No.

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

QUESTION PRESENTED

"The general rule is that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper* v. *City of Greenwood*, 904 F.2d 302, 304 (5th Cir. 1990) (quoting *United States* v. *Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States* v. *La Fatch*, 565 F.2d 81, 83 (6th Cir. 1977))). 18 U.S.C. § 922(g) makes it "unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm."

The question presented is whether such a conviction prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the government (1) transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests or (2) sell the firearms for the benefit of the defendant. The Second, Fifth, and Seventh Circuits and the Montana Supreme Court all allow lower courts to order such transfers or sales; the Third, Sixth, Eighth and Eleventh Circuits, by contrast, bar them.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is unreported, but available at 2014 WL 292169. The order of the district court (App., *infra*, 5a-6a) adopting the magistrate judge's report and recommendation is unreported. The magistrate judge's report and recommendation (App., *infra*, 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 for filing a petition for a writ of certiorari until June 27, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 922(g) of Title 18 of the United States Code provides, in pertinent part, that "[i]t shall be unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess in or affecting commerce[] any firearm or ammunition."

Rule 41(g) of the Federal Rules of Criminal Procedure provides, in pertinent part, that "a person aggrieved by * * * the deprivation of property may move for the property's return."

STATEMENT

This case concerns an important and recurring question at the intersection of criminal and property law: Whether 18 U.S.C. § 922(g), which prohibits a convicted felon from "possessing * * * any firearm or ammunition," also tacitly extinguishes that person's entire ownership interest in firearms unrelated to the offense of conviction that the person lawfully owned before the offense.

Petitioner was a United States Border Patrol agent who voluntarily turned over his firearms to the FBI while unrelated marijuana charges were pending against him. Following petitioner's guilty plea and service of his six-month sentence, the FBI refused to transfer his personal firearms to an unrelated third party who had purchased them. In response, petitioner filed a motion under Fed. R. Crim. P. 41(g) asking that the guns be transferred to the buyer or, alternatively, to petitioner's wife.

Although recognizing that courts nationwide are divided about whether Section 922(g)'s prohibition on possession prevents a convicted felon from transferring his nonpossessory property interest in firearms, App., *infra*, 3a, 11a-13a, the courts below considered themselves bound by circuit precedent to deny petitioner relief, holding that allowing such a person to transfer his nonpossessory interest to an innocent third party would be tantamount to giving him or her "constructive possession" over it. App., *infra*, 4a (citing *United States* v. *Howell*, 425 F.3d 971, 976-977 (11th Cir. 2005)); *id.* at 14a (same). In addition, the Eleventh Circuit, again relying on circuit precedent, held that "a defendant convicted of a drug offense ha[s] unclean hands to demand" transfer of his firearms, "even though, as with [petitioner], that defendant did not use those firearms in furtherance of his offense." *Id.* at 4a.

The decision below is part of a recognized split among the circuits, which are sharply divided over whether a convicted felon may transfer his nonpossessory property interest in unrelated firearms, or whether Section 922(g)'s prohibition on possession permits the government to deprive owners of any economic interest in them without legal process or compensation. See Frederick C. Benson, Comment, *The Firearm-Disability Dilemma:*

Property Insights into Felon Gun Rights, 80 U. Chi. L. Rev. 1231, 1245 (2013) (recognizing "circuit split" with courts "divided into two camps"; "some courts recogniz[e] a residual property right in firearms for those subjected to the firearm-disability dilemma and others refus[e] to do so"). The Eleventh Circuit joined the Third, Sixth, and Eighth Circuits in holding that any attempt to transfer an ownership interest to a third party would place the transferor in constructive possession and thus violate 18 U.S.C. § 922(g). See *United States* v. *Roberts*, 322 F. App'x 175, 176-177 (3d Cir. 2009); *United States* v. *Headley*, 50 F. App'x 266, 267-268 (6th Cir. 2002); *United States* v. *Felici*, 208 F.3d 667, 670 (8th Cir. 2000).

By contrast, the Seventh, Second, and Fifth Circuits have explicitly rejected the Eleventh Circuit's position and held that a person convicted of a felony may transfer his nonpossessory ownership interest in firearms to a third party because "[the owner's] interest in the firearms continues even though his possessory interest has been curtailed." *United States* v. *Miller*, 588 F.3d 418, 420 (7th Cir. 2009) (Easterbrook, J.). As the Seventh Circuit noted, a contrary conclusion would turn Section 922(g) into "the functional equivalent of forfeiture," and would "nullif[y] the statute of limitations" (among other protections) in a proceeding to forfeit the firearms. *Id.* at 419. The Second Circuit agrees, holding that a person convicted of a felony may validly transfer his ownership interest in firearms through a Rule 41(g) motion. *United States* v. *Zaleski*, 686 F.3d 90, 93 (2d Cir.), cert. denied, 133 S. Ct. 554 (2012). The Fifth Circuit likewise holds that such a person maintains an ownership interest in his firearms, which may be "sold for [his] account." See *Cooper* v. *City of Greenwood*, 904 F.2d 302, 305-306 (5th Cir. 1990). And the Montana Supreme Court has likewise

held that a court may, consistent with Section 922(g), transfer such firearms to a third party or to have the State sell firearms for the benefit of their owner. *State* v. *Fadness*, 268 P.3d 17, 20, 29-30 (Mont. 2012). And no other court has accepted the Eleventh Circuit's "unclean hands" theory for denying the disposition of property unrelated to criminal or inequitable conduct.

The Eleventh Circuit's decision cannot stand. It entrenches a recognized split among the federal courts of appeal on a frequently recurring issue. It allows the government—based on a statutory prohibition on mere *possession*—to bypass formal forfeiture procedures and effectively strip gun owners of their entire ownership interest in significant, lawful household assets following a conviction for an unrelated offense. And it deprives those persons of assets they could use to contribute to the support of their dependents at the very time that imprisonment prevents them from supporting the household with employment income. Further review is warranted.

A. Factual Background

1. In early June 2006, petitioner was arrested and charged with distributing marijuana in violation of 21 U.S.C. § 841(a)(1). App., *infra*, 2a. At petitioner's bond hearing, the magistrate judge required that petitioner surrender the service firearm issued to him in connection with his unrelated employment with the United State Border Patrol. C.A. Expanded Excerpts of R. 54 ("E.R."). The magistrate judge also requested that petitioner surrender his personal firearms to the FBI while criminal charges were pending. See E.R. 61. Petitioner complied and voluntarily turned over to the

FBI fifteen firearms[1] and other items valued at $3,570.92. E.R. 65-66, 69-70. On the "Receipt for Property" it issued petitioner, the FBI marked the box indicating that the items were "Received From" him; it left unmarked the box indicating that items were "Seized" from him. E.R. 65. Petitioner later pleaded guilty to the drug charges and was sentenced to six months' imprisonment. Gov't C.A. Br. 2.

2. Beginning in November 2008, after serving his sentence, petitioner contacted the FBI to arrange for the transfer of his firearms to a third party. App., *infra*, 9a. Following the FBI's instructions, petitioner submitted a letter describing his case together with a bill of sale and the contact information of the buyer, William Boggs. *Ibid.* When Mr. Boggs later chose to withdraw from the transaction because of pressure from the FBI, petitioner arranged to sell his ownership interest in the firearms to Robert Rosier, and again submitted the requested paperwork to the FBI. *Id.* at 10a.

After receiving no response for more than a month, petitioner wrote another letter to the FBI and attempted

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[1] The Eleventh Circuit's decision erroneously states petitioner surrendered "nineteen personal firearms," App., *infra*, 2a, but the FBI inventory indicates that the nineteenth item was not a firearm but spare magazines. E.R. 65-66 (Tab 155, Exh. 1). The remaining eighteen items also included a crossbow and two non-functioning guns. See E.R. 69-70 (describing antique Japanese rifle and home-made muzzle-loading rifle as "nonfunctional" and a third item as a "crossbow"); *id.* at 66 (describing muzzle-loader as "wall [h]anger"). Those three items are not classified as firearms under federal law, see 18 U.S.C. § 921(a)(3), and 18 U.S.C. § 922(g) does not apply to their possession. The remaining firearms included three surplus M1 Garand rifles dating from World War II and the Vietnam War, a host of .22 caliber rifles and pistols, two shotguns, and other pistols. The number of firearms is not material to the legal issue.

to contact an agent familiar with the case on four different occasions between April and June 2009. App., *infra*, 10a. Twelve months after submitting a signed bill of sale, petitioner received a letter from the Jacksonville FBI office asserting that the Bureau had "seized" his firearms on June 9, 2006—the date he voluntarily complied with the magistrate judge's request to surrender the firearms—and notifying him of the procedure for submitting claims. *Ibid.* In December 2009, petitioner and Mr. Rosier filed a claim with the FBI requesting that the agency transfer ownership to Mr. Rosier. *Ibid.* Four to five months later, the FBI rejected the claim, asserting that "the release of the firearms to you or your designee, Robert Rosier * * * would place you in violation of federal law as it would amount to constructive possession." E.R. 67 (citing *Howell*, 425 F.3d at 976-977, and *Felici*, 208 F.3d at 670). The letter advised that petitioner had 10 days to request reconsideration, which he did. E.R. 67, 111.

After receiving no response for another month, petitioner, proceeding *pro se*, filed a motion in district court under Rule 41(g) of the Federal Rules of Criminal Procedure, asking that the firearms be transferred to Mr. Rosier or petitioner's wife. App., *infra*, 2a; E.R. 61-62, 96. The magistrate judge assigned the case withheld action until the FBI issued a final agency decision on petitioner's request for reconsideration. E.R. 80. Finally, in January 2011—more than two years after petitioner first sought to transfer his ownership interest in the firearms—the FBI issued its final decision denying his appeal. App., *infra*, 11a.

B. Procedural History

1. After the FBI issued its final decision, the magistrate judge took up petitioner's motion for return of property under Rule 41(g). That rule provides, in relevant part, that "[a] person aggrieved * * * by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). Although recognizing that federal courts were divided on whether "weapons to which a convicted felon has legal title, but not possession, can be sold for the owner's benefit" without constituting constructive possession, App., *infra*, 13a, the magistrate judge recommended denying petitioner relief because it was "bound by *Howell*," *ibid.*, the controlling circuit precedent. "Although the firearms were neither seized from [petitioner], nor constituted contraband, nor were they forfeited [by the government]," *id.* at 13a-14a, *Howell* dictated that "allowing a defendant to transfer the firearms or receive money from their sale would be constructive possession" prohibited by Section 922(g). *Id.* at 12a. The district court adopted the magistrate judge's report and recommendation as the opinion of the court and denied the motion. *Id.* at 5-6a. Petitioner, again proceeding *pro se*, timely appealed.

2. The court of appeals affirmed. App., *infra*, 1a-4a. The court held that granting petitioner's motion and transferring the firearms to third parties would violate 18 U.S.C. § 922(g) by placing him in constructive possession of the firearms he had surrendered to the FBI. *Id.* at 4a. Although acknowledging "cases from other circuit and district courts which afforded defendants relief," *id.* at 3a (citing, *inter alia*, *Zaleski*, 686 F.3d at 90, *Miller*, 588 F.3d at 418, and *Cooper*, 904 F.2d at 302), the court denied relief, concluding that "our decision in *Howell* controls." *Id.* at 4a. Again following *Howell*, the court also

held that "a defendant convicted of a drug offense ha[s] unclean hands to demand return of his firearms even though * * * th[e] defendant did not use those firearms in furtherance of his offense." *Id.* at 4a.

REASONS FOR GRANTING THE PETITION

Courts widely recognize that "[t]he general rule is that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper*, 904 F.2d at 304 (quoting *United States* v. *Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979) (quoting *United States* v. *La Fatch*, 565 F.2d 81, 83 (6th Cir. 1977))); *United States* v. *Rodriguez-Aguirre*, 264 F.3d 1195, 1212 (10th Cir. 2001) (same; quoting *Cooper*) (collecting cases); *United States* v. *Bein*, 214 F.3d 408, 411 (3d Cir. 2000) (collecting cases); see also *United States* v. *Wilson*, 540 F.2d 1100, 1101 (D.C. Cir. 1976) ("district courts ha[ve] both the jurisdiction and the duty to ensure the return of such property"). Section 922(g) makes it "unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess * * * any firearm."

There is a deep, acknowledged conflict among the federal courts of appeals and state supreme courts over whether Section 922(g) prevents a court from ordering the government either (1) to transfer a felon's non-contraband firearms to an unrelated third party to whom he has sold them or (2) to sell the firearms for that person's benefit. See *Zaleski*, 686 F.3d at 92-93 (describing federal split); *Miller*, 588 F.3d at 419 (same); Benson, 80 U. Chi. L. Rev. at 1245-1249 (same). This Court's review is urgently needed because this circuit split has "generated a significant amount of litigation," Benson, 80

U. Chi. L. Rev. fat 1245, concerning a common asset held by nearly half of American households, Lydia Saad, *Self-Reported Gun Ownership in the U.S. is Highest Since 1993*, Gallup Politics (Oct. 26, 2011), http://goo.gl/28bQy5—including the families of thousands of newly convicted persons each year. Whether individuals can realize the economic value of these valuable household assets or whether the government can retain firearms indefinitely without due process now depends on the happenstance of geography.

Because the conflict is deep and ultimately implicates constitutional concerns arising under both the Due Process and Takings Clauses, see *Cooper*, 904 F.2d at 304, 305 (holding that those convicted of felonies have "ownership interest" in firearms protected by the Due Process Clause that cannot be extinguished absent forfeiture); *State* v. *Fadness*, 268 P.3d 17, 23 (Mont. 2012) (noting that the government's "continued retention" of property not subject to forfeiture "would constitute a taking without just compensation"), this Court should not delay review. Granting the petition is the only way to bring uniformity to this area of law and settle this recurring and important issue.

I. THE CIRCUITS DISAGREE ABOUT WHETHER SECTION 922(G) EXTINGUISHES ONLY POSSESSORY INTERESTS OR ALL OWNERSHIP INTERESTS IN NON-CONTRABAND FIREARMS

A. Four Federal Circuits Have Held That Section 922(g) Extinguishes All Property Interests In Non-Contraband Firearms

1. The Eighth and Eleventh Circuits have held that when a person is convicted of a felony, Section 922(g) extinguishes not just his possessory interest in all firearms

but effectively all other ownership interests as well. In *United States* v. *Bagley*, 899 F.2d 707 (1990), the Eighth Circuit held that Section 922(g)'s bar against a felon's possession of firearms extended to other ownership interests, including the right to dispose of such property. *Id.* at 708. In just two short sentences of analysis, it rejected the argument that the government could sell the individual's firearms to a third party and give him the money without violating Section 922(g): "Bagley's argument is frivolous. We agree with the district court 'that to allow [Bagley] to reap the economic benefit from ownership of weapons [] which it is illegal for him to possess would make a mockery of the law.'" *Ibid.* (brackets in original). That court revisited the issue in *United States* v. *Felici*, 208 F.3d 667 (2000), but offered scant additional reasoning to support its conclusion. In rejecting the argument that the government could transfer to a third-party trust non-contraband firearms it had seized from a person convicted of a felony, 208 F.3d at 670, the court stated simply that "[s]uch a request suggests constructive possession [and a]ny firearm possession, actual or constructive, by a convicted felon is prohibited by law," *ibid.*

In *United States* v. *Howell*, 425 F.3d 971 (2005), the Eleventh Circuit expressly adopted the Eighth Circuit's reasoning in rejecting the argument that the government could "sell the [non-contraband] firearms" it had seized from a person convicted of a felony "and distribute the proceeds to him." *Id.* at 977. Selling the property for the person's benefit, it held, would amount to giving him "possession, actual or constructive, [which] is prohibited by [Section 922(g).]" *Ibid.* It also held, as an alternative ground, that the individual could not force the government to sell non-contraband firearms because, as a felon,

he had "extremely 'unclean hands.'" *Id.* at 974. "One engaged in * * * criminal conduct," the court concluded, "is hardly entitled to equitable relief." *Ibid.*

2. Two other circuits have adopted the Eighth and Eleventh Circuit's Section 922(g) rationale in unpublished opinions. In *United States* v. *Roberts*, 322 F. App'x 175 (2009), the Third Circuit ruled that the government could destroy non-contraband firearms it had seized from a person convicted of a felony rather than return them to his mother for her to sell and use the proceeds to benefit his children. *Id.* at 176. It stated that it was "persuaded by the *Felici* decision" that "because convicted felons are prohibited from possessing guns * * * they are also barred from constructively possessing firearms by transferring them to a third party." *Ibid.* In *United States* v. *Headley*, 50 F. App'x 266 (2002), the Sixth Circuit similarly concluded that because a person convicted as a felon of "tax evasion and * * * student loan fraud" thereby "lacks the power to lawfully possess the firearms himself, he also cannot delegate the authority to possess these firearms to another individual. Thus, Headley could not seek return of the firearms and ammunition nor could he request that they be transferred to a third-party for him." *Id.* at 267 (citation omitted).

B. Three Circuits And The Montana Supreme Court Have Held That Section 922(g) Leaves Non-Possessory Interests In Firearms Intact

1. The Second, Fifth, and Seventh Circuits and the Montana Supreme Court all have held that Section 922(g) extinguishes only a person's *possessory* interest in non-contraband firearms after he has been convicted of a felony, and does not affect any larger ownership interest he may have in them. Closely following the plain language

of Section 922(g), which makes "[i]t * * * unlawful for any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * *possess* * * * any firearm," 18 U.S.C. § 922(g) (emphasis added), these courts have concluded that the provision poses no obstacle to the transfer or sale of such firearms. See *Zaleski*, 686 F.3d at 93 ("The possibility that Zaleski will receive a financial benefit from [the] sale of the firearms and ammunition to compensate him for his nonpossessory property interest in them does not, standing alone, mean that he constructively possesses them."), cert. denied, 133 S. Ct. 554 (2012); *Miller*, 588 F.3d at 420 ("Miller's property interest in the firearms continues even though his possessory interest has been curtailed."); *Cooper*, 904 F.2d at 305 ("Cooper * * * has a constitutionally protected property interest in [his non-contraband] firearms. * * * Cooper's property interest, however, is limited to an ownership interest; as a convicted felon he cannot legally possess the guns."); *Fadness*, 268 P.3d at 20 (noting "prosecutor sought an order giving him the authority to sell [non-contraband firearms] at public sale or auction * * * with the proceeds from the sale to go to Fadness's parents to be held on Fadness's behalf * * * since it is unlawful under 18 U.S.C. § 922(g)(1) for a person[, like Fadness,] who has been convicted in any court of a felony to possess firearms"); *id.* at 29-30 (concluding that firearms may lawfully be transferred to a third party, so long as felon lacks control over them).[2]

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[2] It appears the government has taken inconsistent positions on the lawfulness of transferring firearms. Although the government has in many cases argued that Section 922(g) prevents any sale or transfer of a convicted felon's firearms, in the District of Massachusetts, for example, "the government ha[s] represented that it would surrender

Indeed, the Second and Seventh Circuits have explicitly recognized the circuit conflict and expressly rejected the reasoning of the Eighth and Eleventh Circuits. *Zaleski*, 686 F.3d at 92-93 (discussing conflict and stating that, "[o]n balance, we are persuaded by the Seventh Circuit's reasoning in *Miller*"); *Miller*, 588 F.3d at 419 (noting that Fifth Circuit in *Cooper* "concluded[] to the contrary" of *Felici* and *Howell*, and explaining that "[t]he fifth circuit has the stronger position"). These courts distinguish the possessory interest in firearms, which Section 922(g) extinguishes, from the larger ownership interest, which Section 922(g) leaves intact, recognizing that these interests represent different sticks in the property "bundle."

Both circuits, moreover, expressly reject the Eleventh Circuit's view that the sale of firearms to an independent third party somehow entails constructive possession by the person convicted of a felony. The Second Circuit noted that so long as the transfer "*in fact* strip[s] [the owner] of any power to exercise dominion and control" over the firearms, it "may be approved without running afoul of Section 922(g)(1)." *Zaleski*, 686 F.3d at 93. The Seventh Circuit went further to identify "other possibilities," including the government transferring "the firearms in trust to a reliable trustee" and allowing an individual convicted of a felony to gift "the firearms to one of [his] friends or relatives" on the recipient's written understanding that he would not return the guns to the convicted individual's control. *Miller*, 588 F.3d at 419-420; accord *Zaleski*, 686 F.3d at 93.

[seized firearms] to any third party lawfully purchasing them from [a convicted felon]." *United States* v. *LeCedra*, No. 98-1057, 1998 WL 1247097, at *1 (1st Cir. May 28, 1998) (per curiam).

2. The Seventh Circuit noted an additional problem with the Eighth and Eleventh Circuit's position. If transfer to a third party necessarily entails constructive possession by the felon and the government thus cannot give the guns to *anyone*, it will have achieved "the functional equivalent of forfeiture" without having to satisfy any of the numerous safeguards on forfeiture proceedings—including "nullif[ying] the statute of limitations" applicable to such proceedings. *Miller*, 588 F.3d at 419. But as the Seventh Circuit, the Montana Supreme Court, and other courts have recognized, "'due process guarantees' prevent the government from effecting 'de facto forfeitures of property by retaining items indefinitely,'" and "'[o]ther courts have likened continued retention of evidence as a taking without just compensation.'" *Fadness*, 268 P.3d at 29 (quoting *Lee* v. *City of Chicago*, 330 F.3d 456, 466 & n.5 (7th Cir. 2003)).

C. The Circuits Disagree About Whether "Unclean Hands" Prevent Disposition Of Noncontraband Firearms

The Eleventh Circuit's "unclean hands" holding presents a subsidiary conflict that also warrants this Court's review. This rule has been rejected, both implicitly and explicitly, by numerous other courts; indeed, 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). The courts of appeals routinely allow felons to seek the return of non-contraband property through Rule 41(g) provided they meet applicable requirements. See, *e.g.*, *Savoy* v. *United States*, 604 F.3d 929, 939 (6th Cir. 2010) (remanding for determination of whether felon was allowed to possess particular property under state law); *United States* v. *Kriesel*, 604 F.3d 1124, 1126 (9th Cir.

2010) (remanding for determination of whether Rule 41 requirements met); *Miller*, 588 F.3d at 420 (remanding for fashioning of appropriate Rule 41 remedy); *United States* v. *Cardona-Sandoval*, 518 F.3d 13, 18 (1st Cir. 2008) (remanding for determination whether government still held felon's property); *United States* v. *Albinson*, 356 F.3d 278, 284 (3d Cir. 2004) (same); *United States* v. *Rodriguez-Aguirre*, 264 F.3d 1195, 1200 (10th Cir. 2001) (remanding for determination of whether Rule 41 requirements met); *United States* v. *Robinson*, 78 F.3d 172, 175 (5th Cir. 1996) (remanding for determination whether felon received adequate notice); *United States* v. *Giovanelli*, 998 F.2d 116, 119-120 (2d Cir. 1993) (ordering return of money to felon).

Even the Eighth Circuit has rejected the Eleventh Circuit's approach to unclean hands and indeed did so in *Felici*—the very case that first clearly laid out the "constructive possession" theory of Section 922(g). 208 F.3d at 670-671. There, the government argued that someone convicted of a drug felony could not require the government under Rule 41(g) (then Rule 41(e)) to return various drug-related items because his conviction gave him unclean hands and because the items represented derivative contraband of the offense. *Id.* at 670. The court remanded for a hearing under the "limited derivative contraband theory, *i.e.*, that the items sought to be returned were in fact utilized or intended to be utilized by the person who possessed them for the manufacture, storage, or transportation of controlled substances." *Id.* at 671. In doing so, the Eighth Circuit necessarily rejected the government's other theory that felons *necessarily* have unclean hands that bar them from using equitable mechanisms, like Rule 41(g), even when there is no relationship between the property sought and past misconduct. If the

court had not rejected the government's theory, the Eighth Circuit would have had no reason to remand for a determination of the relationship between the property and the offense; under the Eleventh Circuit's rationale, it would have simply affirmed because of the claimant's "unclean hands" as a person convicted of a felony.

This subsidiary disagreement provides an additional reason to grant review in this case, because it would permit the Court to address, in a single petition, *both* issues that potentially could prevent a person convicted of a felony from arranging the sale of noncontraband assets.

II. THE DECISION BELOW IS WRONG

The circuits that have concluded that Section 922(g) prohibits persons convicted of felonies from transferring or selling firearms acknowledge that the provision's textual bar extends only to *possession* of a firearm. App., *infra*, 4a ("We den[y] Rule 41 relief * * * because of the concern with courts violating 18 U.S.C. § 922(g) by delivering *actual or constructive possession* of firearms to a convicted felon.") (emphasis added); *Howell*, 425 F.3d at 977 ("Even though the defendant's [idea of a proposed sale] is interesting * * * any firearm *possession, actual or constructive,* by a convicted felon is prohibited by law.") (emphasis added); *Felici*, 208 F.3d at 670 (similar); accord *Roberts*, 322 F. App'x at 176 (discussing *Felici*); *Headley*, 50 F. App'x at 266. Those courts err, however, in holding that a court cannot authorize the government to make such a transfer on behalf of the convicted owner without him somehow "possessing" the firearms in the process. In doing so, these courts confuse "possession" with the other incidents of ownership, disregard the language of Section 922(g) and related statutory provisions, and allow the government to effectuate a forfeiture

without having to satisfy any of that procedure's substantive or procedural requirements.

A. The Eleventh Circuit's Rule Confuses Possession Of A Firearm With Other Incidents Of Ownership

This Court has long recognized that when "a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *United States* v. *Turley*, 352 U.S. 407, 411 (1957) (citations omitted). Under the common law, a possessory interest commonly entails "[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner." *Black's Law Dictionary* 1284 (9th ed. 2009); *Restatement (First) of Prop.: Introduction & Freehold Estates* § 7 (1936) ("A possessory interest in land exists in a person who has * * * a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land."). This understanding accords with the courts of appeals' understanding that "possession," including constructive possession, entails "dominion and control" over the property in question. *E.g.*, *United States* v. *Garrett*, 903 F.2d 1105, 1110 (7th Cir. 1990); *United States* v. *Pelusio*, 725 F.2d 161, 167 (2d Cir. 1983); *United States* v. *Laughman*, 618 F.2d 1067, 1077 (4th Cir. 1980); *United States* v. *Craven*, 478 F.2d. 1329 (6th Cir. 1973), abrogated on other grounds by *Scarborough* v. *United States*, 431 U.S. 563 (1977); *United States* v. *Virciglio*, 441 F.2d 1295, 1298 (5th Cir. 1971).

1. The Eleventh Circuit's rule—that the government's sale or transfer of a gun on behalf of an owner who has been convicted of a felony necessarily imputes constructive possession to the owner—violates this well-established understanding. To begin with, the government's transfer to a third party gives the owner no "right to control" or "right to exclude," the two central indicia of possession. While the firearms are in the government's possession, the government, as bailee, enjoys the complete right to control and to exclude others, including the bailor himself. See John D. Lawson, *The Principles of the American Law of Bailments* § 15, at 34 (1895) ("The bailee not having the title, nevertheless has in addition to the possession of the chattel a special, limited or qualified property in it which gives him a right of action against any one, whether the bailor or a stranger, interfering with his possession or doing damage to the bailed article.").[3] The convicted owner enjoys neither: He cannot use the firearms, access them, or decide where they are stored, how they are stored, or how they are maintained. Nor can he stop others whom the government permits from handling them.

Under general principles of law, a bailor can sell the property to a third party during the period of the bailment. See Lawson, *supra*, § 29(9), at 62. When he does, the bailor does not temporarily regain possession in violation of the bailment agreement; throughout the transaction, the bailee retains the same right to control the

[3] Once the firearms are transferred to a third party, the original owner can exercise no right to control or right to exclude. Only the new owner can by virtue of her newfound full ownership. She alone, not the original owner, can decide when, how, where, and by whom the firearms can be used. The sale has extinguished the original owner's property interest in them.

property and exclude others, including the bailor. *Id.* § 15, at 34. It is black-letter law that a bailment "will not be affected by a sale made by the bailor of his reversionary interest to a third person, for the reason that he can convey no greater interest than he possesses, and has not, during the bailment, a present right of possession." *Id.* § 29(9), at 62. That the convicted owner receives money from the sale (either through the government as intermediary or directly from the new owner) makes no difference to this analysis. His receipt of the proceeds gives him no right to control or right to exclude. The new owner gains these possessory rights and, in any event, she receives possession from the government, not the original owner. Although the sale transfers the possessory rights of control and exclusion from the government to the third party, at no time does the original owner enjoy the power to exercise either. He simply gains no constructive possession.

This conclusion is confirmed by examining another common situation of divided possession and ownership, a standard landlord-tenant lease. In it, the landlord who owns the property grants the right of possession to the tenant for a period of time. The owner no longer enjoys the right to possess and, indeed, the tenant (subject to certain express or implied contractual conditions) can even exclude the owner. *Restatement (Second) of Prop.: Land. & Ten.* § 1.2 cmt. a (1977). The owner typically retains the right to sell the property subject to the lease. *Id.* § 15.1. But in the process of selling the property then in possession of the tenant, the landowner does not, even temporarily, regain possession in violation of the tenant's rights under the lease. See *id.* § 15.2 cmt. a ("The enjoyment by the tenant of his rights and expectations under the lease usually does not depend significantly on the

landlord continuing to own his reversionary interest in the leased property.").

Although the courts on this side of the split have concluded that transfer or sale to a third party "suggests constructive possession," *Felici*, 208 F.3d at 670, none has explained exactly when (or *how*) the owner would enjoy constructive possession. They cannot articulate the point in the transaction where the convicted owner attains possession *because he never does*. At no point during the transfer of possession of the firearm, during the receipt of payment or its transfer to the original owner, does the felon control the firearm or have the right to exclude others from using them.

The Eleventh Circuit's mistaken conclusion that such transfer fleetingly provides the convicted owner constructive possession effectively destroys all his remaining nonpossessory interests in the property. Under this mistaken understanding, a person convicted of a felony cannot exercise his ultimate right in the property—the right to sell it—without violating the law's ban on the lesser right of possession. The rule effectively transforms a ban on possession into a ban on ownership and, in so doing, violates both well-understood notions of property and Congress's intent.

2. The Eleventh Circuit's bootstrapping of possession into ownership cannot be squared with Congress's careful statutory scheme. As this Court has recognized, possession is just one stick in the "bundle" of property rights, see *United States* v. *Craft*, 535 U.S. 274, 278 (2002), and this Court has distinguished possession, in particular, from the rights to use and dispose of property, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been

described as the rights to possess, use and dispose of it.") (internal quotation marks omitted). Congress has observed these distinctions in its regulation of firearms. Section 922(j), for example, which appears in the same U.S. Code provision at issue in this case, makes it "unlawful for any person to receive, *possess*, conceal, store, *barter*, *sell*, or *dispose of* any stolen firearm." 18 U.S.C. § 922(j) (emphasis added). By distinguishing between possessing a firearm, and "barter[ing], sell[ing], or dispos[ing] of" it, Congress clearly indicated that a prohibition on possessing a firearm does not itself forbid disposing of it; by the same token, Section 922(g)'s prohibition on "possession" of a firearm by a felon does not include non-possessory incidents of ownership.

Congress expressly distinguished between possession and ownership in a number of related statutes. Section 931(a), for example, makes it unlawful for a convicted felon "to purchase, *own*, or *possess* body armor." *Id.* § 931(a) (emphasis added). Section 924(d)(1) similarly provides, in relevant part, that when someone has forfeited guns allegedly involved in certain crimes, that "upon acquittal of the *owner* or *possessor* * * *, the seized or relinquished firearms or ammunition shall be returned forthwith to the *owner* or *possessor*." *Id.* § 924(d)(1) (emphasis added). Both of those provisions are in the same Chapter as Section 922(g). Section 229(a)(1) likewise makes it a crime to, among other things, "*own*, *possess*, or use * * * any chemical weapon." *Id.* § 229(a)(1) (emphasis added). Section 229B(a) correspondingly provides that any person convicted under § 229A(a) must "forfeit * * * any property, real or personal, *owned*, *possessed*, or used by a person involved in th[at] offense." *Id.* § 229B(a) (emphasis added).

Clearly, Congress understands the difference between ownership and possession and has used each term deliberately with its specific meaning in mind. As this Court has noted, "[w]here Congress includes particular language in one section of a statute but omits it in another section * * * , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Nken* v. *Holder*, 556 U.S. 418, 430 (2009) (internal quotation marks omitted). Congress's decision in drafting Section 922(g) to bar possession but not ownership, transfer, or sale means it intended to do just that—and no more. "[C]ourts must presume that [the] legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). The broad interpretation of "possession" embraced by the Eighth and Eleventh Circuits would render superfluous all of the other terms Congress explicitly included in these other provisions embracing the other incidents of ownership. But see *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06, at 181-186 (rev. 6th ed. 2000)).

Finally, prohibiting those convicted of felonies from transferring their firearms to third parties does nothing to advance the recognized purpose of Section 922(g), to "keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Small* v. *United States*, 544 U.S. 385, 393 (2005) (internal quotation marks omitted). Allowing such transfers poses no risk of putting firearms back in the hands of convicted persons; it

merely allows them to dispose of their remaining property interests.

B. The Eleventh Circuit's Rule Raises Constitutional Concerns

1. The Eleventh Circuit's rule is erroneous for a second reason: It allows the government to effectively extinguish all of an owner's interests in his property without having to satisfy any of the strict substantive and procedural requirements for forfeiture. It is undisputed that by receiving the firearms from petitioner in accordance with the magistrate judge's request, the government acquired no ownership interest in petitioner's firearms. App., *infra*, 14a. But the Eleventh Circuit's rule not only prevents a felon from *possessing* firearms, it also prevents him from lawfully renting, selling, or otherwise transferring them to anyone else, or even realize the value of their sale. That, however, effectively extinguishes all of petitioner's interests in his property, rendering the property utterly without economic value to him.

The Eleventh Circuit's interpretation allows the government to effectively extinguish all of petitioner's interests in the property without satisfying any of the requirements the constitution, statutes, and federal rules establish for forfeiture. In particular, the Eleventh Circuit's rule allows the government to dispense with giving notice and a hearing, as due process ordinarily requires, *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43 (1993), and the government no longer needs to grant the owner an opportunity to show that the deprivation of all his ownership interests is excessive under the Eighth Amendment, see *Austin* v. *United States*, 509 U.S. 602 (1993). Nor does the government

have to show that the guns have some connection to a criminal act, see 18 U.S.C. § 924(d)(1), or that they were purchased with criminal proceeds, 18 U.S.C. § 981(a)(1). It can, in fact, accomplish the equivalent of forfeiture without having to satisfy § 924(d)(1)'s strict 120-day statute of limitations or observing any of the other procedural safeguards imposed by Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

The government has, in fact, effectively achieved "the functional equivalent of forfeiture" (*Miller*, 588 F.3d at 419) without affording petitioner *any* process. That itself "raise[s] a multitude of constitutional problems" counseling against the Eleventh Circuit's broad reading of the statute. *Clark* v. *Martinez*, 543 U.S. 371, 380-381 (2005). If, as this Court has noted, forfeiture proceedings implicate the Due Process Clause of the Fifth Amendment, see, *e.g.*, *United States* v. *$8,850 in U.S. Currency*, 461 U.S. 555 (1983), seizing noncontraband property without any process implicates due process concerns *a fortiori*, see, *e.g.*, *Cooper*, 904 F.2d at 304. The courts have recognized likewise that when the government "effect[s] a *de facto* forfeiture by retaining the property seized indefinitely" its "continued retention * * * constitute[s] a taking without just compensation." *United States* v. *Premises Known as 608 Taylor Ave., Apartment 302, Pittsburgh, Pa.*, 584 F.2d 1297, 1302 (3d Cir. 1978); accord *Fadness*, 268 P.3d at 29 (same); *Lee* v. *City of Chicago*, 330 F.3d at 466 & n.5 (same); see also *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (suggesting that the "denial" of the full "bundle" of property rights constitutes a taking). Furthermore, a continued holding of property may "constitute both a seizure and a taking,"

raising Fourth Amendment concerns as well. *Presley* v. *City of Charlottesville*, 464 F.3d 480, 485 (4th Cir. 2006).

This approach fundamentally conflicts with this nation's long recognition of citizens' economic interest in firearms. Even during the Revolution, when the Continental Congress authorized the seizure of weapons held by Loyalists, it required that "the arms when taken be appraised by indifferent persons, and such as are applied to the arming the continental troops, be paid for by Congress, and the residue by the respective assemblies, conventions, or councils, or committees of safety." 4 *Journals of the Continental Congress, 1774–1789*, at 201-205 (Washington, D.C.: Government Printing Office 1906). Contemporaneous state law likewise required compensation for arms taken from private persons. See, *e.g.*, An Act for Providing Against Invasions and Insurrections, 1777 Va. Acts ch. VII, *reprinted in* 9 *Hening's Statutes at Large* 291 (1821) (directing that any arms taken for temporary state use and lost or damaged be paid for).

2. Finally, the government's broad understanding of "possession" unnecessarily raises Second Amendment issues by placing petitioner and many thousands of others in a "cruel trilemma." Cf. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964). Under the government's theory of possession, a firearm owner charged with a non-violent felony has three bad options: voluntarily deliver her firearms to the government when accused and receive no compensation if convicted of the felony; sell or give away the firearms when accused, leaving her unable to protect herself or her family pending trial; or keep the firearms once accused and face instantaneous liability under Section 922(g) upon conviction. See *United States* v. *Casterline*, 103 F.3d 76, 79 (9th Cir. 1996) ("If owner-

ship were equated with possession, then one charged with a first felony, who had pawned his guns or otherwise put them out of his possession and control, but retained title, would automatically commit a second felony the moment he was adjudged guilty."). In other words, the government's position burdens a gun owner accused of a crime even if he is eventually acquitted. Construing "possession" in its traditional, common-law sense thus avoids several constitutional difficulties.

C. The Eleventh Circuit's "Unclean Hands" Rationale Does Not Support Denying Relief Absent Wrongdoing Related To The Property

The Eleventh Circuit's alternative holding—that, as someone convicted of a felony, petitioner had "unclean hands" and thus was disqualified from seeking any equitable relief under Rule 41(g)—fares even worse under scrutiny. This Court has squarely held that the unclean hands doctrine applies "only where some unconscionable act of one coming for relief has *immediate and necessary relation to the equity that he seeks in respect of the matter in litigation*." *Keystone Driller Co.* v. *Gen. Excavator Co.*, 290 U.S. 240, 245 (1933) (emphasis added); 1 Joseph Story & W.H. Lyon, *Commentaries on Equity* § 100 at 101 (14th ed. 1918); see also 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 399 at 94-95 (Spencer W. Symons ed., 5th ed. 1941). Thus the doctrine of unclean hands "does not go so far as to prohibit a court of equity from giving its aid to a bad or a faithless man *or a criminal*," 2 Pomeroy § 399, at 97 (emphasis added), and "[e]quity does not demand that its suitors shall have led blameless lives," *Loughran* v. *Loughran*, 292 U.S. 216, 229 (1934). "[C]ourts of equity," in short, "do not make the quality of suitors the test." *Keystone Driller*, 290 U.S. at 245.

No other court of appeals has endorsed the Eleventh Circuit's expansive view of the unclean hands doctrine and most have at least implicitly rejected it. See, pp. 11-13, *supra*. While courts occasionally use the language of unclean hands to deny Rule 41(g) relief to persons convicted of crimes, they do so only when they seek the return of derivative contraband related to the offense. See, *e.g.*, *United States* v. *Kaczynski*, 551 F.3d 1120, 1129–1130 (9th Cir. 2009). Denying Rule 41(g) relief in such cases is logical, because the actor's past criminal conduct "has [an] immediate and necessary relation to the equity that he seeks in respect of the matter in litigation." *Keystone Driller*, 290 U.S. at 245.

No such connection exists here. It is undisputed that the firearms at issue are not derivative contraband. Petitioner did not use a firearm—much less his entire collection of firearms—in committing the drug distribution offense to which he pleaded guilty. See App., *infra*, 4a ("[petitioner] did not use those firearms in furtherance of his offense"), 13a-14a. Nor is there any evidence that he used any proceeds from marijuana sales to purchase them. The Eleventh Circuit based its holding of unclean hands solely on petitioner's status as a felon, App., *infra*, 4a, directly violating "[t]he general rule * * * that seized property, other than contraband, should be returned to its rightful owner once * * * criminal proceedings have terminated." *Cooper*, 904 F.2d at 304.

Taken to its logical conclusion, the Eleventh Circuit's rule would foreclose courts from *ever* considering a claim for return of property to someone convicted of a crime. The government could seize or hold property belonging to a person convicted of an offense knowing that he would have no status to invoke the courts' equitable powers to return it. It could thus impose upon a felon or even a

misdemeanant an additional punishment beyond that imposed by law. Indeed, the Eleventh Circuit's rule would bar anyone convicted of a crime from invoking equity even against private individuals. That would be tantamount to outlawry. But this Court has held that claimants cannot be foreclosed from litigating their rights to property based on far more compelling claims of misconduct, including rebellion against the United States. See *Degen* v. *United States*, 517 U.S. 820, 828 (1996) (citing *McVeigh* v. *United States*, 78 U.S. 259, 268 (1870)). As noted there, foreclosing a person from litigating their rights to property because of misconduct unrelated to the property is "an arbitrary response to the conduct it is supposed to * * * discourage." *Ibid.*

The Eleventh Circuit's narrow application of its "unclean hands" rule appears to reflect an appreciation of its flaws: Besides *Howell*, 425 F.3d at 974, and the decision below, the court has never applied the rule to non-contraband goods other than firearms. Indeed, it routinely allows felons to invoke Rule 41(g) in seeking the return of noncontraband property from the government. See, *e.g.*, *United States* v. *Melquiades*, 394 F. App'x 578, 579-580 (11th Cir. 2010). The Eleventh Circuit's inconsistent approach reflects little faith in the validity of its rule.

III. THIS RECURRING ISSUE IS OF NATIONAL IMPORTANCE

Whether persons convicted of felonies retain any nonpossessory ownership interest in their firearms and can receive the proceeds from their sale are recurring questions of great practical importance. One in three Americans and almost half of American households own a firearm. See Saad, *supra*. And in 2006 alone, there were more than 1,200,000 felony convictions, U.S. Dep't of

Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables*, Table 1.1; *id.*, Table 4.2. Under the Eleventh Circuit's rule, an individual convicted of a felony may effectively lose all property interests in any firearms he owns (including nonpossessory interests), without any compensation whatsoever. The rule deprives such persons of the complete economic value of their firearms.

Firearms represent significant household assets. One commenter estimates the cost a handgun—one of the least expensive types of firearms—with associated ammunition and equipment at $ 714. Dan Zimmerman, *The True Cost of Buying a Handgun*, The Truth About Guns (Oct. 20, 2013), http://goo.gl/vzrcV8. That sum represents two-thirds of the typical American household's monthly discretionary income.[4] Furthermore, many individuals purchase firearms as an investment, as "firearms [never] do anything but increase in value." Joe Mont, *Want Bang for Your Buck? Invest in Guns*, MSN Money (Apr. 13, 2011), http://goo.gl/ocPLNu. Those who own firearms tend to own several. Allison Brennan, *Analysis: Fewer U.S. gun owners own more guns*, CNN (July 31, 2012), http://goo.gl/0TCWA6.

Gun collections represent significant assets: Even gun collections consisting only of ordinary, functional pieces (rather than valuable antiques) routinely attain values of thousands of dollars, if not tens of thousands of dollars. *E.g.*, Larry Fitzpatrick, *No Heirs Found for Springfield Man Who Died Leaving Valuable Gun Collection*, Oregon Herald (May 11, 2012), *available at*

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[4] The typical American household has $12,800 in annual discretionary spending. Experian, *The 2011 Discretionary Spend Report* 3 (2011).

http://goo.gl/huSCek (reporting "a gun collection worth about half a million dollars"). The cases involved in the circuit split reflect that fact: In one case, the Government sold the firearm collection for over $30,000, see *Cooper*, 904 F.2d at 304, and, in another, seized a collection valued at over $100,000, see *Zaleski*, 686 F.3d at 91. Sizable collections are present in many of the other cases involved in the split. *E.g.*, *Miller*, 588 F.3d at 418 (34 firearms); *Headley*, 50 F. App'x at 267 (14 firearms); *Roberts*, 322 F. App'x at 176 (10 firearms); Notice and Motion for Court Order to Return Personal Property 4, *United States* v. *Brown*, No. 1:06-cr-0071-SM (D.N.H. filed Oct. 16, 2006), ECF No. 65 (30 firearms). The fifteen firearms involved here, see note 1, *supra*, are typical.

Firearms, and firearm collections, represent significant economic assets given that median per capita annual income is $28,051. U. S. Census Bureau, *State & County Quickfacts*, http://goo.gl/35WxM8 (last visited Apr. 26, 2014). The proceeds from selling a collection of the size at issue here could easily cover several months' rent or mortgage payments,[5] or cover months of grocery bills.[6]

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[5] See RealtyTrac, *Monthly House Payments for Homebuyers Increase an Average 21 Percent from a Year Ago in 325 U.S. Counties* (Feb. 21, 2014), http://goo.gl/ZOLR38 (average payment for house purchased in late 2013 was $865, up from $714 previous year); see also Sam Ro, *How Rent Became More Expensive Than Mortgage Payments*, Business Insider (Jan. 8, 2013), http://goo.gl/GFqbLr (noting fourth quarter 2012 figures showing average rent at $718, average mortgage payment $481).

[6] Elizabeth Mendes, *Americans Spend $151 a Week on Food; the High-Income, $180*, Gallup (Aug. 2, 2012), http://goo.gl/gEjG3o; USDA, *Official USDA Food Plans: Cost of Food at Home at Four Levels, U.S. Average, March 2014*, http://goo.gl/Yzoggg.

Depriving those convicted of felonies of the value of their firearms affects not only the person convicted—it also deprives their dependents of an important source of income, particularly during the period of imprisonment, when the person convicted is no longer able to contribute their wages to household income. Persons convicted of offenses often seek to use the proceeds to support dependents during the time of their incarceration. *E.g.*, *Roberts*, 322 F. App'x at 176 (unsuccessfully seeking authorization that defendant's "mother be permitted to sell the firearms and keep the proceeds to benefit his children"). Others use the proceeds as a nest egg to help them to make a fresh start after completing their prison sentence. *E.g.*, *Fadness*, 268 P.3d at 21 (defendant seeking to sell firearms for use to pay rent deposit and "try to get started on my own again" after prison). Thus, seizing firearms unconnected to an offense and prohibiting the owner from selling them can impose serious hardship on innocent members of the owner's household and other dependents.

IV. THIS CASE REPRESENTS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT

This case presents a particularly favorable vehicle for addressing this recurring issue because it arises from the Eleventh Circuit. Because the Eleventh Circuit—alone among the courts of appeals—holds that *both* Section 922(g) and the doctrine of unclean hands bar the government from selling or transferring firearms owned by a felon for his economic benefit, this case allows this Court to resolve in a single petition both asserted obstacles to permitting a person convicted of a felony from transferring his firearms. If this Court were to grant review in a case coming from any other circuit to address the meaning of Section 922 and concluded that

the provision does bar such transfers, a conflict would still remain on the unclean hands issue. Thus, in the Eleventh Circuit alone, government sale or transfer would still be barred by the convicted owner's unclean hands. In other words, this Court can bring national uniformity to this important issue only in a case arising from the Eleventh Circuit.

This case represents an ideal vehicle in other respects as well. Because the Eleventh Circuit squarely held that petitioner "did not use th[e] firearms in furtherance of his offense," App., *infra*, 4a, they clearly are not contraband subject to forfeiture or traditional unclean hands analysis, see pp. 26-28, *supra*. There are also no outstanding factual issues bearing on the case's outcome. Applying the correct legal rule would be dispositive of the whole case.

* * * * *

Whether a felon can receive the proceeds of a sale of non-contraband firearms in the government's possession now depends solely on geography. Every circuit to have decided the issue in the last decade has expressly recognized and discussed the conflict, App., *infra*, 3a; *Zaleski*, 686 F.3d at 92-93; *Miller*, 588 F.3d at 419; *Howell*, 425 F.3d at 976, only to see it proliferate further. The uncertainty is both deep and pervasive and has "generated a significant amount of litigation," Benson, 80 U. Chi. L. Rev. at 1245, about significant and valuable household assets. Further review is urgently warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

JUNE 2014

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-14628
Non-Argument Calendar

D.C. Docket No. 3:06-cr-00211-TJC-TEM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONY HENDERSON, a.k.a. Hollywood,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Florida

(January 28, 2014)

Before PRYOR, MARTIN, and JORDAN, Circuit Judges.

PER CURIAM:

Tony Henderson, a former federal prisoner and current convicted felon, appeals from the district court's denial of his motion for return of property, namely, nineteen firearms that he voluntarily surrendered to the United States. After review of the parties' briefs and the

record, we affirm.

Mr. Henderson, who was once a United States Border Patrol Agent, was charged with, among other crimes, the distribution of marijuana, in violation of 21 U.S.C. § 841(a)(1). On June 9, 2006, two days after he was arrested, Mr. Henderson voluntarily surrendered nineteen firearms to the Federal Bureau of Investigation. Though Mr. Henderson's conditions of bond required him to surrender "law enforcement firearms and credentials," D.E. 8 at 2, Mr. Henderson maintained that he surrendered the nineteen personal firearms to the FBI for "safekeeping as a condition of the bond" because "the judge felt that [he] was a suicide risk." D.E. 182 at 11. Mr. Henderson eventually pled guilty to the narcotics charge, and he became a convicted felon upon his adjudication of guilt on December 6, 2007.

The FBI refused to return the firearms after Mr. Henderson proposed to transfer them to a purported buyer in 2008, and another in 2009. Mr. Henderson moved the district court under Fed. R. Crim. P. 41(g) to allow him to transfer ownership to the 2009 buyer or to his wife. The magistrate judge, relying on 18 U.S.C. § 922(g) and our decision in *United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), recommended denial of the motion because Mr. Henderson was a convicted felon. The district court adopted the recommendation, and denied Mr. Henderson's Rule 41 motion. This appeal followed.

In *Howell*, we affirmed the denial of a convicted felon's Rule 41 motion for return of firearms because § 922(g) made the felon unable to possess the firearms (actually or constructively) lawfully. *See* 425 F.3d at 976–77 (citing *United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000)).

We review questions of law dealing with the district court's denial of a Rule 41(g) motion *de novo,* and we review findings of fact for clear error. *See Howell,* 425 F.3d at 973. A Rule 41(g) movant must show a possessory interest in the property held by the government, and because a Rule 41(g) motion is one in equity, courts will weigh "all equitable considerations in order to make a fair and just decision." *Id.* As a result, a Rule 41(g) movant must come to the court with clean hands. *See id.*

On appeal, Mr. Henderson raises the same arguments he presented to the district court.[1] He argues that the FBI's failure to provide him, and his wife and family, with any notice of his disqualification of firearm ownership as a felon prior to his adjudication of guilt affords him relief legally and equitably. Mr. Henderson argues that *Howell* does not apply because in that case the government provided the defendant with notice of seizure by including the word "seized" on the defendant's property receipt. Mr. Henderson invites us instead to rely on cases from other circuit and district courts which afforded defendants relief under circumstances he argues are similar to his. *See* Appellant's Br. at 10–11 (citing *Cooper v. Greenwood,* 904 F.2d 302 (5th Cir. 1990); *United States v. Miller,* 588 F.3d 418 (7th Cir. 2009); *United States v. Zaleski,* 686 F.3d 90 (2d Cir. 2012); *United States v. Brown,* 754 F. Supp. 2d 311 (D.N.H. 2010)).

We decline this invitation because, like the district

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[1] Mr. Henderson also argues, for the first time on appeal, that several of the nineteen firearms are not covered by 18 U.S.C. § 922(g). We do not address this argument because he did not present it below. *See Tannenbaum v. United States,* 148 F.3d 1262, 1263 (11th Cir. 1998) ("*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys. . . . But, issues not raised below are normally deemed waived.") (citations omitted).

court, we find that our decision in *Howell* controls. We denied Rule 41 relief in *Howell* because of the concern with courts violating 18 U.S.C. § 922(g) by delivering actual or constructive possession of firearms to a convicted felon. The method in which the government obtained the firearms was immaterial. *See Howell*, 425 F.3d at 976–977. The fact that the government acquired Mr. Henderson's firearms because of a voluntary surrender pursuant to a judge's concern for his safety does not alleviate the concern that by granting Mr. Henderson actual or constructive possession of a firearm, a court would violate § 922(g). *See id.* at 976 ("Requiring a court to return firearms to a convicted felon would not only be in violation of federal law, but would be contrary to the public policy behind the law."). Similarly, we see no reason to hold in this case that the FBI was required to provide notice to Mr. Henderson about § 922(g), as Mr. Henderson acknowledged in his plea agreement that as a felon he would be deprived of the right to possess firearms. *See* D.E. 128 at 8.

Further, Mr. Henderson's equitable argument rings hollow. We held in *Howell* that a defendant convicted of a drug offense had unclean hands to demand return of his firearms even though, as with Mr. Henderson, that defendant did not use those firearms in furtherance of his offense. *See Howell*, 425 F.3d at 974.

In sum, because Mr. Henderson cannot possess firearms as a convicted felon, and because he seeks equitable relief with unclean hands, we affirm the denial of his Rule 41(g) motion.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA

vs.

CASE NO. 3:06-cr-211-J-32TEM

TONY HENDERSON

ORDER

This case is before the Court on Defendant's Motion to Return/Disposition of Property (Doc. 155), Defendant's Renewed Motion for Return of Property (Doc. 162), Defendant's Renewed Motion for Return of Property (Doc. 163) and Defendant's Renewed Motion to Return/Disposition of Property (Doc. 165), to which the United States has filed a response (Doc. 159). The Magistrate Judge held a hearing on May 16, 2011, following which the Magistrate Judge entered a Report and Recommendation (Doc. 169) recommending that the Motions be denied. Defendant objected to the Report and Recommendation (Doc. 170) and the government did not respond to the objections. Having now conducted a *de novo* review, it is

ORDERED:

1. Defendant's Objections to Report and Recommendation (Doc. 170) are **OVERRULED.**

2. The Report and Recommendation (Doc. 169) is **ADOPTED** as the opinion of the Court.

3. Defendant's Motion to Return/Disposition of Property (Doc. 155) is **DENIED**.

4. Defendant's Renewed Motion for Return of Property (Doc. 162), Defendant's Renewed Motion for Return of Property (Doc. 163) and Defendant's Renewed Motion to Return/Disposition of Property (Doc. 165) are **DEEMED MOOT**.

DONE AND ORDERED in Jacksonville, Florida, this 8th day of August, 2012.

/s/_____
TIMOTHY J.CORRIGAN
United States District Judge

md.
Copies to:
Hon. Thomas E. Morris, U.S. Magistrate Judge
Russell C. Stoddard, AUSA
U.S. Probation
Defendant

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA

vs. CASE NO. 3:06-cr-211-J-32TEM

TONY HENDERSON

REPORT AND RECOMMENDATION[1]

This case is before the Court on Defendant Tony Henderson's (hereinafter referred to as "Petitioner" or "Henderson") Motion to Return/Disposition of Property (Doc. #155), and the United States' response in opposition (Doc. #159).[2] The property in issue consists of nineteen (19) firearms that were turned over to the Federal Bureau of Investigation (FBI) by the Petitioner shortly after his arrest in the case, as a condition of bond for pretrial release. Henderson was originally arrested on a controlled substance charge, which was alleged by a complaint. Subsequently, an initial indictment and two

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[1] Within fourteen (14) days after service of this document, specific, written objections may be filed in accordance with 28 U.S.C. § 636, Rule 59, Federal Rules of Criminal Procedure, and Rule 6.02, Local Rules, United States District Court, Middle District of Florida. Failure to file a timely objection waives a party's right to review. Fed. R. Crim. P. 59.

[2] The Court recognizes Petitioner filed three renewed motions for return of this same property, during which time the FBI investigation continued (*see* Docs. #162, #163, #165).

superceding indictments were returned against him (*see* Docs. #15, #34, #89). Each indictment contained a forfeiture provision seeking forfeiture of a house owned by Petitioner and his wife, but none of the indictments sought forfeiture of the firearms.

On November 30, 2007, Henderson pled guilty to a drug charge pursuant to a plea agreement (Doc. #128). He was adjudicated guilty on December 6, 2007 (Doc. #129). Thus, Henderson became a convicted felon as of December 6, 2007. Henderson was sentenced on April 21, 2008 (*see* Docs. #144, #146). Forfeiture was not pursued as to the house or other property.

Since Henderson was convicted of a felony, more than a year after his surrender of the firearms, and the relief sought by the instant motion requests the firearms be given to either his wife or Mr. Robert Rosier, the Court finds Henderson's motion implicitly recognizes it would be illegal to return the firearms to him. Petitioner states in his motion that he transferred his "non-possessory" interest in the firearms to Mr. Robert Rosier on February 4, 2009, and that Mr. Rosier had filed a claim for the firearms which the FBI denied. In the instant motion, Petitioner also stated that he had filed an appeal of the denial to return with the FBI on June 3, 2010, but no decision had been made by the FBI when the motion was filed.

The United States opposes the relief sought by Petitioner, claiming to grant the motion would give Henderson constructive possession of the weapons, which is against the law (*see generally*, Doc. #159).

Previously, the Court took the matter under advisement, requiring "[t]he parties shall provide the Court a copy of the final agency action once they receive

it. Once the United States receives the final decision of the agency, it shall ensure that the firearms are not sold or destroyed until the Court has issued its Order in the matter." (Doc. #160, Court Order.) The following chronology of Henderson's efforts to obtain release of the firearms is based on the exhibits he introduced at a hearing on May 16, 2011, as well as his testimony at the hearing:[3]

1. On June 12, 2006, an FBI agent sent a detailed list of the firearms by facsimile to attorney Alexander Christine, Jr., (Ex. 2).[4] The cover sheet contains a handwritten note referring to a proffer, "hopefully" to occur that day.

2. On June 13, 2008, attorney Mark Rosenblum wrote a letter to the United States Attorney's office asking what steps could be taken to transfer the firearms (Ex. 1). No reply was received.

3. In November 2008, Defendant claims he contacted the FBI seeking to transfer possession and ownership of the firearms and was advised to submit a letter and "bill of sale" (Doc. #165, paragraph 7).

4. On December 1, 2008, Defendant signed a bill of sale transferring the firearms to William Boggs (Ex. 3).

5. In December 2008, Defendant telephoned the FBI to inquire about obtaining the transfer of the firearms.

6. On December 17, 2008, Defendant wrote a letter

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[3] The non-transcribed recording of the hearing is hereby incorporated by reference. The parties may contact the Courtroom Deputy of the undersigned if a transcript of the hearing is desired.

[4] Mr. Alexander R. Christine, Jr., represented Henderson in this case until he was given leave to withdraw on September 6, 2006 (*see* Doc. #26).

to the agent in charge of the Jacksonville FBI office, advising the FBI he had transferred possession and ownership of the firearms to Boggs and asking when the actual transfer of the property could be accomplished (Ex. 3).

7. On March 2, 2009, Defendant wrote a letter to the FBI advising that Mr. Boggs had decided not to take possession and ownership of the firearms; instead, Mr. Robert Rosier would take them (Ex. 4). A bill of sale dated February 2, 2009, from Henderson to Rosier, was attached to the letter. Notably, the bill of sale contains language that the seller certifies, "He is legally entitled to sell and/or transfer title of his firearms" (Ex. 4 at 2).

8. On April 6, 2009, Defendant wrote a followup letter to the FBI, again asking about a transfer of the guns to Mr. Rosier (Ex. 5).

9. After four unsuccessful attempts from April 2009 through June 2009, to contact an agent with knowledge of the firearms by telephone, on December 14, 2009, Henderson apparently talked with "Agent Ubanks" by phone and then wrote a letter memorializing the conversation and asking for a telephone call from someone with authority to act (Ex. 6).

10. On December 16, 2009, the special agent in charge of the FBI office in Jacksonville wrote a letter to Defendant stating that the firearms had been "seized" by the Federal Bureau of Investigation on June 9, 2006, and advising Henderson of a procedure under Title 41, U.S.C. § 128-48, 102-1, in which he could attempt to claim the firearms (Ex. 8).

11. On December 28, 2009, Defendant wrote a letter to the FBI claiming the firearms for Mr. Rosier (Ex. 9).

12. Also on December 28, 2009, Mr. Rosier sent the

FBI a letter claiming he had purchased the firearms from Henderson to help Henderson and his family with their financial situation (Ex.10).

13. On January 5, 2010, the FBI wrote to Henderson, advising it had received Henderson's "January 4, 2010" claim for the weapons and would conduct an investigation (Ex. 7).

14. On May 21, 2010, the FBI wrote Defendant that his claim had been denied and that he could request reconsideration of that decision with ten (10) days (Ex. 11). Also on May 21, 2010, the FBI wrote to Mr. Rosier stating his claim to the firearms that had been filed on December 30, 2009 was denied and he had ten (10) within which to request reconsideration (Ex. 12).

15. On June 3, 2010, Defendant wrote a letter to the Finance Division of the FBI seeking reconsideration of the initial decision (Ex. 13).

16. On January 26, 2011, the FBI wrote Henderson advising his appeal had been denied as a final decision (Ex. 14).

***Analysis*:**

Henderson's request must be denied under Eleventh Circuit authority. In *United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), a defendant filed a motion under Rule 41(g), Fed. R. Crim. P., to recover cash and firearms after the close of all criminal proceedings in the case. The court treated the motion as a civil motion in equity. The court noted the defendant was the record owner of the firearms, but found that returning firearms to a convicted felon would violate Title 18, U.S.C. § 922(g). The court then noted that to prevail under Rule 41(g), the owner must have "clean hands" under the equitable test, but a

defendant convicted of a drug offense has "unclean hands" and is not entitled to equitable relief. *Id.* at 974.

The *Howell* court also examined whether due process would allow the defendant to designate someone else to receive the firearms or to have the weapons sold and the proceeds provided to him. Relying on an Eighth Circuit opinion, *United States. v. Felici*, 208 F.3d 667 (8th Cir. 2000), the *Howell* court found the defendant could not receive the firearms "either directly or indirectly." *Id.* at 976. The court agreed with the reasoning in *Felici* that the prohibition of a felon possessing firearms applied to either actual or constructive possession and allowing a defendant to transfer the firearms or receive money from their sale would be constructive possession. *Id.* at 976-77.

Although the Court recognizes that the firearms in Henderson's case were surrendered by him as a condition of bail, rather than seized under Rule 41, that difference does not appear significant under *Howell.* "The fact that the defendant was in lawful possession and was not a convicted felon when he acquired the firearms is irrelevant," stated the Eleventh Circuit, noting that section 922(g) was designed to work retroactively to prevent constructive or actual possession of firearms by a convicted felon. *Id.* at 977.[5]

The Seventh Circuit later agreed with the Eleventh Circuit and cited *Howell* in *United States v. Miller*, 588 F.3d. 418 (7th Cir. 2009). A district court in *United States*

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[5] The Eleventh Circuit explicitly declined to express an opinion on whether Howell could file an action under 42 U.S.C. § 1983 for the value of the firearms. *Howell*, 425 F.3d at 977 n.4. This Court similarly declines to express such an opinion. One of the cases upon which Howell relied, *Cooper v. City of Greenwood*, 904 F.2d 302 (5th Cir. 1990), was an action for damages under section 1983.

v. Approximately 627 Firearms, More or Less, 589 F.Supp.2d 1129 (S.D. Iowa 2008), also agreed with the *Howell* conclusion on constructive possession, but found it was not prohibited from ordering the sale of the defendant's personal firearms and distributing the proceeds of the sale to the defendant. *Id.* at 1140. Although the court in *627 Firearms* was ruling on a forfeiture motion in ordering the sale of personal firearms not used in an offense, it relied on *Cooper v. City of Greenwood*, 904 F.2d 302, 306 (5th Cir. 1990), an action under 42 U.S.C. § 1983.

Here, Henderson relies on *United States v. Brown*, 754 F.Supp.2d 311 (D.N.H. 2010), a case which is, admittedly, factually similar to this case. In *Brown*, the firearms in question were surrendered as a condition of release on bail; however, unlike the instant case, the arms were placed in the possession of a dealer rather than a law enforcement agency. *Id.* at 313. Although factually convoluted because of subsequent transfers of the firearms, and a belated attempt by the government to forfeit the firearms, the *Brown* court rejected the idea that continued ownership of firearms after a felony conviction amounts to constructive possession. *Id.* at 314-15. The *Brown* court appears to agree with *627 Firearms* that weapons to which a convicted felon has legal title, but not possession, can be sold for the owner's benefit. *Id.* at 317.

This Court, however, is bound by *Howell*. Although the firearms were neither seized from Henderson,[6] nor

[6] The FBI did send Mr. Henderson a letter in December 2009 stating that the guns had been seized on June 9, 2006 (*see* Ex. 8). However, no basis for a seizure was provided in the letter. The firearms had been surrendered as a condition of bail. Until Henderson was adjudicated guilty December 6, 2007, he could have

constituted contraband, nor were they forfeited, Henderson did not attempt to transfer ownership of the firearms to another person until *after* he had been adjudicated guilty and was a convicted felon.

For the reasons stated herein, the undersigned respectfully recommends the Motion to Return/Disposition of Property (Doc. #155), filed by former Defendant, Tony Henderson, as a *pro se* litigant, be **DENIED**, and the later motions (Docs. #162, #163, #165) requesting the same relief be **DEEMED MOOT**.

DONE AND ENTERED at Jacksonville, Florida this 27th day of May, 2011.

THOMAS E. MORRIS
United States Magistrate Judge

Copies to:
Honorable Timothy J. Corrigan
Asst. U.S. Attorney (Stoddard)
Tony Henderson, *pro se*

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sought Court approval to have the firearms returned or transferred to another person. Moreover, the regulation cited by the FBI in its letter is an abandonment provision stating that if the owner of the firearms is known, he "shall be notified within 20 days of finding such property" and he would have thirty (30) days from the date of the notification letter to claim the property or the property would vest in the United States. 41 C.F.R. § 128-48.102-1. Since Henderson's cash bail was not exonerated until July 8, 2008 (Doc. #149), the basis for the FBI claim of abandonment is not clear, but there is nothing in the record to indicate the FBI notified Henderson that the firearms had been "seized" prior to the December 2009 letter.