Federal Government Files for Certiorari to Supreme Court Over Its Loss in Second Amendment Case *Binderup*

The consolidated case overturned the application of U.S. Code 922(g)(1) in two cases where the convicted criminals' crimes were not serious enough to deny them Second Amendment rights, according to the 3rd Circuit Court of Appeals.

Brian Doherty | Jan. 9, 2017 8:15 am

Federal law states, at 18 USC 922(g)(1), that anyone convicted of most crimes with punishment of more than one year imprisonment (or, if a misdemeanor, more than two years) can't legally own a gun.

The Justice Department last week filed for certiorari to the Supreme Court in an attempt to overturn a loss they suffered in September 2016 in the 3rd District Court of Appeals in a case that is now known as *Lynch v. Binderup.*

|CCRE

Binderup consolidated two cases, in each of which a plaintiff who felt his Second Amendment rights had been violated by the specific application of 922(g)(1) won in both district court and in an *en banc* opinion of the 3rd District Court of Appeals.

Daniel Binderup, for whom the case is now named, had a consensual sexual relationship with a 17-year-old in 1998. He was sentenced to probation for three years under a misdemeanor conviction in Pennsylvania for corruption of a minor. The federal government believes this barred him from legal gun ownership forever, as it was a misdemeanor for which he could have been (though was not) given over two years' incarceration. (Julio Suarez, the other person challenging the

government in the cases now consolidated, was convicted of possessing a handgun *in a car* without a ~~permit~~ *license to carry* in Maryland in 1990.)

The complicated issues that arise over whether "punishable" means what punishment could have been applied or what actually was applied is explored at length in the 3rd Circuit opinion, which ultimately concludes, to the detriment of Binderup's legal team which tried to rely on the fact that he did not in fact receive over two years' incarceration on his misdemeanor, that "'subject to a maximum possible penalty of' is the best reading of the phrase 'punishable by.'"

Alan Gura, who won two previous Supreme Court cases for Second Amendment rights, *Heller* (2008) and *McDonald* (2010), is one of Binderup's lawyers. The constitutional issue being argued was whether that 922(g)(1) prohibition should cover people whose crimes present no evidence of danger to the public, especially given the post-*Heller* environment in which gun ownership is recognized as a core constitutional right.

In that complicated September 2016 decision from an *en banc* panel of the 3rd Circuit Court of Appeals (in which different elements were signed on to by different batches of judges), the Court declared that the offenses of Binderup and Suarez:

> were not serious enough to strip them of their Second Amendment rights. For starters, though the Challengers' crimes meet the generic definition of a felony and Congress's definition of a felony for purposes of § 922(g)(1), the Pennsylvania and Maryland legislatures enacted them as misdemeanors. Misdemeanors are, and traditionally have been, considered less serious than felonies...Congress tried to ensure that only serious crimes would trigger disarmament under § 922(g)(1) by exempting from the ban any state-law misdemeanant whose crime was punishable by less than two years' imprisonment....
>
> But we believe that accommodation still paints with too broad a brush, for a state legislature's classification of an offense as a misdemeanor is a powerful expression of its belief that the offense is not serious enough to be disqualifying. This is not to say that state misdemeanors cannot be serious.....Other considerations, however, confirm our belief that the Challengers' crimes were not serious...neither Challenger's offense had the use or attempted use of force as an element....
>
> Also important is that each Challenger received a minor sentence by any measure...punishments are selected by judges who have firsthand knowledge of the facts and circumstances of the cases and who likely have the benefit of pre-sentence reports prepared by trained professionals. With not a single day of jail time, the punishments here reflect the sentencing judges' assessment of how minor the violations were. Finally, there is no cross-jurisdictional consensus regarding the seriousness of the Challengers' crimes....

Judge Thomas Ambro in the 3rd Circuit also believed that the "intermediate scrutiny" under which laws impacting the Second Amendment should be judged invalidated the statute as applied to Binderup and Suarez:

> The Challengers' isolated, decades-old, non-violent misdemeanors do not permit the inference that disarming people like them will promote the responsible use of firearms. Nor is there any evidence in the record to show why people like them remain potentially irresponsible after many years of apparently responsible behavior. Without more, there is not a substantial fit between the continuing disarmament of the Challengers and an important government interest. Thus, § 922(g)(1) is unconstitutional as applied to them.

The Justice Department doesn't wish to let this precedent stand and has asked the Supreme Court to reconsider the case.

Core to the arguments in the government's certiorari petition:

The DOJ claims to believe that certain criminals just give up their Second Amendment rights, and that's all there is to it, so there can be no particularized exceptions to 922(g)(1); DOJ insists the 3rd Circuit in this case is the first court to ever find any.

"The right to bear arms is analogous," the government's cert petition insists, "to other civic rights that have historically been subject to forfeiture by individuals convicted of crimes, including the right to vote...the right to serve on a jury...and the right to hold public office."

DOJ considers Judge Ambro's principles in the 3rd Circuit opinion too vague; "Judge Ambro's approach would require courts to identify some ill-defined subset of those offenses as insufficient to trigger a firearms disability—and to do so using a test with no foundation in this Court's decisions or the history of the right to bear arms."

Further, the government insists at any rate that "Section 922(g)(1) is valid in all of its applications because it is reasonably tailored to serve the government's compelling interest in public safety."

What of Ambro's insistence that the particular crimes committed by Binderup and Suarez seem to raise no public safety issues regarding their ownership of guns? It is, the filing claims:

> inconsistent with the entire premise of evaluating a statute under intermediate scrutiny. That standard demands that "the fit between the challenged regulation and the asserted objective be reasonable, not perfect." (*Marzarella*)....It necessarily follows that "the validity of the regulation depends on the relation it bears to the overall problem the

> government seeks to correct, not on the extent to which it furthers the government's interests in a particular case." (*Ward v. Rock Against Racism*)

The government fears the result of letting the 3rd Circuit's judgment stand:

> Section 922(g)(1) is by far the most frequently applied of Section 922(g)'s firearms disqualifications, forming the basis for thousands of criminal prosecutions and tens of thousands of firearm-purchase denials each year...If left undisturbed, the court of appeals' conclusion that Section 922(g)(1) and other felon-in-possession laws are subject to individualized as-applied challenges would pose serious problems of public safety and judicial administration.

As the Obama Justice Department clearly fears, many, many other cases of the government denying people Second Amendment rights without posing any reasonable threat might need to be reconsidered if they don't take this case to the Supreme Court, and win.

Interestingly, one Judge on the 3rd Circuit Court of Appeals panel had an even more radical vision about the proper application of 922(g)(1) than Judge Ambro, as explained in the cert petition:

> Judge Hardiman....disagreed with the plurality's conclusion that individuals who commit "serious"crimes forfeit their Second Amendment rights. Instead, he stated that the Second Amendment excludes only those who "have demonstrated that they are likely to commit violent crimes."...Judge Hardiman stated that Section 922(g)(1) is "categorically" unconstitutional as applied to individuals outside that class, even if it would survive heightened scrutiny...And he concluded that Section 922(g)(1) is unconstitutional as applied to respondents because, in his view, the government had not introduced evidence that respondents "ha[d] been, or would be, dangerous, violent, or irresponsible with firearms."

The application of 922(g)(1) is being fought by Gura in more cases than just *Binderup*. Gura is also fighting *Baginsky v. Lynch,* currently at the District Court for D.C. and awaiting a decision on a federal motion to dismiss. Baginsky's sole conviction barring gun ownership was a DUI conviction in Massachusetts, where that crime is potentially punishable for two and a half years imprisonment (though he actually got less than two).

One of the Binderup team's court filings sums up the relevant issue well: "*not one word* of the Government's brief discusses the critical issue in this as-applied Second Amendment challenge: whether Daniel Binderup's possession of firearms would be in any way dangerous." Whether or not the Supreme Court chooses to take up *Binderup*, as long as the government keeps applying 922(g)(1) to people with no demonstrated risk of harm to others, the issue will not go away.

Brian Doherty is a senior editor at *Reason* magazine and author of ***Ron Paul's Revolution: The Man and the Movement He Inspired*** (Broadside Books).

Media Contact **Reprint Requests**

EMAIL | SHARE

RELATED

The House Passes a Gun Measure Supported by the ACLU and Mental Health Advocates. Media Hysteria Ensues.
Brian Doherty | 2.03.17

"Armed" is Same as "Armed and Dangerous" When it Comes to Police Searches, 4th Circuit Concludes
Brian Doherty | 1.31.17

Weaponized Drones and the Second Amendment
Ronald Bailey | 12.28.16

Second Amendment, Gun Rights, Gun Control, Supreme Court

VIEW COMMENTS (37) | LEAVE A COMMENT

Donald Trump Is a Jerk,...
Jacob Sullum | 01.09.2017

What This Journalist Saw...
Robby Soave | 01.09.2017

VIEW HIT & RUN ARCHIVES

DONATE:

- Donate Online
- Donate via Fax or Mail
- Why Support Reason?
- Donation FAQ
- Stock Donations
- Planned Giving
- Shop to Support Reason

LINKS:

- Home
- About
- Reason Foundation
- Cover Gallery
- Reason TV
- Events
- Advertise
- Staff
- Contributors
- Widgets

SUBSCRIBE:

- Subscribe to the Print Magazine
- Reason Mobile Apps
- Apple Newsstand
- E-Reader Subscriptions
- Give Reason as a Gift
- Back Issues
- Subscription Services
- Email Newsletters

CONTACT:

- News Tips
- Site Technology Questions
- Media Inquiries
- Reprint Permissions
- Submissions

Editorial & Production Offices
5737 Mesmer Ave.
Los Angeles, CA 90230
(310) 391-2245

Washington Office
1747 Connecticut Ave., NW
Washington, DC 20009

(202) 986-0916