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

PETITION FOR REHEARING *EN BANC*

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STATEMENT PURSUANT TO FED. R. APP. P. 35(B)(1) AND L.A.R. 35.1

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court, *i.e.*, the panel's decision is contrary to this Court's decision in *Binderup v. Att'y Gen. United States*, 836 F.3d 336 (3d Cir. 2016) (en banc) and the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. __ (2022). Additionally, this appeal involves a question of exceptional importance, *i.e.*, how to adjudicate as-applied Second Amendment challenges brought by prohibited persons.

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INTRODUCTION

Edward Williams was convicted of a misdemeanor for the nonviolent offense of driving under the influence 17 years ago. Williams received the mandatory minimum sentence—house arrest and electronic monitoring for 90 days—but based on the conviction federal law forever prohibits him from possessing a firearm.

Federal law forbids anyone convicted of a crime punishable by imprisonment of over one year to ever possess a firearm, regardless of whether the crime was nonviolent or when it occurred.

This broad federal law is unsupported by history in many of its applications and thus contradicts this Nation's tradition of firearm regulation. Indeed, the Government failed to provide any examples of similar or analogous historical laws. It is therefore unconstitutional.

This Court has held the law unconstitutional in some applications—but in a split decision by a divided *en banc* panel. It was never clear—to Judges or litigants—which opinion from the *en banc* decision controlled. Then last month, the Supreme Court issued its first major Second Amendment decision since 2010 and invalidated the two-part test that

this Court adopted in 2010 to adjudicate Second Amendment challenges.

Consequently, this Court's Second Amendment precedents are in disarray and the test applied to uphold the ahistorical federal law forever depriving Williams of his constitutional rights has been invalidated.

STATEMENT OF ISSUES MERITING *EN BANC* RECONSIDERATION

1. Does a test based on virtue or dangerousness apply to as-applied Second Amendment challenges brought by prohibited persons?
2. Does a lifetime firearms prohibition based on a nonviolent misdemeanor conviction violate the Second Amendment?

STATEMENT OF THE CASE

Edward Williams has no history of violent behavior. Yet, he is forever prohibited from possessing firearms under 18 U.S.C. §922(g)(1), which forbids anyone convicted of a crime punishable by over one year of imprisonment to possess a firearm. Section 922(g)(1) applies because

of Williams's 2005 misdemeanor conviction for driving under the influence.

Because Williams had a previous DUI non-conviction in 2001—which was later expunged—the 2005 conviction qualified as a first-degree misdemeanor, punishable by up to five years' imprisonment. App. 2. But Williams was never imprisoned. He was placed under house arrest for 90 days, and ordered to pay costs, a $1,500 fine, and complete any recommended drug and alcohol treatment. *See id.* at 2-3.

Williams's court docket sheet indicated that he had been convicted of a second-degree misdemeanor—which would not have triggered a prohibition under Section 922(g)(1)[1]—so he did not discover that he was prohibited from possessing firearms until he was denied a license to carry in 2015. At that point, he refrained from possessing or using firearms in any capacity. Opening Br. 4.

Prior to that, for nearly two decades, Williams worked as a firearms instructor, sales manager, and range safety officer at a firearms store

[1] *See* 18 U.S.C. §921(a)(20) (defining "crime punishable by imprisonment for a term exceeding one year" for misdemeanor offenses).

and range. *Id.* Thus, while he has no history of violent behavior, he does have a history of firearms safety and responsibility.

Hoping to regain his Second Amendment rights to defend himself and his family as well as resume his occupation teaching firearms safety, Williams voluntarily underwent an examination by a psychologist, Dr. Robert M. Gordon, in 2018. *Id.* at 5. Dr. Gordon conducted a variety of tests "to determine if Mr. Williams is fit to be allowed to own, possess, carry, and use a firearm without risk to him or any other person." *Id.* Williams was subjected to many tests and procedures, including the Minnesota Multiphasic Personality Invetory-2, Brief Psychiatric Rating Scale, Montreal Cognitive Assessment Test, Violence Risk Appraisal Guide-R, Hare Revised Psychopathy Checklist, and Psychodiagnostic Chart. *Id.* at 5-6. The testing demonstrated that Williams has a normal personality without violent tendencies or psychopathology. *Id.* at 6. Dr. Gordon therefore concluded that "Mr. Williams may possess a firearm without risk to himself or any other person," and "recommend[ed] that Mr. Williams be allowed to own, possess, carry, and use a firearm." *Id.*

Williams filed this as-applied challenge to Section 922(g)(1) in the United States District Court for the Eastern District of Pennsylvania, alleging that his Second Amendment rights cannot be permanently denied based on his nonviolent misdemeanor conviction. D.Ct. Dkt. 1.

The district court, applying the two-part test adopted by this Court in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), granted the Government's motion for summary judgment and denied Williams's as-applied challenge. *Williams v. Barr*, 379 F. Supp. 3d 360 (E.D. Pa. 2019). In part one of the two-part test, the court considered whether Section 922(g)(1) burdens Williams's Second Amendment rights. The court considered the four factors provided by Judge Ambro's opinion in *Binderup v. Att'y Gen. United States*, 836 F.3d 336 (3d Cir. 2016) (en banc), which are used to demonstrate whether a crime is "serious" enough to indicate a lack of "virtue" and thus justify disarmament, *id.* at 348: (1) whether the crime is a misdemeanor or felony; (2) whether the offense was violent; (3) the actual punishment the challenger received; and (4) whether there is a cross-jurisdictional consensus regarding the seriousness of the crime. *Williams*, 379 F. Supp. 3d at 370 (citing *Binderup*, 836 F.3d at 351-53 (Ambro, J., opinion)). After

determining that the first, second, and fourth factors weighed in Williams's favor and thus that his Second Amendment rights were burdened, the district court proceeded to part two of the test. *Id.* at 374. In part two, where *Marzzarella* required that the court select and apply the appropriate level of heightened scrutiny, the district court upheld the law under intermediate scrutiny. *Id.* at 380.

Williams appealed, arguing that based on the rule for interpreting split opinions set forth for in *Marks v. United States*, 430 U.S. 188 (1977), the controlling *Binderup* opinion was Judge Hardiman's concurrence rather than Judge Ambro's opinion. Opening Br. 11-20. Moreover, "present-day disarmament laws must reflect historical laws," and historically, only persons "likely to use firearms for illicit purposes" were disarmed, as Judge Hardiman's concurrence elucidated. *Id.* at 23, 27. "The virtuous citizen theory" from Judge Ambro's opinion, Williams explained, "has no basis in history." *Id.* at 27.

Without addressing which *Binderup* opinion controls, the panel ruled against Williams based on *Holloway v. Att'y Gen. United States*, 948 F.3d 164 (3d Cir. 2020). App. 5. Holloway was also subject to a lifetime firearms prohibition under Section 922(g)(1) due to a misdemeanor DUI

conviction. In *Holloway*, this Court applied the two-part test from *Marzzarella*, including the multifactor virtue test from Judge Ambro's *Binderup* opinion in part one. *Holloway*, 948 F.3d at 173-77. But after finding that the original *Binderup* factors favored Holloway, *see id.* at 179 (Fisher, J., dissenting) ("The majority appears to concede that at least three of the four Binderup factors are in Holloway's favor"), the majority added a fifth factor to the test: the "potential for danger and risk of harm to self and others," *id.* at 173. Adding new factors was acceptable because "[t]here are no fixed rules for determining whether an offense is serious" and thus disqualifying. *Id.* at 172.

One month after the panel issued its decision in this case, the Supreme Court issued its decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. __ (2022). In holding that ordinary Americans have a right to carry arms in public, the *Bruen* Court invalidated the two-part test that this Court applied to Second Amendment challenges. Instead, the Court reaffirmed the test it established in *District of Columbia v. Heller*, 554 U.S. 570 (2008)—*i.e.*, "a test rooted in the Second Amendment's text, as informed by history," which requires "the government [to] demonstrate that the regulation is consistent with this

Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S., slip op. at 8, 10.

ARGUMENT

I. This Court's two-part test for Second Amendment challenges has been invalidated by the Supreme Court's *Bruen* decision.

The panel here ruled against Williams based on "a precedential opinion" in which this Court "applied the two-step test from the *Marzzarella* decision." App. 4. Since the panel decision, however, the Supreme Court has invalidated that test. The Supreme Court expressly "decline[d] to adopt that two-part approach" that "the Courts of Appeals have coalesced around," and instead mandated "a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 597 U.S., slip op. at 8, 10. Williams, therefore, was denied his Second Amendment rights based on an invalid test.

1. *Bruen* foreclosed the multifactor virtue test from step one of the two-part test.

For prohibited persons cases, in part one of the two-part test, this Court has considered whether a crime is "serious" enough to indicate a lack of "virtue" and therefore justify disarmament. *Binderup*, 836 F.3d

at 348 (Ambro, J., opinion). Because "the category of serious crimes changes over time as legislative judgments regarding virtue evolve," *id.* at 351, "there are no fixed criteria for determining whether crimes are serious enough to destroy Second Amendment rights," *id.*

In practice, the test evolves more rapidly than *Binderup* suggests. The seriousness criteria may change from case to case. For DUI misdemeanants, this Court has considered: (1) whether the crime is a misdemeanor or felony; (2) whether the crime was violent; (3) the actual sentence imposed; (4) whether a cross-jurisdictional consensus exists regarding the seriousness of the crime; and (5) the crime's "potential for danger and risk of harm to self and others." *Holloway*, 948 F.3d at 173-77. Notably, the "risk of harm" factor has never been considered outside of the misdemeanor DUI context.

This multifactor virtue test is ahistorical. *Bruen* requires "the government [to] demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." 597 U.S., slip op. at 8. But no historical law ever disarmed anyone because the crime was "serious" or the person lacked "virtue." Nor did disarmament ever depend on whether the crime was classified as a misdemeanor or felony,

the actual sentence imposed, or the existence of a cross-jurisdictional consensus. These factors are twenty-first century inventions and thus improper considerations according to *Bruen*.

Indeed, the idea that Americans could be disarmed based on virtue was invented by late-20th-century academics. Judge Bibas analyzed every source commonly cited to support the virtue theory: "eight academic articles and decisions of six other circuits." *Folajtar v. Att'y Gen. United States*, 980 F.3d 897, 915 (3d Cir. 2020) (Bibas, J., dissenting). "Though the list looks long and impressive," Judge Bibas explained, "that impression is misleading. On close inspection, each layer lacks historical support or even undermines" the theory. *Id.* Ultimately, the virtue test "rests on strained readings of colonial laws and ratifying conventions perpetuated by scholars and courts' citing one another's faulty analyses." *Id.* at 919. Then-Judge Barrett's historical analysis also revealed that the Second Amendment's "limits are not defined by a general felon ban tied to a lack of virtue or good character." *Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting). Other judges who have examined the actual history have reached the same conclusion. *See, e.g.*, *State v. Roundtree*, 2021 WI 1, at

¶94 (Hagedorn, J., dissenting) ("The virtuous citizenry standard lacks any foundation in the historical backdrop to the Second Amendment."); *State v. Weber*, 2020-Ohio-6832, at ¶88 n.3 (DeWine, J., concurring) ("I find that [virtue] explanation less persuasive and underprotective of the Second Amendment right"); *see also* Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 275-83 (2020) (tracing the virtuous-citizen theory to its roots in scholarship from the 1980s and finding no historical law disarming anyone based on virtue). In sum, there is "no historical evidence … indicating that 'virtuousness' was a limitation on one's qualification for the right," and "contemporary insistence to the contrary falls somewhere between guesswork and *ipse dixit*." *Binderup*, 836 F.3d at 372 (Hardiman, J., concurring).

Even the Government denounced the "ill-defined multifactor standard" because it "contradicts the historical understanding of the right to bear arms." Pet. For Writ of Cert. 10, 25, *Sessions v. Binderup*, 137 S.Ct. 2323 (2017) (No. 16-847).

What is more, the multifactor virtue test contradicts "this Nation's historical tradition of firearm regulation" that does exist. As explained

in Part II, the historical tradition regarding prohibited persons allowed the disarmament only of persons likely to use firearms for illicit purposes. Because "[t]he category of 'unvirtuous citizens' … covers any person who has committed a serious criminal offense, violent or non-violent," *Binderup*, 836 F.3d at 348 (Ambro, J., opinion), it applies to peaceable persons whom the Founders never would have disarmed—like Williams.

Moreover, under the multifactor virtue test, it is impossible for someone to "regain their lost Second Amendment rights after not posing a threat to society for a period of time." *Id.* at 350. But this also contradicts history. Offenders in the Founding Era could often regain their rights upon providing securities (a financial promise, like a bond) of peaceable behavior. For example, individuals "who shall go armed offensively" in New Hampshire were imprisoned "until he or she find such surities of the peace and good behavior." ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE IN NEW ENGLAND 2 (1759). Some states during the Revolutionary War had procedures for restoring arms rights once the person no longer posed a danger. *See, e.g.*, 4 THE AMERICAN HISTORICAL REVIEW 282 (1899) (1775 Connecticut); 1776

Mass. Laws 484. Even many of the treasonous rebels who took up arms in Shays's Rebellion regained their arms rights after three years of peaceable behavior. 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS FROM 1780–1805, at 145–47 (1805).

2. *Bruen* foreclosed the heightened scrutiny analysis applied in part two of the two-part test.

In the second part of the two-part test, this Court would apply heightened scrutiny. But *Bruen* reaffirmed that "the Courts of Appeals' second step is inconsistent with *Heller*'s historical approach and its rejection of means-end scrutiny." 597 U.S., slip op. at 15 (quotation omitted). With the second part now invalid, this case presents an ideal vehicle for the *en banc* Court to establish a uniform approach to Second Amendment cases that is currently lacking.

II. *Bruen* requires a test based on dangerousness.

Bruen "reiterate[d] that the standard for applying the Second Amendment is as follows":

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then

> may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

597 U.S., slip op. at 15 (quotation omitted).

Because Williams is an American wanting to exercise his right "to keep and bear Arms," U.S. CONST. amend. II, and "the Second Amendment's plain text covers" such "conduct, the Constitution presumptively protects that conduct," *Bruen*, 597 U.S., slip op. at 15. "The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* America's historical tradition allows only for the disarmament of persons likely to use firearms for illicit purposes, so any prohibited persons test must be based on dangerousness, as the following summary demonstrates.

Bruen cautioned against overreliance on English history, but found value in "English practices that prevailed up to the period immediately before and after the framing of the Constitution." 597 U.S., slip op. at 26 (quotations omitted). Here, Williams demonstrated that "'[i]n England and colonial America, the Government disarmed people who posed a danger to others.'" Opening Br. 23 (quoting *Folajtar*, 980 F.3d at 913 (Bibas, J., dissenting)). Specifically, English officers could "seize

arms from those who were dangerous to the Peace of the Kingdom" as well as "people who [went] armed to terrify the King's subjects." *Id.* at 23-24 (quoting *Folajtar*, 980 F.3d at 914 (Bibas, J., dissenting)) (quotation marks omitted).

Bruen valued colonial laws to the extent that they informed the original understanding of the Second Amendment. 597 U.S., slip op. at 37-42. "The American colonies had similar laws" to England, disarming the "disloyal, who were potentially violent and thus dangerous," and sometimes "Catholics," for the same "intent of preventing social upheavals and rebellion." Opening Br. 24 (quoting *Folajtar*, 980 F.3d at 914 (Bibas, J., dissenting)).

To be sure, "[n]ot all history is created equal"—because "'[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*,'" Founding Era history is paramount. *Bruen*, 597 U.S., slip op. at 25 (quoting *Heller*, 554 U.S. at 634-35) (emphasis in *Bruen*). Continuing English and colonial practice, those disloyal to the government were disarmed

during the Revolutionary War.[2] Opening Br. 24. Then at the Constitution ratifying conventions, New Hampshire, Massachusetts, and Pennsylvania each proposed arms guarantees addressing "threatened violence and the risk of public injury." *Id.* (quoting *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting)).

Bruen deemed late-19th-century evidence relevant only to the extent that it provided "confirmation of what … had already been established" by earlier history. 597 U.S., slip op. at 28 (quotation omitted). The Court was clear that late-19th-century and 20th-century evidence

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[2] The *Folajtar* majority concluded that the disarming of disaffected persons proved that some colonies "did not require violence or dangerousness for disarmament." 980 F.3d at 908. But disaffected persons were dangerous and often violent. "Insurrections were common" in Maryland, Harold Hancock, THE LOYALISTS OF REVOLUTIONARY DELAWARE 5 (1977), "[a]t various times Whigs and Tories confronted one another in insurrections" causing "occasional deaths" in Delaware, *id.* at 4, and when a "Loyal Association" formed in Massachusetts, Royal Governor Thomas Gage provided 300 stand of arms and 100 troops," Richard Frothingham, HISTORY OF THE SIEGE OF BOSTON, AND OF THE BATTLES OF LEXINGTON, CONCORD, AND BUNKER HILL 46 (4th ed. 1873); *see also* Rick Atkinson, THE BRITISH ARE COMING 119 (2019) (Virginia's royal governor "boasted that three thousand [loyalists] joined his ranks" in November 1775); 180 ("southern governors had been given authority to raise loyalist troops"); 253 (brigadier general reporting that patriots "ha[d] most happily terminated a very dangerous insurrection" in North Carolina in 1776); 320 (Newark resident worrying that "our wives & children [are] unprotected … from … the Tories … in the midst of us"); 309 ("Civil liberties for loyalists had become [a] rare commodity" because "Congress had resolved that" loyalists were "guilty of treason").

cannot "provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 58. In fact, the Court did not even bother to "address any of the 20th-century historical evidence." *Id.* at 58 n.28. This is significant because while prohibitions on firearm possession continued to target dangerous persons throughout the 19th and 20th centuries, the first prohibitions to target peaceable persons like Williams were enacted in the mid-20th century. Greenlee, *Historical Justification*, at 269-75.

Rehearing *en banc* is appropriate because the panel opinion contradicts *Bruen*, which mandates a historical test based on dangerousness and thus forbids the disarmament of peaceable persons like Williams. *See Binderup*, 836 F.3d at 377 n.25 (Hardiman, J., concurring) ("To be sure, Suarez's 1998 DUI conviction was a dangerous act—but not in the sense of the traditional concerns motivating felon dispossession." (citing *Begay v. United States*, 553 U.S. 137, 145 (2008) ("holding that drunk driving is not a 'violent felony' under the Armed Career Criminal Act because it does not involve 'purposeful, violent, and aggressive conduct'")")).

III. *Bruen* threw an already chaotic constitutional issue within this Circuit into greater disarray.

Even before *Bruen* eliminated the two-part test, it was unclear what test in part one applied to prohibited persons: Judge Ambro's multifactor virtue test that was supported by three *Binderup* Judges or Judge Hardiman's dangerousness test that was supported by five *Binderup* Judges and seemingly later endorsed by Judge Bibas in *Folajtar*. 980 F.3d at 912 (Bibas, J., dissenting) ("The historical touchstone is danger, not virtue."). So even if some part of this Court's former test remains, *en banc* review is needed.

While Judge Ambro's *Binderup* opinion declared its test controlling under *Marks*, 836 F.3d at 356 (Ambro, J., opinion), Judges Fisher and Bibas disagree, *Holloway*, 948 F.3d at 180 (Fisher, J., dissenting); *Folajtar*, 980 F.3d at 913-14 (Bibas, J., dissenting). And to be sure, this Court has never applied a *Marks* analysis to *Binderup*.[3] Indeed, only

[3] Neither *Binderup* nor *Holloway* conducted a *Marks* analysis. The *Holloway* majority stated that it "need not conduct an explicit *Marks* analysis of the *Binderup* opinions here because we already recited its holdings, as expressed by Judge Ambro's controlling opinion, in *Beers* [*v. Att'y Gen. United States*, 927 F.3d 150, 155-56 (3d Cir. 2019)]." 948 F.3d at 170. But, as the *Holloway* majority later conceded, "*Beers* did not explicitly conduct a *Marks* analysis" either. *Id.* at 171 n.5. Moreover,

one of the four common *Marks* applications could possibly support Judge Ambro's *Binderup* opinion, and this Court has not adopted that application. Opening Br. 16. In fact, in this Court, "[t]here are no specific rules for how to identify the holdings and legal standards from split circuit opinions," *Holloway*, 948 F.3d at 170, so no one within this Court's jurisdiction can be certain how split opinions might apply.

Adding to the confusion is the fact that the multifactor virtue test has "no fixed criteria." *Binderup*, 836 F.3d at 351 (Ambro, J., opinion). *Holloway* proves that three-judge panels can add new factors, such as the "potential for danger and risk of harm." 948 F.3d at 173. *Folajtar*, by later declining to consider that same factor, proves that three-judge panels can eliminate factors. This makes it impossible for litigants and lower courts to know what to argue or expect. And it raises several questions. For example, can district courts create new factors and eliminate others? Should parties explain why new factors should be considered or existing factors overlooked? Or is it solely up to this Court to determine when the rules are fixed? In any event, this make-it-up-as-you-go approach that "changes over time as legislative judgments

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"*Beers* was vacated, so it is not precedent." *Folajtar*, 980 F.3d at 913 (Bibas, J., dissenting).

regarding virtue evolve," *Binderup*, 836 F.3d at 351 (Ambro, J., opinion), contradicts *Bruen*, which emphasized that the Second Amendment's "meaning is *fixed* according to the understandings of *those who ratified it*," 597 U.S., slip op. at 19 (emphasis added).

CONCLUSION

Because the test applied to deny Williams's Second Amendment rights has been invalidated, because the Supreme Court's test favors Williams, and because great uncertainty exists in this Circuit's Second Amendment precedents, Williams respectfully requests that the Court grant rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Petition for Rehearing *En Banc* complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because, according to the word-count feature of Microsoft Word, this brief contains 3,899 words, excluding the parts of the petition excluded by Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point, proportionally spaced Century Schoolbook font.

The PDF was scanned with Bitdefender Virus Scanner v. 3.12.10781 and no malware was reported.

I hereby certify that counsel for Plaintiff-Appellee are admitted to practice in the Third Circuit Court of Appeals and are members in good standing.

Dated this 18th day of July 2022.

Joshua Prince

Joshua Prince, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2022, I served the foregoing petition 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 July 2022.

Joshua Prince, Esq.

APPENDIX

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 19-2694

_____

EDWARD A. WILLIAMS,
Appellant

v.

ATTORNEY GENERAL OF THE UNITED STATES; DIRECTOR BUREAU OF ALCOHOL TOBACCO FIREARMS & EXPLOSIVES; DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; UNITED STATES OF AMERICA

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 2-17-cv-02641)
District Judge: Honorable Robert F. Kelly

_____

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
December 15, 2021

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Before: GREENAWAY, JR., KRAUSE, and PHIPPS, *Circuit Judges*.

(Filed: May 12, 2022)

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OPINION*

_____

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PHIPPS, *Circuit Judge*.

A federal statute makes it unlawful for a felon – generally defined as a person convicted of a crime punishable by more than one year of imprisonment – to possess a firearm that was transported in interstate commerce.[1] Pennsylvania outlaws driving under the influence, and a person who commits that crime with the highest level of impairment – a blood alcohol content above 0.16% – may be punished by up to five years of imprisonment if he or she has a prior DUI conviction.[2] Thus, the federal felon-in-possession statute bars certain Pennsylvania DUI offenders from possessing a firearm.

In 2005, Edward A. Williams was convicted in Pennsylvania of a DUI at the highest level of impairment.[3] Because that was his second DUI conviction, it was punishable by up to five years in prison.[4] Ultimately, Williams was sentenced to ninety

[1] *See* 18 U.S.C. § 922(g)(1); *see also* 18 U.S.C. § 921(a)(20)(B) (excluding from the felony definition "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").

[2] *See* 75 Pa. Cons. Stat. § 3802(c) (prohibiting operating or driving a vehicle with a blood alcohol concentration at 0.16% or higher); *id.* § 3803(b)(4) (grading a violation of § 3802(c) as a misdemeanor of the first degree for a person who has committed one prior offense); 18 Pa. Cons. Stat. § 1104 (setting the maximum term of imprisonment for first-degree misdemeanors at five years).

[3] *See Williams v. Barr*, 379 F. Supp. 3d 360, 365–66 (E.D. Pa. 2019); *see* 75 Pa. Cons. Stat. § 3802(c).

[4] *See* 75 Pa. Cons. Stat. § 3803(b)(4); 18 Pa. Cons. Stat. § 1104. In 2000, Williams was arrested and charged with a DUI with a blood alcohol content of 0.10%. *See Williams*, 379 F. Supp. 3d at 365. Although that charge was dismissed upon Williams's completion of an accelerated rehabilitation program, it still constituted a prior offense for purposes of computing sentences for later DUI offenses. *See id.* & n.3 (citing 75 Pa. Cons. Stat. § 3806(a)(1)).

days to two years in prison, fined $1,500, and subjected to several other requirements: mandatory attendance at alcohol safety driving school, license suspension for eighteen months, and imposition of an ignition interlock.[5] Based on that conviction, Williams fell within the federal firearms bar, so his application for a firearms license in 2014 was denied.

But Williams believed that applying the federal felon-in-possession statute to him by virtue of his DUI convictions violated the Second Amendment.[6] To vindicate that belief, Williams brought an as-applied challenge to the felon-in-possession statute in the District Court. In exercising federal-question jurisdiction,[7] the District Court entered summary judgment against him. Williams timely appealed that final order, bringing his challenge within this Court's appellate jurisdiction.[8]

The problem for Williams is that another person, Raymond Holloway, Jr., was previously in a very similar situation. In 2005, Holloway was convicted in Pennsylvania of a DUI at the highest level of impairment.[9] Holloway also had a prior DUI conviction

[5] *See id.*

[6] U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

[7] *See* 28 U.S.C. § 1331.

[8] *See* 28 U.S.C. § 1291.

[9] *See Holloway v. Att'y Gen.*, 948 F.3d 164, 168 (3d Cir. 2020); *see also* 75 Pa. Cons. Stat. § 3802(c).

and was therefore punishable by up to five years in prison.[10] He received a sentence of sixty-months' intermediate punishment, including ninety-days' imprisonment that allowed for work release.[11] He was also fined $1,500 and was ordered to complete mandatory drug and alcohol evaluation.[12] As a result, Holloway was subject to the same federal firearms bar, and his 2005 conviction prevented him from purchasing a firearm in 2016.[13]

Holloway also believed that the federal felon-in-possession statute violated the Second Amendment. He likewise brought an as-applied challenge to the constitutionality of the felon-in-possession statute in federal district court. After that court granted Holloway's motion for summary judgment, the Government appealed to this Court, which – in a precedential opinion – applied the two-step test from the *Marzzarella* decision[14] and held that the federal firearms bar was constitutional as applied to Holloway.[15] After that decision, Holloway filed a petition for *en banc* review, which was

[10] *See Holloway*, 948 F.3d at 168. Like Williams, Holloway had a prior DUI offense dismissed after completing an accelerated rehabilitation program. *See id.*

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

[15] *See Holloway*, 948 F.3d at 172–78.

denied.[16] Without enough votes for *en banc* review, Holloway turned to the Supreme Court, which denied his petition for a writ of certiorari.[17]

This Circuit adheres to binding precedent,[18] and because Williams brings the same legal challenge on remarkably similar facts as Holloway, his case must meet the same fate as Holloway's prior precedential case. Thus, in reviewing his challenge *de novo*,[19] we will affirm the District Court's entry of summary judgment against Williams.[20]

[16] *See* Am. Order, *Holloway v. Att'y Gen.*, No. 18-3595 (3d Cir. July 9, 2020).

[17] *See Holloway v. Garland*, 141 S. Ct. 2511 (2021) (Mem.) (denying petition for writ of certiorari).

[18] *Mateo v. Att'y Gen.*, 870 F.3d 228, 231 n.6 (3d Cir. 2017) (explaining that a prior panel's precedential opinion is "binding on subsequent panels" (citing 3d Cir. I.O.P. 9.1)).

[19] *See Cranbury Brick Yard, LLC v. United States*, 943 F.3d 701, 708 (3d Cir. 2019).

[20] Williams also argues that the *Holloway* decision misconstrued the *en banc* decision in *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016) (en banc), which did not have a majority opinion on all aspects of *Marzzarella* framework. Williams contends that the *Marks* rule, which applies to Supreme Court decisions that lack a majority opinion, *see Marks v. United States*, 430 U.S. 188 (1977), would yield a different construction of *Binderup*. But *Holloway*'s application of the *Marks* rule to *Binderup* also constitutes binding precedent. *See Holloway*, 948 F.3d at 170–71.