

No. 13-1487

In the Supreme Court of the United States

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, following a felony conviction that makes it unlawful to possess firearms under 18 U.S.C. 922(g)(1), a defendant is entitled under Federal Rule of Criminal Procedure 41(g) or general equity principles to have non-contraband firearms that were held by the government during the criminal proceedings transferred to his wife or to his friend.

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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, and granted on October 20, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the Appendix to this brief. App., *infra*, 1a-9a.

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. The district court sentenced petitioner to six months of imprisonment, to be followed by two years of supervised release, including four months of home detention. *Id.* at 2-4. After his conviction, petitioner filed a motion seeking to control the disposition of firearms that he had voluntarily surrendered to agents from the Federal Bureau of Investigation (FBI) after his arrest. J.A. 38-56. A magistrate judge recommended that petitioner's motion be denied, Pet. App. 7a-14a, and the district court adopted the magistrate judge's report and recommendation, *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. Second Superseding Indictment 1-6. A federal grand jury in the Middle District of Florida returned an indictment charging petitioner with two counts of conspiring to distribute less than 50 kilograms of marijuana, in violation of 21 U.S.C. 846; three counts of distributing less than 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(D); and six counts of using a telephone to facilitate that distribution, in violation of 21 U.S.C. 843(b). Second Superseding 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 during the pendency of the criminal proceedings, that petitioner “surrender all firearms and law enforcement credentials in [his] possession immediately” to federal law enforcement officers. J.A. 12, 28, 30. In a subsequent written order setting the conditions of petitioner’s release issued the same day, the magistrate judge ordered petitioner “immediately to surrender all law enforcement firearms and credentials.” J.A. 34. Two days later, petitioner voluntarily surrendered to FBI agents 19 personal firearms or weapons. J.A. 67, 146-147; see J.A. 43-46 (initial handwritten inventory of items collected by FBI agents on June 9, 2006); J.A. 50-56 (subsequent type-written inventory of items).¹ Petitioner later explained that he was motivated to surrender all of his weapons because the judge felt he was “a suicide risk.” Pet. App. 2a (quoting J.A. 147).

¹ The FBI’s original handwritten inventory (J.A. 43-46) has 19 numbered items but includes two entries numbered “10,” and entry number 19 lists “3 M4 magazines” that are not separately listed on the FBI’s subsequent typewritten list, which has 19 numbered items (see J.A. 50-56). Petitioner counts 18 personal firearms because he classifies the Smith & Wesson “Border Patrol” firearm (number 7 on each list, see J.A. 44, 52) as petitioner’s “service revolver.” See Pet. Br. 5 & n.2. The government has learned that petitioner’s service weapon was taken from him when he was arrested on June 7, 2006. The “Border Patrol” firearm collected at his home was a personal firearm issued by Smith & Wesson to commemorate the 50th anniversary of the United States Border Patrol.

On November 30, 2007, petitioner pleaded guilty to one count of distributing marijuana—a felony. Pet. App. 2a, 8a; see 21 U.S.C. 841(b)(1)(D) (distributing 50 kilograms or less of marijuana is punishable by a maximum of five years of imprisonment). On December 6, 2007, his plea was accepted and he was adjudicated guilty. Pet. App. 8a. On April 21, 2008, the district court sentenced petitioner to six months of imprisonment, to be followed by two years of supervised release, including four months of home detention. *Ibid.*; Judgment 2-4.

2. In June 2008, petitioner’s attorney wrote a letter to an Assistant United States Attorney inquiring about the firearms that petitioner had turned over to the FBI in 2006. J.A. 78-79. The letter stated that “[petitioner], of course, knows that he is prohibited from possessing the firearms, and therefore would like to make arrangements for his mother, who lives in Panama City, to get them.” J.A. 78.

After the letter from his attorney, petitioner repeatedly contacted the FBI between December 2008 and December 2009, seeking to have it transfer his firearms to two different purported buyers. J.A. 80-94. First, petitioner sought to have the FBI transfer all firearms listed on the FBI’s inventory to William Boggs, petitioner’s next-door neighbor. J.A. 80-84, 150-151. Boggs later decided that he did not want to “become involved” and informed petitioner that he did not want to take possession of the firearms. J.A. 85, 151.

Petitioner next asked the FBI to transfer the firearms to Robert Rosier, petitioner’s friend from a camping group. J.A. 85-89, 152, 162; Pet. App. 9a-10a. Petitioner sent the FBI a copy of a “bill of sale,” which

stated that petitioner had sold all of the items on the FBI's inventory to Rosier, but did not reflect that Rosier had agreed to pay any amount of money to petitioner. J.A. 87-89, 162-163.

In December 2009, the FBI sent a letter to petitioner stating that he had 30 days to file a claim for the items on the FBI's inventory or that title to the property would otherwise vest in the United States pursuant to 41 C.F.R. 128-48.102-1 (regulation governing abandoned property). J.A. 97-104. Petitioner and Rosier both filed claims within the prescribed period. J.A. 105-119. Petitioner's claim stated that he had legally transferred all of the property to Rosier and that, in the event the property is released to Rosier, petitioner would "relinquish any property interest * * * in the firearms." J.A. 106. Petitioner's claim further stated that if the FBI would not release the property to Rosier, petitioner would retain his "right to transfer [his] interest to a person of [his] choosing." J.A. 106-107. In Rosier's letter asserting a claim to the property, he informed the FBI that he had met petitioner in March 2004 through a camping club and the two "ha[d] since become good friends." J.A. 117. Rosier said he had "agreed to buy the firearms in order to help [petitioner] and his family with their financial situation." J.A. 116.

The FBI denied petitioner's request to transfer the firearms to Rosier and denied petitioner's request for reconsideration of that decision. J.A. 47-56; see Pet. App. 2a, 10a-11a. The FBI explained that "our investigation into the merits of your claim confirms your status as a convicted felon" and noted that "[a]ny firearm possession, actual or constructive, by a convicted felon is prohibited" by 18 U.S.C. 922(g)(1). J.A.

48. Section 922(g)(1) provides 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.” 18 U.S.C. 922(g)(1). The FBI stated, among other things, that “release of the firearms to you or your designee, Robert Rosier, as you have requested, would place you in violation of federal law, as it would amount to constructive possession.” J.A. 48.

3. On July 16, 2010, petitioner filed in the district court a “Motion to Return/Disposition of Property,” J.A. 38-56; 3:06-cr-00211-TJC-TBT-1 Docket entry No. 155, in which he requested that his wife “be given possession and control of the firearms collection for the benefit of [their] adult children and heirs” 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.” J.A. 40; see J.A. 73 (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, J.A. 59, and petitioner did not question that construction, even in his petition for a writ of certiorari. See Pet. 2, 6 (describing motion as one under Rule 41(g)); J.A. 131 (invoking Rule 41(g) in petitioner’s objections to the magistrate judge’s report and recommendation); J.A. 177 (appealing from “Denial of Motion to Return Property Under Rule 41(g)”). That construction was also shared by the court of appeals. See Pet. App. 2a, 4a. Rule 41(g) 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 district 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 to 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 the firearms nor forfeited his interest in them. J.A. 70-71; J.A. 157-162, 169-173.

A magistrate judge conducted an evidentiary hearing, at which petitioner reiterated his request for a transfer of his firearms either to his wife, to Rosier, or to "any other person of [petitioner's] choosing who is lawfully entitled to own subject firearm collection." J.A. 161. The magistrate judge asked petitioner during the hearing whether Rosier was a firearms dealer. J.A. 162. The magistrate judge also inquired why the "bill of sale" to Rosier did not show that Rosier had paid any money to petitioner for the firearms. J.A.

162-163. Petitioner confirmed that Rosier is not a firearms dealer, and he informed the magistrate judge that he and Rosier had not yet settled on a sale price. *Ibid.* Petitioner's proposal was that after Rosier received the firearms, "then [he and Rosier] would decide on what would be transferred, as far as funds." J.A. 163. Rosier did not attend the evidentiary hearing. J.A. 140. Petitioner testified at the hearing that "[t]he firearms have been owned by my family and me for many years" and that "[m]any [of the firearms] were given to me by inheritance, trading and buying from family members, friends, co-workers, and other law enforcement officers." J.A. 159.

4. The 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.

a. In *Howell*, the defendant had filed a motion pursuant to Rule 41(g) to recover \$140,000 in cash seized at the time of his arrest and firearms seized during a search of his residence. 425 F.3d at 972. With respect to the firearms, the court of appeals concluded that although the defendant was the undisputed owner of the firearms, a court could not return the firearms to him because doing so would violate Section 922(g)(1). *Id.* at 974. "[I]f an individual is a convicted felon," the court explained, "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.

The court in *Howell* further rejected the defendant's alternative request that the court should "either place the firearms in the possession of a relative in trust or sell the firearms and distribute the proceeds to [the defendant]." 425 F.3d at 977. The court explained that such relief "is beyond the scope of Rule 41(g)." *Id.* at 976-977. "Rule 41(g)," the court explained, "deals solely with the return of property." *Id.* at 977. The court further explained that the defendant was not entitled to have the firearms held in trust for him by a third party because "[s]uch a request suggests constructive possession," and "[a]ny firearm possession, actual or constructive, by a convicted felon is prohibited by law." *Ibid.* (quoting *United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000), cert. denied, 531 U.S. 1201 (2001)).

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." 425 F.3d at 974.

b. The magistrate judge concluded that petitioner's motion was controlled by *Howell*. Pet. App. 13a. The magistrate judge rejected petitioner's attempt to distinguish *Howell* on the grounds that the firearms in that case had been "seized," whereas petitioner's firearms had been voluntarily turned over to the FBI as a condition of his release on bond. *Id.* at 12a-14a; J.A. 39, 70-71; cf. J.A. 127-128 (objections to magistrate judge's report and recommendation). The magistrate judge explained 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 to

another person until *after* he had been adjudicated guilty and was a convicted felon,” and such a transfer would amount to constructive possession in violation of Section 922(g)(1). Pet. App. 12a-14a.

5. Petitioner filed objections to the magistrate judge’s report and recommendation. J.A. 126-133. After conducting *de novo* review, the district court overruled those objections, adopted the magistrate judge’s report and recommendation, and denied petitioner’s motion. Pet. App. 5a-6a.

6. Petitioner appealed. See J.A. 177 (“Appeal of Denial of Motion to Return Property under Rule 41(g).”). The court of appeals affirmed. Pet. App. 1a-4a. The court agreed that its prior decision in *Howell* prevents courts from “violating [Section] 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 acquired 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 [Section] 922(g).” *Id.* at 4a (citing *Howell*, 425 F.3d at 976).

Because petitioner had invoked the district court’s authority to “grant equitable relief” under Rule 41(g) (J.A. 194), 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). The

court further noted that petitioner had argued for the first time on appeal “that several of the nineteen firearms are not covered” by Section 922(g)(1). *Id.* at 3a n.1. The court declined to address that argument because petitioner had not raised it below. *Ibid.*²

SUMMARY OF ARGUMENT

I. Although petitioner did not cite Federal Rule of Criminal Procedure 41(g) in the motion that he filed in the district court, the government construed the motion as one under that rule, and the magistrate judge and court of appeals adopted that construction. Rule

² Petitioner contends (Pet. Br. 5) that his firearms collection included “[i] a crossbow, [ii] a ‘nonfunctional’ antique ‘Japanese Arisika * * * rifle,’ [iii] a nonfunctional ‘wall [h]anger,’ and [iv] a ‘nonfunctional’ ‘homemade muzzle-loading rifle,’” which he contends are not firearms under federal law. Petitioner did not bring this to the attention of the district court, and it was an oversight on behalf of the United States that the collection included weapons that are not firearms.

Although petitioner lists four weapons that he contends are not firearms, the “wall [h]anger” and the “homemade muzzle-loading rifle” (Pet. Br. 5) are references to the same gun. See J.A. 45 (item number 15 on the FBI’s handwritten inventory describing a “Black Powder-wall Hanger” with serial number f3-126855); J.A. 55 (item number 16 on the FBI’s subsequent type-written inventory describing a “Homemade percussion cap muzzle-loading rifle, non-functional” with serial number 83-126855). The United States agrees that the crossbow and the muzzle-loading rifle are not firearms, but it is the government’s position that the Japanese Arisika rifle is a firearm. It was manufactured well after 1898 and is not an antique, see 18 U.S.C. 921(a)(16)(A), and it is designed to expel a projectile by the action of an explosive, 18 U.S.C. 921(a)(3). Although the gun appears to be missing part of the firing mechanism, it “may readily be converted” to functionality with a new part. *Ibid.* The FBI is making the necessary arrangements to return the crossbow and the muzzle-loading rifle to petitioner.

41(g) provides that when a court grants a motion under the rule, it “must return the property to the movant.” Fed. R. Crim. P. 41(g). Petitioner’s question presented asks, in part, whether a court may order the government, under Rule 41(g), to transfer non-contraband firearms to a third party to whom the convicted felon has sold his property interests. The answer to that question is “no,” because Rule 41(g) states that property transferred under that rule must be returned to the movant. Rule 41(g) does not provide authority for a transfer of the movant’s property to a third party.

II. If the Court considers petitioner’s motion as one that invoked the general civil equitable jurisdiction of the district court, the court of appeals’ decision should nevertheless be affirmed because the district court acted within its discretion when it denied petitioner’s request to transfer his firearms to his wife or to Rosier. The district court was not required to grant relief that would allow petitioner to control the sale of his firearms or that could result in his continued ability to control the firearms through others. The relief petitioner requested did not eliminate those possibilities.

A. Section 922(g)(1) does not terminate a felon’s ownership interest in firearms; it is a ban on possession. But Section 922(g)(1) prohibits both actual and constructive possession of firearms, and constructive possession is established when a person has the power and intention to exercise dominion or control over property, either directly or through others.

B. Because Section 922(g)(1) does not extinguish a convicted felon’s ownership interest in firearms, a person who seeks to maintain or transfer his owner-

ship interest after being convicted of a felony is not categorically prohibited from doing so. But he may not transfer his ownership interest in a way that results in his actual or constructive possession of the firearms.

One way that a convicted felon could divest himself of his ownership interest in firearms without violating Section 922(g)(1)'s ban on possession is for his firearms to be transferred to a federal firearms licensed dealer, who would sell the firearms on consignment and give the net proceeds to the convicted felon. So long as the felon does not exercise control over the firearms during or after the sale, his receipt of money in exchange for his ownership interest would not amount to constructive possession.

Another option that some courts have discussed with approval is that a convicted felon may select a third party to receive his firearms. Courts that have endorsed this option have stated that it would be appropriate for any such transfer to be conditioned on the third party's assurances that he or she would not return the firearms to the convicted felon or follow his instructions. Even with proper assurances, however, this option would still amount to constructive possession, because the convicted felon exercises control over the firearms when he selects the next recipient and controls their destination.

C. Petitioner characterizes the court of appeals' decision as holding that a person is barred for all time from realizing the value of his firearms after he is convicted of a felony. Characterizing the decision in that way, petitioner contends that the court has ignored the distinction between ownership and possession, permitted the government to forfeit property

without following proper procedures, and unnecessarily raised a plethora of constitutional concerns. But the court of appeals did not hold—and it is not the government’s position—that a defendant loses his ownership interest in non-contraband firearms after he is convicted of a felony. Instead, the courts below evaluated the specific relief requested by petitioner and concluded that such relief was not warranted because of concerns about petitioner’s actual or constructive possession of the firearms.

D. Given the specific relief requested by petitioner—that his firearms collection be transferred to his wife or his good friend Rosier—the district court acted within its discretion when it denied petitioner’s motion. Petitioner’s requested relief would have allowed him to control who next had access to the firearms, which would result in constructive possession. Furthermore, the requested relief did not sufficiently ensure that petitioner would not continue to have control over the firearms, because he offered no assurances from either of his selected recipients that they would not return the firearms to him or follow his instructions.

ARGUMENT

I. RULE 41(G) DOES NOT CONTEMPLATE A TRANSFER OF PROPERTY TO A THIRD PARTY

The motion petitioner filed in the district court was a “Motion for Return/Disposition of Property.” J.A. 38. Although petitioner did not cite Federal Rule of Criminal Procedure 41(g), the government construed the motion as one under that rule, which is entitled “Motion to Return Property,” *ibid.*; see J.A. 59, and the magistrate judge adopted that construction, Pet. App. 11a. Consistent with the title of petitioner’s

brief, J.A. 177, the court of appeals likewise analyzed the issue under Rule 41(g), Pet. App. 1a-4a. And in seeking certiorari, petitioner acknowledged that his motion was brought pursuant to Rule 41(g). Pet. 6-7; see Pet. 2 (“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”).

Petitioner’s question presented asks, in part, whether a court may order the government, under Rule 41(g), to transfer non-contraband firearms belonging to a convicted felon to a third party to whom the felon has sold his property interests. The answer to that question is “no.” Rule 41(g) 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 Rule 41(g) does not provide authority for the action petitioner sought: a transfer to a third party that he designates. See *Ordonez v. United States*, 680 F.3d 1135, 1139 (9th Cir. 2012) (“The Rule by its very terms provides only for the ‘return [of] the property to the movant,’ nothing more.”) (brackets in original; citation omitted); *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)”); *ibid.* (“Rule 41(g) deals solely with the return of property.”). Petitioner does not, and cannot, deny that the firearms cannot actually be “return[ed]” to him without causing him to be in violation of Section 922(g)(1)’s prohibition on the possession of firearms by convicted felons.

Sometimes a motion under Rule 41(g) will be the correct mechanism to seek the return of property that remains in the government's possession after the close of criminal proceedings. For example, Rule 41(g) is properly invoked if the defendant has been acquitted, if the defendant is convicted of a misdemeanor that does not trigger Section 922(g)(1)'s ban on firearm possession, or if the government is holding non-contraband property that the defendant is not prohibited from possessing. By its terms, however, Rule 41(g) cannot be invoked to request that a court order a transfer of property to someone other than the movant.

II. IF PETITIONER'S MOTION IS CONSIDERED AS A MORE GENERAL MOTION INVOKING THE DISTRICT COURT'S CIVIL EQUITABLE JURISDICTION, THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT DENIED THE MOTION

Although the courts below viewed petitioner's motion as one brought under Federal Rule of Criminal Procedure 41(g), petitioner contends (Br. 7-9) that his intention was to invoke the more general civil equitable jurisdiction of the district court. If the Court considers petitioner's motion in that way, the court of appeals' decision should nevertheless be affirmed because the district court acted within its discretion when it denied petitioner's request to transfer his firearms collection to his wife or to Rosier. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 718 (1996) (noting the "historic discretion exercised by federal courts 'sitting in equity'") (citation omitted); cf. *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.”); *United States v. Zaleski*, 686 F.3d 90, 92 (2d Cir.) (motion for return of property is available only when the equities favor the exercise of jurisdiction), cert. denied, 133 S. Ct. 554 (2012).

A district court’s equitable jurisdiction must be exercised “with caution and restraint,” and exercise of that jurisdiction is appropriate only when necessary to “prevent manifest injustice” in light of the movant’s conduct and his request. *United States v. Eubanks*, 169 F.3d 672, 674 (11th Cir. 1999) (per curiam). The court’s weighing of equitable considerations and its decision to deny equitable relief are reviewed for an abuse of discretion. See *United States v. Shigemura*, 664 F.3d 310, 312 (10th Cir. 2011), cert. denied, 132 S. Ct. 1952 (2012); *United States v. Mochado*, 465 F.3d 1301, 1307 (11th Cir. 2006), abrogation on other grounds recognized by *United States v. Lopez*, 562 F.3d 1309, 1311-1313 (11th Cir. 2009); *Zaleski*, 686 F.3d at 92. The district court was not required to grant relief that would allow petitioner to control the sale of his firearms or that could result in his continued control over the firearms, in violation of Section 922(g)(1). The relief petitioner requested did not eliminate those possibilities.

A. Convicted Felons May Not Actually Or Constructively Possess Firearms

Petitioner correctly observes (Pet. Br. 14-23) that 18 U.S.C. 922(g)(1) does not terminate a felon’s ownership interest in firearms. See, e.g., *United States v. Miller*, 588 F.3d 418, 420 (7th Cir. 2009) (convicted felon’s “property interest in [his] firearms continues even though his possessory interest has been curtailed”); *Cooper v. City of Greenwood*, 904 F.2d 302,

304 (5th Cir. 1990) (convicted felon’s “claimed ownership interest in [his] firearms survived his criminal conviction”). Section 922(g)(1) is a ban on possession. It prohibits “any person * * * who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year” from “possess[ing] in or affecting commerce, any firearm or ammunition.” 18 U.S.C. 922(g)(1).

Although Section 922(g)(1) does not prohibit ownership of firearms, it prohibits both actual and constructive possession. See *United States v. Farmer*, 770 F.3d 1363, 1367 (10th Cir. 2014); *United States v. Schmitt*, 770 F.3d 524, 534 (7th Cir. 2014); *United States v. Ridolfi*, 768 F.3d 57, 61 (1st Cir. 2014); *United States v. Benjamin*, 711 F.3d 371, 376 (3d Cir.), cert. denied, 134 S. Ct. 309 (2013); *United States v. Meza*, 701 F.3d 411, 419 (5th Cir. 2012); *United States v. Bryant*, 523 F.3d 349, 354 (D.C. Cir. 2008); *United States v. Gardner*, 488 F.3d 700, 713 (6th Cir. 2007); *United States v. Davis*, 449 F.3d 842, 846 (8th Cir. 2006); *United States v. Scott*, 424 F.3d 431, 435 (4th Cir.), cert. denied, 546 U.S. 1051 (2005); *United States v. Gunn*, 369 F.3d 1229, 1235 (11th Cir.) (per curiam), cert. denied, 543 U.S. 937 (2004); *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998); *United States v. Terry*, 911 F.2d 272, 278 (9th Cir. 1990); see also 2A Kevin F. O’Malley et al., *Federal Jury Practice and Instructions* § 39.12 (6th ed. 2009) (“The law recognizes two kinds of ‘possession’—actual possession and constructive possession.”).

Actual possession is a familiar concept that exists when a person “knowingly has direct physical control over a thing at a given time.” 2A O’Malley § 39.12; see, e.g., *Meza*, 701 F.3d at 419. Constructive posses-

sion is established when a person “knowingly has the power and intention at a given time of exercising dominion and control over [the property], either directly or through others.” *Ridolfi*, 768 F.3d at 61-62 (citation and internal quotation marks omitted); see *Farmer*, 770 F.3d at 1367; *Benjamin*, 711 F.3d at 376; *United States v. Reed*, 636 F.3d 966, 969-970 (8th Cir. 2011); *Bryant*, 523 F.3d at 354-355; *Gardner*, 488 F.3d at 713-714; *Gunn*, 369 F.3d at 1235; *United States v. Dhinsa*, 243 F.3d 635, 677 (2d Cir.), cert. denied, 534 U.S. 897 (2001); *United States v. McKnight*, 953 F.2d 898 (5th Cir.), cert. denied, 504 U.S. 989 (1992); *Terry*, 911 F.2d at 279; see 2A O’Malley § 39.12 (“A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.”). The doctrine of constructive possession thus “allows the law to reach beyond puppets to puppeteers.” *United States v. Al-Rekabi*, 454 F.3d 1113, 1118 (10th Cir. 2006).

Accordingly, although Section 922(g)(1) does not extinguish a convicted felon’s ownership interest in firearms, it prohibits him from having direct physical access to firearms (actual possession), and it prohibits him from exercising control over firearms through others (constructive possession).

B. It Is Possible For A Convicted Felon To Transfer His Ownership Interest In Firearms Without Violating Section 922(g)(1)’s Ban On Possession

Because Section 922(g)(1) does not extinguish a convicted felon’s ownership interest in firearms, a person who seeks to maintain or transfer his ownership interest after being convicted of a felony is not

categorically prohibited from doing so, but he may not transfer his ownership interest in a way that results in his actual or constructive possession of the firearms. See *Zaleski*, 686 F.3d at 93 (“[U]nder 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.”).

1. a. One option courts have considered is that a convicted felon’s firearms could be transferred to a federal firearms licensed dealer, see 18 U.S.C. 923(c), who would sell the firearms on consignment and give the net proceeds to the convicted felon. In *Zaleski*, the defendant had asked the district court to permit the transfer of his firearms to a federally licensed gun dealer who had agreed to sell them and remit the proceeds to the defendant. 686 F.3d at 92.³ The Second Circuit held that, in light of that request, the district court had erred in concluding that the defendant was categorically ineligible for any relief. *Id.* at 93-94.

The court in *Zaleski* explained 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

³ In *Zaleski*, the firearms at issue were seized as part of a “large cache of firearms, ammunition, and explosives at Zaleski’s home” during his arrest. 686 F.3d at 91. Although some of the seized firearms were unlawfully possessed and forfeited by the federal government, others were lawfully possessed and not subject to forfeiture, but nevertheless remained in the government’s possession. *Ibid.*

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.” 686 F.3d at 93. The decision in *Zaleski* thus strongly implied that where such conditions are not present, a court should not grant (or at least is not compelled to grant) a convicted felon’s request to transfer firearms.

The fact that a convicted felon receives money from a sale of his firearms would not run afoul of Section 922(g)(1)’s ban on possession. 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 non-possessory property interest in them does not, standing alone, mean that he constructively possesses them.”). So long as the convicted felon does not exercise control over the firearms during or after the sale, either directly or through others, the sale of his firearms by a federally licensed dealer would not result in constructive possession.⁴

b. Petitioner’s question presented asks, in part, whether a court may “order[] * * * *the government*” to “sell [non-contraband] firearms for the benefit of [a convicted felon].” Pet. I (emphasis added). Although a court could order a convicted felon’s firearms trans-

⁴ Although a convicted felon is not prohibited from receiving money from a sale of his firearms, he may still choose to abandon his ownership interest in firearms. See 41 C.F.R. 128-48.102-1. If he does so, title would vest in the United States, 41 C.F.R. 128-48.102-1(d), and the firearms could then be destroyed. Many convicted felons will voluntarily abandon their firearms as part of a plea agreement, and others will decide to do so after receiving a letter similar to the letter received by petitioner in this case. J.A. 97-98.

ferred to a firearms dealer for a consignment sale in the manner described above, regulations promulgated by the General Services Administration prohibit the federal government from selling firearms, except as scrap metal. See 41 C.F.R. 101-42.1102-10(c) ("Surplus firearms may be sold only for scrap after total destruction by crushing, cutting, breaking, or deforming to be performed in a manner to ensure that the firearms are rendered completely inoperative and to preclude their being made operative."). Courts therefore should not order the government to sell a convicted felon's non-contraband firearms.⁵

2. a. Another option courts have considered is that a convicted felon could dispose of his ownership interest in firearms by transferring the firearms to a third party selected by the convicted felon. See *Miller*, 588 F.3d at 420. Courts that have discussed this option with approval have stated that it would be appropriate for any such transfer to be conditioned on the third party's assurances that he or she would not return the firearms to the convicted felon or follow his instructions.

In *Miller*, for example, the district court had authorized the government to destroy the defendant's firearms. 588 F.3d at 419.⁶ The Seventh Circuit held

⁵ Petitioner states (Pet. Br. 30 n.4) that in *Cooper*, *supra*, "the Government sold [a convicted felon's] firearm collection for over \$300,000." To clarify, in *Cooper*, a local government—not the federal government—sold the convicted felon's non-forfeited firearms at public auction for \$30,000 and provided him with none of the proceeds. 904 F.2d at 304.

⁶ The firearms at issue in *Miller* were seized during a search of the defendant's farm but had not been forfeited. 588 F.3d at 418-419.

that the district court had 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) and 1491—was not the sole option available to the court. 588 F.3d at 419-420. The court stated (without citation or further explanation) that another permissible resolution would have been to give the firearms “to one of [the defendant’s] friends or relatives,” which could be “conditioned on the recipient’s written acknowledgement that returning the guns to [the defendant] or honoring his instructions would aid and abet [the defendant’s] unlawful possession.” *Id.* at 420; see *Zaleski*, 686 F.3d at 93-94 (stating that the third-party transferee must be “a suitable custodian and not subject to [the convicted felon’s] control”).

Constructive possession encompasses “control or dominion over property without actual custody of it.” *Miller*, 588 F.3d at 419. Accordingly, a person who never touches a firearm but retains the authority to direct that Person A may possess the firearm on Monday, Person B may possess it on Tuesday, and so on, would constructively possess that firearm. The court therefore could not, consistent with Section 922(g)(1), transfer firearms “to someone willing to accept [the felon’s] instructions about their disposition.” *Ibid.*

b. Although some courts have discussed with approval the option of allowing a convicted felon to select a third-party recipient of his firearms, that option would still amount to constructive possession, even with proper assurances from the third party. Although third-party assurances may prevent the convicted felon from having continuing control over the

firearms after the first transfer, allowing the felon to select the first recipient of the firearms gives him control over them.

In petitioner's view, the government could transfer firearms to a third party on behalf of the convicted-felon owner, and such a transfer 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. Br. 16. Petitioner's proposed transaction, however, cannot be reconciled with his own theory. Because petitioner's request would require the firearms to be transferred to a person of petitioner's own choosing, petitioner would, contrary to his suggestion (*ibid.*), have and exercise a "right to control" or "right to exclude." The transfer would permit petitioner to determine who would (and who would not) next have access to the firearms.

The felon exercises his right to control or to exclude by selecting the recipient (and ruling out others), even though he may need a court order to effectuate the transfer because the firearms happen to be in the government's custody. Although the court grants or denies the transfer after considering equitable factors, and thus exercises its own measure of control, if the court approves the request made by the defendant to transfer to a specific person, then the felon has indirectly exercised at least some measure of authority to control and to exclude.

Petitioner contends (Pet. Br. 18) that the court of appeals did not "articulate the point in the transaction where the convicted owner attains possession." Though the convicted felon would not attain *actual* possession of his firearms if they were transferred from the government to a third party of the felon's

choosing, he would have constructive possession because he controls the destination of the firearms. If that does not amount to constructive possession, then a gang leader who is convicted of a felony can require the court to order his firearms transferred to fellow gang members. The purpose of Section 922(g)(1) is to “keep guns out of the hands of those who”—like a corrupt federal law enforcement officer—“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) (citation and internal quotation marks omitted). And because possession encompasses constructive possession, Section 922(g)(1) deems convicted felons untrustworthy of both actually possessing firearms and exercising control over them. Indeed, Congress was sufficiently concerned with convicted felons having the ability to direct actions involving firearms that Congress made it unlawful for anyone who is employed by a convicted felon “to receive, possess, or transport any firearm * * * in or affecting interstate or foreign commerce” in the course of that employment. 18 U.S.C. 922(h)(1).

In analogous contexts, courts have concluded that felons who brokered sales of firearms constructively possessed the firearms that they sold. See *United States v. Nungaray*, 697 F.3d 1114, 1115-1117 (9th Cir. 2012) (finding constructive possession for purposes of Sentencing Guidelines § 2K2.1(b)(1)(A) where a convicted felon offered to sell firearms to a confidential informant, negotiated the sale price, and then directed someone else to deliver the firearms to the buyer); *United States v. Hood*, 507 Fed. Appx. 859, 861 (11th Cir. 2013) (per curiam) (defendant construc-

tively possessed firearms for purposes of Sentencing Guidelines § 2K2.1(b)(1)(B) when he contacted confidential sources and agreed to sell them the firearms, which were then handed over to the buyers by the defendant's associates); *United States v. Virciglio*, 441 F.2d 1295, 1298 (5th Cir. 1971) (holding that defendant had constructive possession of machine guns because he "planned the[ir] sale"). Those findings of constructive possession were based on the defendants' ability to control the destination of the firearms. See, e.g., *Nungaray*, 697 F.3d at 1117 (defendant "controlled the sale of the guns from start to finish"); *Virciglio*, 441 F.2d at 1298 (defendant "exercise[d] dominion and control over the machine gun" by planning its sale); see also *Al-Rekabi*, 454 F.3d at 1120 ("A knowing ability to control is all constructive possession requires.").

c. Petitioner's analogies to the law of bailment or a landlord-tenant lease are inapposite. Petitioner contends (Pet. Br. 17-18) that as a "bailor," he has no right to control his firearms or to exclude others from using them while they are in the FBI's possession, and he does not "temporarily regain possession in violation of the bailment agreement" when he sells the property to a third party. But by exercising his right to "terminate the bailment when he pleases" and directing the government to transfer the firearms to someone else, petitioner exercises control over the property. John D. Lawson, *The Principles of the American Law of Bailments* § 29 (1895).

d. One of petitioner's amici points out that if the owner or possessor of a seized firearm is *acquitted*, 18 U.S.C. 924(d)(1) requires that the firearm be returned "to the owner or possessor or to a person dele-

gated by the owner or possessor unless the return of the firearms * * * would place the owner or possessor or his delegate in violation of law.” Nat’l Ass’n of Crim. Def. Lawyers Amicus (NACDL) Br. 13-14 (quoting 18 U.S.C. 924(d)(1)). According to NACDL, that provision “confirms that a person who may not lawfully possess a firearm does not commit an act of possession by assigning his or her ownership interest in a firearm to a delegate.” *Id.* at 14. Section 924(d)(1) does not answer that question.

Circumstances other than a person’s status as a convicted felon may cause him to request that his firearms be released to a delegate. For example, he may be serving a prison term for a misdemeanor and thus be unable to receive the firearms while he is incarcerated, or he may no longer wish to own the firearms having just been through a criminal trial. The fact that a person who has been acquitted of criminal conduct may choose to delegate another person to receive his firearms does not answer the question whether transferring firearms to the delegate of a convicted felon would “place the [convicted-felon] owner * * * in violation of law.” 18 U.S.C. 924(d)(1); see *United States v. Wacker*, 903 F. Supp. 1412, 1414-1415 (D. Kan. 1995) (convicted felon may not “control the possession” of a firearm by appointing an agent to receive it and sell it for him).

In sum, in certain circumstances, a convicted felon may transfer ownership of his firearms without running afoul of Section 922(g)(1)’s ban on possession. Under appropriate circumstances, he may receive the value of his firearms through a consignment sale conducted by a federal firearms licensed dealer. Some courts have also concluded that a convicted felon may

designate a third party to receive his firearms with proper assurances that the recipient will not allow the felon to have further control over the firearms, but those courts did not consider whether permitting the felon to select the recipient is a form of constructive possession. Regardless of the precise scope of relief that is available, Section 922(g)(1) does not categorically bar a convicted felon from transferring ownership of his firearms or receiving their value after a sale.

C. The Court Of Appeals Did Not Hold That Section 922(g)(1) Extinguishes A Convicted Felon's Ownership Interest In Firearms

Petitioner characterizes the court of appeals' decision as holding that a convicted felon is barred "for all time from lawfully realizing the value of the[] sale [of his firearms]." Pet. Br. 26; see *id.* at 2, 15, 19, 34-35. Characterizing the court's decision in that way, petitioner contends that the decision "effectively strip[s] [convicted felons] of their entire ownership interest" in firearms, even though Section 922(g)(1) is only a ban on possession. *Id.* at 2. But the court of appeals did not hold—and, contrary to petitioner's assertions (*e.g.*, *id.* at 2, 25, 33-34), the government does not contend—that a defendant loses his ownership interest in non-contraband firearms after he is convicted of a felony. Rather, the courts below evaluated the specific relief requested by petitioner and concluded that such relief was not warranted because of concerns about petitioner's actual or constructive possession of the firearms.

1. Petitioner asked the district court for a specific type of relief. In his motion, he requested that his wife "be given possession and control of the firearms

collection for the benefit of [their] adult children and heirs” 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.” J.A. 40; see J.A. 73 (similar request in petitioner’s renewed motion). At the evidentiary hearing before the magistrate judge, petitioner requested a transfer of his firearms either to his wife, to Rosier, or to “any other person of [petitioner’s] choosing who is lawfully entitled to own subject firearm collection.” J.A. 161. It was the magistrate judge’s understanding that “the relief sought by [petitioner’s] motion requests the firearms be given to either [petitioner’s] wife or Mr. Robert Rosier.” Pet. App. 8a; see J.A. 136-137 (magistrate judge confirming at the evidentiary hearing that it was the United States’ position “that the property cannot or should not be returned or disposed of in any way that [petitioner] seeks”).

Petitioner did not request that his firearms be transferred to a federal firearms licensed dealer and sold for his benefit.⁷ Nor did he offer any assurances

⁷ Petitioner claims that in the court of appeals, he “outlined several different equitable means through which the courts could grant him relief,” Pet. Br. 9, including by ordering a sale of the firearms for his account through an arrangement where petitioner would not set the value or “direct[] the sale or purchase of the firearms” but instead would “merely [be] compensated for the value of [the] property by a neutral third-party.” *Id.* at 9-10 (quoting J.A. 193-194 (petitioner’s court of appeals brief). The court of appeals, however, was entitled to evaluate the district court’s decision based on the relief requested from that court—transfer of the firearms to petitioner’s wife, to Rosier, or to another person of petitioner’s choosing. The court of appeals was not required to

from his wife or from Rosier that they would agree not to return the firearms to petitioner or to follow his instructions. Rosier did not even attend the hearing. J.A. 140. Although petitioner appeared pro se in the lower courts, he cited *Zaleski* and *Miller* in his briefs and in his testimony (J.A. 71, 170, 183, 186, 189-190, 193), and he presumably understood that such assurances may be required before a court will order firearms transferred to a third party selected by the convicted felon. See *Miller*, 588 F.3d at 420; *Zaleski*, 686 F.3d at 93-94.

Thus, contrary to petitioner's contention (Pet. Br. 26), the court of appeals did not hold that convicted felons effectively lose their ownership interest in firearms or are categorically barred from realizing any value from their sale. Rather, the court held that the relief petitioner sought—transfer of the firearms to his wife or to Rosier—was not warranted because of “the concern that by granting [petitioner] actual or constructive possession of a firearm, [the] court would violate [Section] 922(g).” Pet. App. 4a.

The court of appeals followed its prior decision in *Howell*. Pet. App. 3a-4a. *Howell* likewise did not hold that convicted felons are categorically barred from receiving any financial value for firearms that they may no longer possess. The court in *Howell* held that returning firearms to a convicted felon “would be a clear violation of [Section] 922(g),” 425 F.3d at 976, and that the defendant's alternative request “to either place the firearms in the possession of a relative in trust or sell the firearms and distribute the proceeds to him” was “beyond the scope of Rule 41(g),” which

devise relief based on a new request made for the first time in petitioner's appellate brief.

“deals solely with the return of property.” *Id.* at 977-978. The court further explained that a defendant is “not entitled to have * * * firearms held in trust for him by a third party” because “[s]uch a request suggests constructive possession.” *Id.* at 977 (quoting *United States v. Felici*, 208 F.3d 667, 670 (8th Cir. 2000), cert. denied, 531 U.S. 1201 (2001)). The court expressly declined to decide whether the defendant could file suit against the United States to recover the value of the firearms, *id.* at 977 n.4, thus demonstrating the court’s understanding that the defendant potentially retained an ownership interest in the firearms.⁸

⁸ Consistent with controlling precedent in *Howell*, 425 F.3d at 974, the government argued in the court of appeals that petitioner could not be the beneficiary of equitable relief afforded by Rule 41(g) because, as a convicted felon, he had unclean hands. The court of appeals followed *Howell*, holding that a defendant convicted of a drug offense has unclean hands to demand the return of firearms, even if the firearms were not used in furtherance of the offense. Pet. App. 4a. The government does not rely on that argument as a basis for affirming the court of appeals’ decision. This case does not present the question whether a court of equity could decline to provide relief in derivative contraband cases—i.e., cases involving property that is not contraband *per se*, but that had become forfeitable because of unlawful use. See *Felici*, 208 F.3d at 670 (failure to initiate a forfeiture action “should not prevent the government from being able to assert, in resistance to a Rule 41(e) motion, a 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”); *United States v. Clymore*, 245 F.3d 1195, 1200 (10th Cir. 2001) (*per curiam*); *Sash v. United States*, No. 09 Civ. 450 (DC), 2009 WL 3007379, at *5 (S.D.N.Y. Sept. 22, 2009).

Likewise, the Eighth Circuit in *Felici*, which was cited by the court of appeals in *Howell*, neither stated that a convicted felon loses ownership rights in firearms nor addressed the possibility of a sale to a neutral third party. The court held that the defendant's request to have a third party hold firearms in trust for a convicted felon "suggest[ed] constructive possession." 208 F.3d at 670. The question whether the beneficiary of a trust retains some level of control over the contents of the trust sufficient to raise concerns about constructive possession is not presented here.

2. Because the court of appeals did not hold that a convicted felon is barred from realizing any financial value from his ownership interest in firearms, the extended arguments of petitioner and his amici that the court's decision ignores the distinction between ownership and possession (Pet. Br. 14-23); permits the government to forfeit property without following proper procedures (*id.* at 25-28); and raises constitutional concerns about due process (*id.* at 28-32), the taking of property without just compensation (*id.* at 32-33), unreasonable seizures (*id.* at 33), and excessive fines (*id.* at 35) are inapposite.

Petitioner's contention (Pet. Br. 33-35) that the court of appeals' decision raises Second Amendment concerns is particularly misplaced. He contends (*ibid.*) that if a firearm owner cannot divest himself of his ownership interest after being convicted of a felony, he is left with "three bad options": (1) to be released on bond but effectively forfeit his firearms if he is convicted; (2) to sell or give away his firearms "before [he] has even been accused," leaving him unable to defend himself; or (3) to forgo his ability to be re-

leased on bond while the criminal charges are pending and then “face possible liability under Section 922(g) upon conviction.” *Id.* at 34. Petitioner faced no such dilemma.

As explained above (see pp. 19-28, *supra*), a convicted felon is not forever barred from receiving any financial benefit from his firearms if he fails to transfer ownership before he is convicted of a felony. Furthermore, there is no reason why petitioner would need to sell his firearms “before [he] [is] even * * * accused” of a crime in order to ensure that he will be permitted to dispose of his ownership interest in them in accordance with his preferences. Pet. Br. 34. Of course, petitioner voluntarily agreed to turn over his firearms (and thus voluntarily relinquished his ability to protect himself with the firearms) after he was accused of criminal activity in exchange for the ability to be released on bond. But even after he did so, he remained free to sell or transfer his firearms before he was adjudicated guilty of a felony on December 6, 2007. See Pet. App. 8a. Petitioner acknowledged in his plea agreement (entered on November 30, 2007) that he would “be adjudicated guilty of the offense[] to which [he] ha[d] pleaded” and that because the offense was a felony, he would “thereby be deprived of * * * the right * * * to have possession of firearms.” 3:06-cr-00211-TJC-TBT-1 Docket entry No. 128, at 8; Pet. App. 4a. If he had transferred ownership before being adjudicated guilty, Section 922(g)(1) would have presented no bar.⁹

⁹ In the courts below, petitioner suggested that he could not have transferred the firearms before his guilty plea because they “secured” his bond. J.A. 128 (stating that selling or transferring the firearms before being adjudicated guilty was “impossible” because

In short, the basic premise of petitioner's argument is that the court of appeals incorrectly held that a convicted felon effectively loses his ownership rights in firearms because he is categorically barred from transferring them to a third party or receiving any financial benefit from their sale. But the court of appeals did not categorically rule out all such relief; it rejected only the specific type of relief that petitioner requested.

D. The District Court Was Not Required To Grant Petitioner's Request That His Firearms Be Transferred To His Wife Or To Rosier

Given the relief requested in petitioner's motion—that his firearms collection be transferred to his wife or to his good friend Rosier—the district court acted within its discretion when it denied the motion. A court exercising equitable discretion is not required to allow a convicted felon to control the disposition of his firearms or to accept the risk that he may continue to have control over the firearms after they are released. See *Quackenbush*, 517 U.S. at 718 (noting the “historic discretion exercised by federal courts ‘sitting in equity’”) (citation omitted); cf. *Howell*, 425 F.3d at 974

“[g]enerally, one cannot pass good title to property that is securing a bond or the bond would be meaningless”); J.A. 188 (stating that “[f]rom the moment I delivered the Collection[,] the property was encumbered with the bond and deprived me of my ability to sell or dispose of the property”). That is incorrect. Surrendering his law enforcement firearm and credentials was one condition of petitioner's release on bond (J.A. 34); a separate condition of his release was the requirement that petitioner execute a secured bond in the amount of \$20,000 (J.A. 33). The bond was secured with petitioner's salary from his former job as a United States Border Patrol agent, not with any firearms, and certainly not with firearms that petitioner voluntarily turned over to the FBI. See J.A. 26-28, 34.

“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.”); *Zaleski*, 686 F.3d at 92 (a motion for return of property is available only when the equities favor the exercise of jurisdiction).

Equitable jurisdiction must be exercised “with caution and restraint” and is appropriate only when necessary to “prevent manifest injustice” in light of the movant’s conduct and his request. *Eubanks*, 169 F.3d at 674. The district court’s decision to deny equitable relief is reviewed only for an abuse of discretion. *Shigemura*, 664 F.3d at 312; *Mochado*, 465 F.3d at 1307. Based on the specific relief insisted upon by petitioner in the district court, it was not an abuse of discretion for the court to deny his motion.

1. First, petitioner’s requested relief would have allowed him to control who next had access to the firearms. Petitioner insisted before the magistrate judge that the firearms be transferred to his wife, to Rosier, or to “any other person of [petitioner’s] choosing.” J.A. 161; see J.A. 40, 73; cf. J.A. 106-107 (petitioner’s claim submitted to the FBI stating that if the firearms were not released to Rosier, petitioner would retain his “right to transfer [his] interest to a person of [his] choosing”). Granting such relief would have resulted in constructive possession, in violation of Section 922(g)(1). See pp. 23-26, *supra*.

2. Second, even if the Court were to conclude that permitting a convicted felon to select the next recipient of his firearms does not amount to constructive possession, petitioner’s requested relief did not sufficiently ensure that petitioner would not continue to

have control over the firearms. “Whether a particular proposed arrangement would constitute prohibited constructive possession [is] an issue of fact to be determined by the [court].” *Zaleski*, 686 F.3d at 93.

a. Although it appears that petitioner no longer seeks to have his firearms transferred to his wife, see Pet. Br. I (asking whether a felony conviction prevents a court from ordering the government to “transfer non-contraband firearms to an unrelated third party to whom the defendant has sold all his property interests”), that request made to the district court encompassed a significant risk that petitioner would regain possession of the firearms. Petitioner has never suggested that he and his wife do not live together, and petitioner offered no assurances from his wife that the firearms would be kept in a location over which petitioner could not exercise dominion or control. Proof that a firearm is found in an area of a shared residence over which the convicted felon has dominion and control is sufficient to establish constructive possession. See, e.g., *United States v. Alanis*, 265 F.3d 576, 592 (7th Cir. 2001), cert. denied, 535 U.S. 1095 (2002); *Meza*, 701 F.3d at 419-420.

b. Furthermore, with respect to either of the selected recipients, it was not clear that petitioner was actually offering to give up control over his firearms collection. Petitioner had previously sought to have the firearms transferred to his next-door neighbor Boggs, who decided he did not want to “become involved” in petitioner’s plan when he was contacted by the FBI. J.A. 85, 150-151. Before the district court, petitioner tried to have the firearms transferred to his wife or to his good friend Rosier, but neither of those selected recipients offered any assurances that they

would not return the firearms to petitioner or follow his instructions (Rosier did not even attend the hearing). J.A. 117, 140.

The absence of any assurances was especially conspicuous given that the “bill of sale” purporting to transfer the firearms to Rosier did not indicate that Rosier had agreed to pay any money to petitioner for his collection—an omission that did not go unnoticed by the magistrate judge, J.A. 87-89, 162-163; and also given petitioner’s repeated statements that many of the firearms were received by inheritance and were supposed to be given to petitioner’s children, see J.A. 161 (requesting that the firearms be given to petitioner’s wife “for the benefit of [petitioner’s] adult children and heirs”); J.A. 40, 73 (same); J.A. 159 (petitioner’s testimony that “[t]he firearms have been owned by my family and me for many years” and that “[m]any were given to me by inheritance, trading and buying from family members, friends, co-workers and other law enforcement officers”); cf. J.A. 178 (petitioner’s appellate brief stating that petitioner had “inherited several rifles and guns from [his father] which were to be passed on to [petitioner’s] son, stepson and daughter from their grandfather”).

That petitioner offered no assurances from his wife or from Rosier that they would not allow petitioner to have further control over the firearms was sufficient grounds for the district court to deny petitioner’s motion. Courts that have discussed the possibility that a convicted felon could designate a third party to receive his firearms have stated that assurances are an important part of such an arrangement. See *Miller*, 588 F.3d at 420 (stating that firearms could be given to a friend or relative “conditioned on the recip-

ient's written acknowledgement that returning the guns to [the felon] or honoring his instructions would aid and abet [the felon's] unlawful possession"); *Zaleski*, 686 F.3d at 93 (stating that transfer to a federal firearms licensed dealer selected by the defendant would be appropriate if the dealer is "a suitable custodian not subject to [the defendant's] control"); cf. *State v. Fadness*, 268 P.3d 17, 30 (Mont. 2012) (concluding that "even if the [d]istrict [c]ourt had concluded that [the defendant] would *not* have constructive possession of his weapons upon their release * * * , the court was not then obligated to adopt that disposition" and could instead order the firearms sold for the defendant's account). Petitioner does not contend, nor could he, that any assurances were offered to the district court. He asserts in his brief (Pet. Br. 25) that "[a]llowing felons to transfer their non-possessory interests to lawful purchasers poses no risk of putting firearms back in felons' hands." But no court has adopted that view in a case where the convicted felon is allowed to select the purchaser.

A court that is exercising "caution and restraint" to ensure that it is not facilitating a violation of Section 922(g)(1) is not required to allow a convicted felon to control the disposition of his firearms. *Eubanks*, 169 F.3d at 674. At the very least, the court is not required to comply with a convicted felon's insistence that the firearms be transferred to his selected recipients without any offer of assurances that they would not be subject to his further control. In light of petitioner's specific request, an exercise of the court's equitable jurisdiction was not necessary to "prevent manifest injustice." *Ibid.*

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2015

APPENDIX

1. 18 U.S.C. 922 provides in pertinent part:

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed

for any person described in any paragraph of subsection (g) of this section, in the course of such employment—

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. 924(d)(1) provides:

Penalties

Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions

of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

3. 41 C.F.R. 101-42.1102-10 provides:

Special requirements for utilization, donation, sale, and abandonment or destruction of hazardous materials and certain categories of property.

Firearms.

(a) *Utilization requirements.* (1) In accordance with § 101-43.4801(c) of this chapter, reports of excess reportable firearms and requests for their transfer must be submitted to the:

General Services Administration (7FP-8), Denver, CO 80225-0506.

(2) Firearms may be transferred only to those Federal agencies authorized to acquire firearms for official use. Such transfers must be executed under § 101-43.309-5 of this chapter and, when applicable,

§ 101-42.1102-8(b). Additional written justification from the requesting agency may be required.

(b) *Donation requirements.* (1) Only handguns, rifles, shotguns, and individual light automatic weapons, all less than .50 caliber in FSC 1005, and rifle and shoulder fired grenade launchers in FSC 1010, assigned a disposal condition code of 4 or better, as defined in § 101-43.4801(e) of this chapter, may be offered by GSA (7FP-8) to State agencies for donation to eligible law enforcement entities for law enforcement purposes only. Donations are limited to only those eligible law enforcement entities whose primary function is the enforcement of applicable Federal, State, and/or local laws, and whose compensated law enforcement officers have powers to apprehend and arrest. Such donations must be executed under § 101-42.1102-8(c) as applicable.

(2) Each SF 123 submitted to GSA must be accompanied by a conditional transfer document, signed by both the intended donee and the State agency, and containing the special terms, conditions, and restrictions prescribed by GSA, and any other required forms or information.

(3) The restrictions on donated firearms shall be in perpetuity, and they may not be released by the State agency without prior written approval from GSA. The donee must notify the State agency when donated firearms are no longer needed. The State agency may, with GSA approval, reassign firearms from one donee to another donee within the state or to another SASP (see § 101-44.205(f) of this chapter); otherwise,

firearms must be delivered directly to the place of destruction to be destroyed by either the donee or the State agency. Destruction must be such that each complete firearm is rendered completely inoperable and incapable of being made operable for any purpose except for the recovery of basic material content in accordance with paragraph (c) of this section. The donee and a representative from the State agency, or designee, must both state in writing that the firearms were so destroyed and the original signed statement must be maintained by the State agency.

(4) Surplus firearms approved for donation must be shipped or transported directly from the holding Federal agency to the donee, and may not be stored in the State agency warehouse; or, arrangements may be made by the State agency for the designated donee to make a direct pickup at the holding agency.

(5) Firearm ammunition may not be donated.

(c) *Sales requirements.* Surplus firearms may be sold only for scrap after total destruction by crushing, cutting, breaking, or deforming to be performed in a manner to ensure that the firearms are rendered completely inoperative and to preclude their being made operative. Such sale shall be conducted under subpart 101-45.3.

(d) *Foreign gifts of firearms.* Firearms reported to GSA as foreign gifts may be offered for transfer to Federal agencies, including law enforcement activities. Foreign gifts of firearms shall not be donated. Such gifts not required for Federal use may be sold only to the gift recipient at the discretion of GSA. A certifi-

cation that the purchaser shall comply with all State and local laws regarding purchase and possession of firearms must be received by GSA prior to release of such firearms to the purchaser. Firearms not transferred to a Federal agency or sold to the recipient shall be disposed of in accordance with paragraph (c) or (e) of this section.

(e) *Abandonment and destruction of firearms.* Firearms shall not be abandoned. Destruction of firearms is subject to the requirements set forth in paragraph (c) of this section. Such destruction shall also be accomplished under the provisions of subpart 101-45.9, § 101-42.406 and, when applicable, § 101-42.1102-8.

(f) *Abandoned and forfeited firearms.* In addition to the requirements of this part 101-42, forfeited or voluntarily abandoned firearms shall be subject to the provisions of part 101-48.

4. 41 C.F.R. 128-48.102-1 provides:

Vesting of title in the United States.

(a) Abandoned or other unclaimed property, subject to the provisions of section 203(m) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 484(m)), shall remain in the custody of and be the responsibility of the bureau finding such property.

(b) If the owner of such property is known, the owner shall be notified within 20 days of finding such property by certified mail at the owner's address of

record that the property may be claimed by the owner or his designee and that if the property is not claimed within 30 days from the date the letter of notification is postmarked, the title of the property will vest in the United States.

(c) If the owner of such property is not known and the estimated value of the property exceeds \$100, the bureau shall post notice within 20 days of finding such property, which contains the following information:

(1) A description of the property including model or serial numbers, if known.

(2) A statement of the location where the property was found and the office that has custody of it.

(3) A statement that any person desiring to claim the property must file with the bureau within 30 days from the date of first publication a claim for said property.

(4) A complete mailing address is to be provided as a point of contact within the bureau for any person to obtain additional information concerning the property or the procedures involved in filing a claim.

Notice must be published once a week for at least three successive weeks. Sound judgment and discretion must be used in selecting the publication medium. Advertisements should be placed in a publication of general circulation within the judicial district where the property was found.

(d) Property, as described in paragraphs (b) and (c) of this section, shall be held for a period of 30 days

from the date of the first publication of notice. Upon the expiration of this 30-day period, title to such property vests in the United States, except that title reverts to the owner where a proper claim is filed within three years from the date of vesting of title in the United States, but if the property has been in official use, transferred for official use, or sold at the time the proper claim is approved, title shall not revert back to the former owner. The former owner shall instead obtain reimbursement in accordance with 41 CFR 101-48.102-4 or 101-48.305-1.

(e) If the owner of such property is unknown and the estimated value of the property is \$100 or less, no notice is required, and the property shall be held for a period of 30 days from the date of finding the property. Upon expiration of this 30-day period, title to such property vests in the United States.

No. 13-1487
IN THE SUPREME COURT OF THE UNITED STATES

TONY HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES**, via e-mail and by first-class mail, postage prepaid, this **13TH day of January, 2015**.

[See Attached Service List]

As required by Supreme Court Rule 33.1(h), I certify that the document contains 1063 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.
Executed on January 13, 2015.

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January 13, 2015

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisor, Case Management, Office of the Solicitor General, at (202) 514-8844, or email at SupremeCtBriefs@USDOJ.gov. Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

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