

No. 13-1487

In the Supreme Court of the United States

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, following a felony conviction that precludes actual or constructive firearm possession under 18 U.S.C. 922(g), a defendant is entitled under Federal Rule of Criminal Procedure 41(g) to have non-contraband firearms that were held by the government during the criminal proceedings transferred to a relative or a third party of the defendant's choosing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 555 Fed. Appx. 851. The order of the district court (Pet. App. 5a-6a) is unreported. The magistrate judge's report and recommendation (Pet. App. 7a-14a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2014. On April 17, 2014, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 27, 2014. The petition for a writ of certiorari was filed on June 10, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of distributing less than 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D). Judgment 1. He was sentenced to six months of imprisonment, to be followed by two years of supervised release (including four months of home detention). Judgment 2-4. After his conviction, petitioner filed a motion in the district court seeking to control the disposition of firearms that he had surrendered after his arrest as a condition of bond for pretrial release. Pet. App. 2a. Adopting the report and recommendation of a magistrate judge (*id.* at 7a-14a), the district court denied the motion, *id.* at 5a-6a. The court of appeals affirmed. *Id.* at 1a-4a.

1. Between November 2003 and January 2006, petitioner, a United States Border Patrol Agent, sold marijuana to a confidential source on multiple occasions. Gov't C.A. Br. 1; D. Ct. Doc. 89, at 1-6 (Sept. 20, 2007) (Indictment). He was indicted on 11 counts of distributing less than 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D), of conspiring to distribute less than 50 kilograms of marijuana, in violation of 21 U.S.C. 846, or of using a telephone to facilitate that distribution, in violation of 21 U.S.C. 843(b). Indictment 1-6.

On June 7, 2006, petitioner was arrested and appeared at a bond hearing, at which a magistrate judge ordered, as a condition of his release, that he “immediately * * * surrender all law enforcement firearms and credentials.” D. Ct. Doc. 8, at 2 (June 11, 2006); D. Ct. Doc. 182, at 11 (Aug. 12, 2013) (transcript of May 16, 2011 evidentiary hearing). Two days later,

petitioner voluntarily surrendered to FBI agents not only his Border Patrol firearms but also as many as 19 other firearms or weapons. D. Ct. Doc. 182, at 11-12; see D. Ct. Doc. 155, at 9-10 (July 16, 2010) (listing surrendered items).¹ Petitioner later explained that he was motivated to surrender the additional weapons because the judge felt he was “a suicide risk.” Pet. App. 2a (quoting D. Ct. Doc. 182, at 12).

On November 30, 2007, petitioner pleaded guilty to one count of distributing marijuana. Pet. App. 2a, 8a. One week later, his plea was accepted and he was adjudicated guilty. *Id.* at 8a. On April 21, 2008, he was sentenced to a six-month term of imprisonment, to be followed by two years of supervised release, including four months of home detention. *Ibid.*; Judgment 2-4.

Between November 2008 and December 2009, petitioner repeatedly contacted the FBI, seeking to have it transfer his personal firearms to two different purported buyers (first a neighbor and later Robert Rosier, a friend from a camping group). Pet. App. 9a-10a;

¹ Petitioner contends (Pet. 5 n.1) that 3 of the 19 weapons he surrendered are not ones that he would now be barred from possessing under 18 U.S.C. 922(g). Petitioner would also exclude (Pet. 5 n.1) three M4 magazines that were numbered as the nineteenth entry on the FBI’s original handwritten inventory (which included two entries numbered “10”). D. Ct. Doc. 155, at 5-6. But those magazines were not included on the FBI’s subsequent typewritten list of 19 weapons. D. Ct. Doc. 155, at 9-10. The court of appeals declined to address petitioner’s contention that some of the weapons deserved different treatment than others, because petitioner had not raised it in the district court. Pet. App. 3a n.1. As petitioner observes (Pet. 5 n.1), resolution of the question presented in this Court does not turn on the precise number of “firearms” at issue.

D. Ct. Doc. 182, at 15, 25. The “bill of sale” to Rosier apparently contemplated that Rosier would decide what to pay petitioner after he had received the firearms. D. Ct. Doc. 182, at 25.

The FBI declined petitioner’s requests to transfer the firearms to either of the individuals petitioner identified and denied petitioner’s request for reconsideration of that decision. Pet. App. 2a, 10a-11a; see Gov’t C.A. Br. 4-6.

2. On July 16, 2010, petitioner filed in the district court a “Motion for the Return/Disposition of Property,” in which he requested that his wife “be given possession and control of the firearms collection” or, in the alternative, that “Robert Rosier be lawfully entitled to own the subject firearms collection and be awarded possession and control” and that “payment for the firearms be awarded to [petitioner] as the lawful non-possessory owner.” D. Ct. Doc. 155, at 1, 2; see also D. Ct. Doc. 165, at 4 (Feb. 3, 2011) (similar request in petitioner’s renewed motion). The government construed the motion as having been filed under Rule 41(g) of the Federal Rules of Criminal Procedure, D. Ct. Doc. 159, at 2 (Sept. 3, 2010), and petitioner has not questioned that construction,² which was shared by the court of appeals, see Pet. App. 2a, 4a. That rule provides as follows:

Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return. The motion must be filed in the dis-

² See Pet. 6 (describing motion as one under Rule 41(g)); D. Ct. Doc. 170, at 5 (invoking Rule 41(g) in petitioner’s objections to the magistrate judge’s report and recommendation).

trict where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g).

Petitioner contended that transfer of the firearms to either his wife or Rosier was warranted because (1) the firearms did not relate to his crime; (2) the FBI did not have probable cause to seize them and did not follow its procedures for seizing property; (3) he had surrendered them only for safekeeping and to satisfy a bond condition; (4) when the FBI took the firearms, it did not tell him that he was effectively abandoning them; (5) he still held legal title to the firearms; and (6) he had neither abandoned them nor forfeited his interest in them. D. Ct. Doc. 165, at 3; D. Ct. Doc. 182, at 21-24, 31-33.

After a hearing, a magistrate judge recommended that petitioner's motion be denied. Pet. App. 7a-14a. The magistrate judge concluded that the case was controlled by the Eleventh Circuit's decision in *United States v. Howell*, 425 F.3d 971 (2005). Pet. App. 11a-14a.

The court in *Howell* held that the government was not required to return firearms it seized from a drug defendant's home because the defendant had become a convicted felon and returning them to him would violate 18 U.S.C. 922(g), which makes it a crime for a convicted felon to "possess in or affecting commerce[] any firearm or ammunition." 425 F.3d at 974-975. "[I]f an individual is a convicted felon," the court held,

“that individual will not be entitled to the return of seized firearms, either directly or indirectly. Requiring a court to return firearms to a convicted felon would not only be in violation of a federal law, but would be contrary to the public policy behind the law.” *Id.* at 976. It further explained that “any firearm possession, actual or constructive, by a convicted felon is prohibited by law.” *Id.* at 977 (quoting *United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000), cert. denied, 531 U.S. 1201 (2001)). *Howell* also rejected the defendant’s suggestion that the district court could place the firearms in a relative’s possession or sell the firearms and give him the proceeds, explaining that such relief “is beyond the scope of Rule 41(g).” *Id.* at 976-977. The court in *Howell* separately noted that Rule 41(g) provides for only equitable relief and that the defendant was not entitled to such relief because, as someone who had engaged in drug dealing, he had “unclean hands.” *Id.* at 974.

Here, the magistrate judge found that he was bound by *Howell* and that, even though petitioner’s firearms had not been “seized,” were not contraband, and had not been forfeited, petitioner had not “attempt[ed] to transfer ownership of the firearms until *after* he had been adjudicated guilty and was a convicted felon.” Pet. App. 13a-14a.

3. Petitioner filed objections to the magistrate judge’s report and recommendation. Pet. App. 5a. After conducting *de novo* review, the district court overruled those objections, adopted the magistrate judge’s report and recommendation, and denied petitioner’s motion. *Id.* at 5a-6a.

4. The court of appeals affirmed. Pet. App. 1a-4a. The court agreed that its prior decision in *Howell*

prevents courts from “violating 18 U.S.C. § 922(g) by delivering actual or constructive possession of firearms to a convicted felon” and “controls” the decision in this case. *Id.* at 3a-4a. The court noted that the method by which the government obtained the firearms was “immaterial” in *Howell*, and it stated that “[t]he fact that the government obtained [petitioner’s] firearms because of a voluntary surrender pursuant to a judge’s concern for his safety does not alleviate the concern that by granting [petitioner] actual or constructive possession of a firearm, a court would violate § 922(g).” Pet. App. 4a (citing *Howell*, 425 F.3d at 976). Because petitioner had invoked the courts’ authority to “grant equitable relief” (Pet. C.A. Br. 16), the court of appeals added that petitioner, as a convicted drug offender, had “unclean hands to demand return of his firearms” even though he “did not use those firearms in furtherance of his offense.” Pet. App. 4a (citing *Howell*, 425 F.3d at 974).

ARGUMENT

Petitioner contends (Pet. 8-32) that the decision below is incorrect and that the courts of appeals disagree about whether a defendant who is prohibited by 18 U.S.C. 922(g) from possessing a firearm is entitled under Rule 41(g) of the Federal Rules of Criminal Procedure to have non-contraband firearms that were held by the government during the criminal proceedings transferred to a third party or sold for the defendant’s benefit. The decision below is correct, and the courts of appeals are not divided on the question presented by the facts of petitioner’s case. Further review is accordingly unwarranted.

1. The court of appeals correctly affirmed the district court’s denial of petitioner’s motion that his fire-

arms be transferred to his wife or to a friend of his choosing.

a. As an initial matter, petitioner acknowledges (Pet. 6-7) that his motion was brought pursuant to Rule 41(g), which states that, when a court grants a motion under the rule, it “must *return the property* to the movant.” Fed. R. Crim. P. 41(g) (emphasis added). But neither Rule 41(g) nor any other provision identified by petitioner provides authority for the action petitioner sought: a transfer (either by gift or by sale) to a third party of his designation. See *United States v. Howell*, 425 F.3d 971, 977 (11th Cir. 2005) (explaining that a request that the court “either place the firearms in the possession of a relative in trust or sell the firearms and distribute the proceeds to [the defendant]” was “beyond the scope of Rule 41(g)”). Petitioner does not, and cannot, deny that the firearms could not actually be “return[ed]” to him without causing him to be in violation of Section 922(g)’s prohibition on felons’ possession of firearms.

b. Petitioner instead draws (Pet. 13) a distinction between a convicted felon’s “possessory interest in firearms, which Section 922(g) extinguishes,” and his “larger ownership interest, which Section 922(g) leaves intact, recognizing that these interests represent different sticks in the property ‘bundle.’” In petitioner’s view, the government could “transfer” firearms “on behalf of the convicted owner,” Pet. 16, and such a transfer “to a third party” could be made without “giv[ing] the owner” (*i.e.*, petitioner) any “‘right to control’ or ‘right to exclude,’ the two central indicia of possession,” Pet. 18.

Petitioner’s proposed transaction, however, cannot be reconciled with his own theory for two reasons.

First, his transaction would vest the supposedly extinguished possessory interest in a third party. See Pet. 19 (noting that “the new owner gains these possessory rights”). Second, petitioner’s proposed transfer would vest that possessory right in a person of petitioner’s own choosing (either his wife or his friend, Robert Rosier). See Pet. App. 8a; D. Ct. Doc. 155, at 1, 2; D. Ct. Doc. 165, at 4; D. Ct. Doc. 182, at 24-25.³ That belies petitioner’s suggestion (Pet. 19) that the transaction would “give[] him no right to control or right to exclude,” because it would still permit him to determine who would (and who would not) next have access to the firearms, and it would not even rule out the possibility that his wife or friend would subsequently allow him further control over them. Under the circumstances, both of petitioner’s proffered options created a significant risk that petitioner would retain custody or control over the firearms, in violation of Section 922(g). See *United States v. Zaleski*, 686 F.3d 90, 93 (2d Cir.) (“Whether a particular proposed arrangement would constitute prohibited constructive possession will be an issue of fact to be determined by the District Court.”), cert. denied, 133 S. Ct. 554 (2012); *United States v. Miller*, 588 F.3d 418, 419 (7th Cir. 2009) (“if the United States were to surrender the firearms to someone willing to accept [the

³ At the hearing, petitioner’s phrasing was slightly broader than in his written motions, but it still required the transferee to be a person of his choosing. He asked first that his wife “be given possession of, title, and control of the firearms collection for the benefit of my adult children and heirs.” D. Ct. Doc. 182, at 24. “In the alternative,” he asked that the court “issue Mr. Robert Rosier ownership, title, and possession, or any other *person of my choosing* who is lawfully entitled to own subject firearm collection.” *Ibid.* (emphasis added).

defendant's] instructions about their disposition, then [the defendant] would retain constructive possession"). A court exercising equitable discretion is not required to run that risk. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (noting the "historic discretion exercised by federal courts 'sitting in equity'"); *Howell*, 425 F.3d at 974 ("A motion to return seized property under Fed. R. Crim. P. 41(g)[] is a motion in equity, in which courts will determine all the equitable considerations in order to make a fair and just decision.").

Thus, even assuming that a Rule 41(g) motion may be used to transfer property to a third party—rather than simply return it to the movant—such a motion clearly may be denied where, as here, a transfer would result in constructive possession by a convicted felon.

c. The court of appeals' decision does not present the constitutional concerns that petitioner identifies (Pet. 23-26) when the government deprives someone of ownership interests. Nowhere does the decision below suggest that a defendant loses his ownership rights in non-contraband and non-forfeited firearms. Nor does it suggest that the government may affirmatively employ the firearms for its own purposes without providing just compensation. Compare Pet. 25. Instead, the court of appeals held only that, where a transfer would result in constructive possession of a firearm by a convicted felon, a Rule 41(g) motion is properly denied. See Pet. App. 4a ("by granting [petitioner] actual or constructive possession of a firearm, a court would violate § 922(g)").

d. Nor is there merit to petitioner's contention (Pet. 25) that the decision below leaves "a firearm owner charged with a non-violent felony" with only

“three bad options.” He suggests (*ibid.*) that a defendant (like himself) who voluntarily surrenders firearms when charged will be unable to receive any “compensation if convicted of the felony.” But petitioner’s supposed dilemma arose only because he gave his personal firearms to the government (rather than someone else) in June 2006, and because he then “did not attempt to transfer ownership of the firearms to another person until after he had been adjudicated guilty and was a convicted felon,” which occurred when his agreement to plead guilty—which acknowledged his impending inability to possess firearms—was accepted in December 2007. Pet. App. 4a, 8a, 9a, 14a (emphasis omitted).⁴

2. Petitioner contends (Pet. 9-14) that this Court’s review is necessary to resolve a disagreement in the courts of appeals about whether a court must grant a convicted felon’s Rule 41(g) motion requesting that the federal government transfer the felon’s firearms to a third party or sell them. But the courts of appeals have not disagreed about the disposition of a case like this, in which a defendant requests only that the firearms be released to his relative or to a friend of his choosing.

a. Petitioner identifies (Pet. 9-11) the Eighth and Eleventh Circuits as having published opinions on one side of the split. In *Howell, supra*, the Eleventh Cir-

⁴ Because the government acquired the firearms when petitioner chose to give them to FBI agents rather than someone else, the government cannot be charged with seeking forfeiture “without satisfying any of the” associated procedural requirements. Pet. 23. The government did not affirmatively seek possession of the firearms for forfeiture or any other purpose; petitioner voluntarily placed them in the government’s custody.

cuit held that “a convicted felon * * * will not be entitled to the return of seized firearms, either directly or indirectly. Requiring a court to return firearms to a convicted felon would not only be in violation of a federal law, but would be contrary to the public policy behind the law.” 425 F.3d at 976. *Howell* did not, as petitioner asserts (Pet. 4, 9-10), hold that a defendant loses all of his “ownership interest” in non-contraband firearms. It held only that any action by the court that would result in the direct or indirect return of firearms to a convicted felon would violate Section 922(g) and that a request that the court transfer property to a third party or sell it is “beyond the scope of Rule 41(g).” 425 F.3d at 976-977.

The *Howell* court cited the Eighth Circuit’s decision in *United States v. Felici*, 208 F.3d 667 (2000), cert. denied, 531 U.S. 1201 (2001), which held that a defendant who has been convicted of a felony is not entitled under Rule 41(g) to have firearms returned to him or transferred to a third party who would hold the firearms in trust for the defendant because the holding of firearms in trust for the defendant would constitute constructive possession by the defendant and “[a]ny firearm possession, actual or constructive, by a convicted felon is prohibited by law.” *Id.* at 670.⁵

In unpublished decisions, the Third and Sixth Circuits have agreed with *Howell* and *Felici*. *United States v. Roberts*, 322 Fed. Appx. 175, 176-177 (3d Cir. 2009) (affirming order denying defendant’s motion for

⁵ The Eighth Circuit had previously held that it would “make a mockery” of Section 922(g) to allow a defendant prohibited from possessing firearms to receive the proceeds of the sale of those firearms. *United States v. Bagley*, 899 F.2d 707, 708, cert. denied, 498 U.S. 938 (1990).

transfer of firearms to his mother to keep or sell); *United States v. Headley*, 50 Fed. Appx. 266, 267 (6th Cir. 2002) (holding that firearms could not be returned to defendant or transferred to a third party to be held in defendant's trust).

Thus, petitioner is correct that the decision below is consistent with holdings in published or unpublished opinions in four circuits (even if those decisions do not go as far as petitioner suggests in some regards).

b. Petitioner nevertheless errs in suggesting (Pet. 11-14) that the Second, Fifth, and Seventh Circuits have adopted a view that is directly contrary to the decision below. While those courts have disagreed with aspects of the reasoning of the Eighth and Eleventh Circuits, none of them has held that courts must approve the kind of request that was made by petitioner.

In the Second Circuit's decision in *Zaleski*, *supra*, the defendant had asked the district court to permit the transfer of his firearms to a federally licensed gun dealer who would sell them, comply with any procedures required by the court, and remit the proceeds to the defendant. 686 F.3d at 92. In the alternative, the defendant requested a third-party appraisal of the firearms for use in a subsequent civil suit against the government for damages. *Ibid.* The Second Circuit held only that, in light of those requests, the district court erred in concluding that the defendant was categorically ineligible for any relief. The court stated that "*under limited circumstances* a convicted felon may arrange to benefit from the sale of otherwise lawful, unforfeited firearms by a third party without actually or constructively possessing them." *Id.* at 93

(emphasis added). It further concluded that the defendant’s “proposed arrangement” could “be approved without running afoul of Section 922(g)(1) if” the following three conditions were satisfied: (1) “the evidence shows that transferring the weapons to [the firearms dealer] would *in fact* strip Zaleski of any power to exercise dominion and control over them,” (2) the dealer “is a suitable custodian and not subject to Zaleski’s control,” and (3) “the arrangement is otherwise equitable.” *Ibid.* Thus, the decision in *Zaleski* strongly implied that where, as here, such factors are not present, a court should not grant (or at least is not compelled to grant) a convicted felon’s motion to return firearms; indeed, the Second Circuit observed that “[w]hether a particular proposed arrangement would constitute prohibited constructive possession will be an issue of fact to be determined by the District Court.” *Id.* at 93.

Likewise, in the Seventh Circuit’s decision in *Miller, supra*, the appeal was from a district court order requiring the government to destroy the defendant’s firearms. 588 F.3d at 419. The court held only that the district court erred because destroying the firearms and having the government pay the defendant just compensation as calculated through an action under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, was not the sole option available to the court. 588 F.3d at 419-420. The court noted (without citations or further explanation) that other permissible resolutions of the defendant’s Rule 41(g) motion would have included ordering the “[t]ransfer of the firearms in trust to a reliable trustee (such as a bank) that promises to put them in a safe deposit vault and not return them to [the defendant], or honor any of his instructions about

them, unless he regains his ability to possess them lawfully”; “[s]torage of the firearms by the United States while [the defendant’s] firearms disability continues”; or a “[g]ift of the firearms to one of [the defendant’s] friends or relatives,” which could be “conditioned on the recipient’s written acknowledgment that returning the guns to [the defendant] or honoring his instructions would aid and abet [the defendant’s] unlawful possession.” *Id.* at 420. That last option differs critically from what petitioner proposed in this case, because the Seventh Circuit contemplated sufficient assurances that the defendant would not retain effective custody or control over the weapons. See *id.* at 419 (recognizing that “if the United States were to surrender the firearms to someone willing to accept [the defendant’s] instructions about their disposition, then [the defendant] would retain constructive possession”). No such assurances existed here.

The Fifth Circuit’s decision in *Cooper v. City of Greenwood*, 904 F.2d 302 (1990), did not involve Rule 41(g) at all. In that civil case, the court of appeals reversed a summary judgment rejecting the plaintiff’s action under 42 U.S.C. 1983, in which he claimed that the local police had deprived him, without due process, of his property interest in non-forfeited firearms, when they sold them at auction for \$30,000 and provided him with none of the proceeds. 904 F.2d at 304. The court held that the defendant, although precluded from possessing the firearms once he was convicted, had retained a property interest protected by the Due Process Clause and that the firearms in question could have been sold on his account or he could have been given a “partial remission of sale proceeds.” *Id.* at

305-306. Neither of those options, however, was presented by petitioner, who instead sought to have his firearms transferred to a person of his own choosing, and did so pursuant to Rule 41(g).

Petitioner also cites (Pet. 12, 14) the Montana Supreme Court's decision in *State v. Fadness*, 268 P.3d 17 (2012). That case applied a state-law provision that, unlike Rule 41(g), allowed for the sale of "non-contraband property at public sale or auction." *Id.* at 29 (quoting Mont. Code Ann. 46-5-308(1)(e)). The state supreme court held that the trial court did not abuse its discretion in allowing the State to sell Fadness's firearms "at public sale or auction, or to a licensed firearms dealer, with the proceeds to go to Fadness's father as agent for Fadness." *Id.* at 30. But the supreme court also affirmed the trial court's refusal to release the firearms, as Fadness requested, directly to Fadness's parents "for them to sell on his behalf." *Ibid.* Indeed, the supreme court found that the trial court could have denied that request even if it "had concluded that Fadness would *not* have constructive possession of his weapons upon their release to his parents." *Ibid.* That result is consistent with, rather than in conflict with, the decision below, in which petitioner asked that his firearms be transferred to one of two people he identified.

c. There is therefore no conflict in the courts of appeals on the question presented by the facts of this case: *i.e.*, whether a district court is required under Rule 41(g) to order the return of non-contraband firearms to a spouse or friend identified by a convicted felon. Although *Zaleski* and *Miller* posited that a court has other alternatives available to it (such as releasing the firearms to a licensed firearms dealer or

disinterested trustee, or retaining the firearms until the defendant's firearms disability expires), those decisions do not conflict with the unpublished decision below, because petitioner did not present any of those alternatives, and because the court of appeals did not hold that a defendant necessarily loses his ownership interest in non-contraband and non-forfeited firearms. This case would accordingly be a poor vehicle for resolving any dispute about the viability of such alternatives.

d. Finally, petitioner also contends (Pet. 14-16) that this Court should resolve whether the “unclean hands” doctrine provides an independent basis to deny a Rule 41(g) motion for the return of firearms to a convicted drug dealer. Yet, it is unclear whether, or to what extent, the Eleventh Circuit would apply the “unclean hands” doctrine as a fully independent bar to relief on other facts. See Pet. App. 4a (stating that the unclean hands doctrine, as construed in *Howell*, bars a felon from “demand[ing] *return* of his firearms”) (emphasis added). And, as petitioner acknowledges (Pet. 14), “no court of appeals besides the Eleventh Circuit has held that a person’s status as a felon gives him unclean hands to seek return of non-contraband property through Rule 41(g).” Petitioner reads (Pet. 15-16) the Eighth Circuit’s decision in *Felici* as rejecting the Eleventh Circuit’s unclean-hands analysis. In fact, however, the portion of the opinion on which he relies—which required the district court to receive evidence about whether certain items were contraband—was about “items that were not firearms,” because the court had already held that “the district court could properly deny Felici’s motion for the return of his firearms without receiving any

additional evidence.” 208 F.3d at 670, 671. Petitioner would therefore be as ineligible for Rule 41(g) relief in the Eighth Circuit as in the Eleventh. Further review of the court of appeals’ two-sentence discussion of the applicability of the “unclean hands” doctrine is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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