 F.3d at 377 n.25 (Hardiman, J., concurring). For support, the concurrence cited *Begay v. United States*, 553 U.S. 137, 145 (2008), which held that "drunk driving is not a 'violent felony' . . . because it does not involve 'purposeful, violent, and aggressive conduct.'" *Id.*

Moreover, the claim that Williams demonstrated a propensity for violence by "repeatedly disregard[ing] the firearms laws" is disingenuous. Ans. Br. at 31. It is undisputed that Williams believed he could legally possess a firearm because the court docket sheet provided that he was convicted of a non-disqualifying second-degree misdemeanor. Op. Br. at 4. Furthermore, he passed the background check required to acquire a firearm, giving him no reason to second-guess whether he was prohibited based on what he thought was a second-degree misdemeanor. App. Vol. 4, P. 81. That misunderstanding

in no way reflects a propensity for violence, or a willingness to disregard firearms laws. To the contrary, as soon as Williams learned that he was prohibited from possessing arms, he immediately refrained from doing so, and undertook actions to regain his rights in accordance with the law. Op. Br. at 4–6. There is no historical basis for disarming Williams due to this confusion, and to be sure, the government has not provided one.

In a last-ditch effort, the government claims in a footnote that "Williams' historical arguments are erroneous." Ans. Br. at 31 n.5. But the government fails to dispute a single law that Williams cited, identify any error in the *Binderup* concurrence's historical analysis, or provide any historical analysis of its own.

III. Williams presents a unique case that is distinguishable from *Holloway*.

The main thrust of the government's answer brief is that because Section 922(g)(1) was upheld as applied to Holloway, who was convicted of the same crime as Williams, Section 922(g)(1) must be upheld as applied to Williams. But despite the similarities between the two cases, there are important differences that compel different outcomes.

Most fundamentally, as explained above, the *Binderup* concurrence's dangerousness test should apply here rather than the multifactor test applied in *Holloway*. No *Marks* analysis was conducted in *Holloway*, and the application of the multifactor test was erroneous.

But even if the multifactor test applies, *Holloway* is distinct from this case—a unique factor, with no proper application here, was added to the multifactor test in *Holloway* and determined the outcome. That factor—the "potential for danger and risk of harm to self and others," *Holloway*, 948 F.3d at 173—has never been considered in any other case—in this Court or elsewhere—and should not be considered here. While the *Holloway* Court did not explain why the "risk of harm" factor was relevant in that case alone, it is not relevant in this case.

Unlike Holloway, Williams was examined by a Board-certified clinical psychologist, Robert Gordon, Ph.D., ABPP, after his conviction. Op. Br. at 5–6, 37–38. Dr. Gordon concluded that Williams has no "addiction or violent tendencies," and that he "may possess a firearm without risk to himself or any other person." *Id.* at 6. The government claims that the medical report proving Williams' fitness is "not relevant" because "'[t]here is no historical support for the view that the

passage of time or evidence of rehabilitation can restore Second Amendment rights that were forfeited.'" Ans. Br. at 18 (quoting *Holloway*, 948 F.3d at 172, 177 n.15 and *Binderup*, 836 F.3d at 350, 354 n.7 (Ambro, J., opinion)). But *Binderup* was not considering this new "risk of harm" factor when it dismissed evidence of rehabilitation. And how could a medical examination determining that Williams "may possess a firearm without risk to himself or any other person" *not* be relevant to the issue of whether he presents the "potential for danger and risk of harm"?

What is more, there *is* historical support for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights. In 1637, Massachusetts Bay's leadership disarmed 76 supporters of Anne Hutchinson (who was banished from the colony for criticizing its clergy's legalistic interpretation of the Bible) and exiled others, but allowed some supporters who confessed their sins to reenter the community and regain their arms rights. Bradley Chapin, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606–1660, 102–04 (2010). Connecticut's 1775 wartime law disarmed an "inimical" person only "until such time as he could prove his friendliness to the liberal cause."

4 THE AMERICAN HISTORICAL REVIEW 282 (1899). Massachusetts' 1776 law provided that "persons who may have been heretofore disarmed by any of the committees of correspondence, inspection or safety" may "receive their arms again . . . by the order of such committee or the general court." 1776 Mass. Laws 484. And after Shays' Rebellion—in which armed bands in 1786 Massachusetts attacked courthouses, the federal arsenal in Springfield, and other government properties, leading to a military confrontation with the Massachusetts militia on February 2, 1787—Massachusetts restored the arms rights of many persons "guilty of treason, or giving aid or support to the present rebellion" after three years. 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS FROM 1780–1805, at 145–47 (1805). In all these examples, once the perceived danger abated, the arms disability was lifted.

Williams has proven that he may possess a firearm "without risk to himself or any other person," so no "risk of harm" factor should work against him. Whatever the reason was for considering that factor in *Holloway*, the factor adds nothing to the analysis here.

Without the "risk of harm" factor, Williams easily satisfies the original multifactor test—that is, the test as applied in *Binderup*. The factors Judge Ambro's *Binderup* opinion considered are: (1) whether the crime is a misdemeanor or felony; (2) whether the use or attempted use of force was an element of the crime; (3) the actual sentence imposed; and (4) whether a consensus exists among other jurisdictions that the crime is serious. 836 F.3d at 351–52 (Ambro, J., opinion).

As explained in Williams' opening brief, (1) Williams' DUI conviction was a misdemeanor; (2) the crime did not involve the use or attempted use of force; (3) Williams received the lightest possible punishment—90 days of house arrest; and (4) Williams' conduct would meet the traditional definition of a felony in only eleven other states—far less than *Binderup*, in which a consensus did not exist where nearly half the states would have punished the crime with a sentence meeting the threshold of a traditional felony. Op. Br. 31–33; 836 F.3d at 352 (Ambro, J., opinion).

The government does not seriously dispute that these factors favor Williams. Instead, it relies on *Holloway*, arguing that "Williams' offense constitutes a serious offense for the same reasons that Holloway's

offense constituted a serious offense." Ans. Br. at 16. But without the "risk of harm" factor, Holloway would have been successful. Both the *Holloway* majority and dissent recognized that the original *Binderup* multifactor test favored Holloway, *see Holloway*, 948 F.3d at 179 (Fisher, J., dissenting), just as the district court here held that the original *Binderup* multifactor test favored Williams, App. Vol. 1, P. 21 ("Williams has thus carried his high burden of showing that his misdemeanor was not serious. Accordingly, he has distinguished himself from those persons historically excluded from the right to bear arms."). The government has provided no reason for this Court to rule to the contrary.

IV. A complete ban on Second Amendment rights for someone with Second Amendment rights is categorically invalid, but the ban fails even intermediate scrutiny.

The government cannot carry its burden under either the dangerousness test or multifactor test, so it must justify the law under heightened scrutiny. It does not carry this burden either.

The government takes for granted that intermediate scrutiny—the lowest level available in Second Amendment cases—applies. As

explained in Williams' opening brief, a complete ban on Second Amendment rights for someone with Second Amendment rights is categorically invalid. *Cf. Holloway*, 948 F.3d at 189 n.17 (Fisher, J., dissenting) ("I do not think the application of intermediate scrutiny in *Binderup* is binding precedent under the *Marks* rule."). But even under intermediate scrutiny, Section 922(g)(1) is unconstitutional as applied to Williams.

First, Section 922(g)(1) is underinclusive. Op. Br. at 42–44. The government does not dispute that "only about one in five individuals behaving exactly as Holloway did would be barred from possessing a firearm under § 922(g)(1)." *Id.* at 43 (quoting *Holloway*, 948 F.3d at 192 (Fisher J., dissenting)). Instead, it claims that "[s]uch cross-jurisdictional variation results because, in determining which crimes should be disqualifying, Congress deferred to state legislative judgments about the seriousness of crimes as expressed through the maximum punishment prescribed for those crimes." Ans. Br. at 37. But the Pennsylvania legislature does not believe a DUI should be disqualifying. Williams' DUI conviction never prevented him from purchasing or possessing firearms under Pennsylvania law. 18 Pa.C.S.

6105(c)(3). The government, disregarding the minimum sentence Williams actually received, misinterprets the fact that Pennsylvania chose to grant discretion to its judges to match sentences to the severity of the offense within a broad range rather than micromanage sentencing, as evidence that Pennsylvania intended for every person convicted of DUI to be treated as someone who received a maximum sentence.

Williams' conviction gave the sentencing judge considerable latitude, and he was sentenced to the absolute minimum—house arrest and electronic monitoring for only ninety days, Op. Br. at 1—well less than the statutory cutoff for Section 922(g)(1) of two years. That the judge had discretion to impose a greater sentence for a more serious offense within the broad law should be of no constitutional significance.

Focusing on only the maximum sentence rather than the actual sentence imposed is arbitrary in jurisdictions that favor greater judicial discretion—they may have precisely the same view of the seriousness of Williams' conduct as jurisdictions that create narrower tranches of violations with narrower sentencing ranges within those tranches. Indeed, in most jurisdictions where the gradations in offenses are more

narrowly defined by law, Williams would not have been disqualified under Section 922(g)(1). Op. Br. at 32. The law is therefore underinclusive, and the broad discretion granted to the sentencing judge should not outweigh the fact that Williams was sentenced to the mandatory minimum, well under Section 922(g)(1)'s two-year statutory cutoff.

Second, the government relies on Dr. Wintemute's three-decades-old study on the experiences of a single state to argue that "depriving individuals convicted of a second DUI at the highest rate of alcohol from possessing firearms demonstrates a reasonable fit with the goal of protecting public safety." Ans. Br. at 33. But the study itself acknowledges its limited utility: "This study has the obvious limitation that the data are old and from a single state. A large longitudinal study now under way will provide further information based on contemporary data." 24 *Firearms, Alcohol and Crime: Convictions for Driving Under the Influence (DUI) and Other Alcohol-Related Crimes and Risk for Future Criminal Activity Among Authorised Purchasers of Handguns*, INJURY PREVENTION 72 (2018).

Additionally, in the study, "[v]iolent and firearm-related crimes were combined because aggravated assault was often recorded *without information on the type of weapon used, if any*." *Id.* at 69 (emphasis added). It is therefore impossible to determine whether those individuals previously convicted of DUI were later convicted of an offense involving a firearm or merely some other violation of law. And the study was not even limited to DUIs involving alcohol: "DUI convictions among our study subjects may have resulted from impairment due primarily to drugs other than alcohol." *Id.* at 71. Finally, the study shows that the vast majority—78.5%—of its sample committed no subsequent "violent or firearms-related" offenses. *Id.* at Table 2.[2]

In sum, Dr. Wintemute's small and outdated study says almost nothing definitive or specific about alcohol users and violent or firearms-related crimes, except that most people convicted of alcohol-related offenses *do not* later commit violent or firearms-related crimes. *Id*. Combined with the specific facts here—including that Williams has

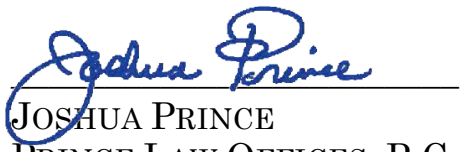
[2] Curiously, the study group consisted of 5,923 individuals, but the results section was limited to 4,066 individuals, and there is no explanation for excluding 1,857 individuals in the study group from the results section.

no history of violence and that a Board-certified clinical psychologist determined that his possession of firearms presents no risk to himself or others—the study adds little to the analysis.

CONCLUSION

For the foregoing reasons, and those stated in the opening brief, the judgment of the district court should be reversed.

Respectfully submitted,



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Dated this 18th day of August 2021.

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2021, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Third Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 18th day of August 2021.

Counsel for Appellant