

March 18, 2013

U.S. Court of Appeals
for the Eleventh Circuit
56 Forsyth Street N.W.
Atlanta, GA 30303



Attn: Walter Pollard, Clerk of Court

Re: Appeal Number: 12-14628-C
Case Style: USA v. Tony Henderson
District Court Docket No: 3:06-cr-00211-TJC-TEM-1

Dear Mr. Pollard:

Enclosed are a copy of the Money Order in the amount of \$455 filed with the U.S. District Clerk of the Court in Jacksonville, FL. Also, a copy of the denial of the motion in forma pauperis and the motion for the Appeal of Denial of Motion to Return Property under Rule 41(g).

Please contact me if any other action is needed on my part in order to proceed. Thank you for your help in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Tony Henderson".

Tony Henderson

Phone#:(904)259-1436

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 05, 2013

Tony Henderson
6195 OAKDALE LN
MACCLENNY, FL

Appeal Number: 12-14628-C
Case Style: USA v. Tony Henderson
District Court Docket No: 3:06-cr-00211-TJC-TEM-1

On April 1, 2013, this Court will begin **MANDATORY electronic filing**. All counsel are required to file documents electronically in appeals pending on April 1, 2013, and in appeals docketed in this Court on or after that date, unless exempted for good cause.

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Pursuant to Eleventh Circuit Rule 42-1(b) you are hereby notified that upon expiration of fourteen (14) days from this date, this appeal will be dismissed by the clerk without further notice unless you pay to the DISTRICT COURT clerk the \$450 docket and \$5 filing fees (total of \$455), with notice to this office.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-14628-C

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONY HENDERSON,
a.k.a. Hollywood,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Tony Henderson's motion for leave to proceed on appeal *in forma pauperis* is DENIED because the appeal is frivolous. *See Pace v. Evans*, 709 F.2d 1428 (11th Cir. 1983).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE



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Amount: FOUR HUNDRED FIFTY FIVE DOLLARS AND NO CENTS

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Memo	12-14628-C	

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Case: 12-14628 Date Filed: 03/28/2013 Page: 5 of 59

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POSTAL MONEY ORDER

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Amount \$155.00

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Address 300 N. Hogan St. 9-150 From Tony Henderson
Jacksonville, FL 32202 Address 6195 Oakdale Lane

Memo 12-14628-C MacDemy, FL 32063

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**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Fourth Street, N.W.
Atlanta, Georgia 30303**

John Ley
Clerk of Court

For rules and forms visit
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March 05, 2013

**Tony Henderson
6195 OAKDALE LN
MACCLENNY, FL**

**Appeal Number: 12-14628-C
Case Style: USA v. Tony Henderson
District Court Docket No: 3:06-cr-00211-TJC-TEM-1**

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Sincerely,

JOHN LEY, Clerk of Court

**Reply to: Walter Pollard, C
Phone #: (404) 335-6186**

MOT-2 Notice of Court Action

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 12-14628-C

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

**TONY HENDERSON,
a.k.a. Hollywood,**

Defendant-Appellant.

**On Appeal from the United States District Court
for the Middle District of Florida**

ORDER:

Tony Henderson's motion for leave to proceed on appeal *in forma pauperis* is DENIED because the appeal is frivolous. See *Pace v. Evans*, 709 F.2d 1428 (11th Cir. 1983).

**/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE**

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, GA 30303**

United States

v.

Appeal No. 12-14628-CC

Tony Henderson

Appeal of Denial of Motion to Return Property under Rule 41(g)

Introduction:

Defendant, Tony Henderson, pro se, appeals the Denial of the Motion for Return of Property dated August 8, 2012, by U. S. District Court, Middle District of Florida, Jacksonville Division, Florida. The District Court erred in relying on U.S. v Howell, 425 F.3d 971(11th Cir. 2005) which is factually distinguishable from this case. The facts of this case are not in dispute.

Facts:

A. My Collection

For approximately twenty (20) years, I have been collecting firearms and memorabilia for a hobby. My father and I enjoyed hunting together, and I also gave my son and stepson two rifles in order to get them interested in the sport. When my father passed away, I inherited several rifles and guns from him which were to be passed on to my son, stepson and daughter from their grandfather. As a law enforcement officer with the U.S. Border Patrol, I also collected several firearms as a hobby and enthusiast. The firearms collection, (hereinafter "Collection") belonging to

my family and I consisted six (6) hunting rifles, three (3) hunting shotguns, five (5) handguns including a commemorative collectible Border Patrol handgun, two (2) collectible rifles including a M1A1 Garand from Vietnam, and a Enfield from WWII, two (2) inoperable display only weapons including a Black Powder muzzle loader wall hanger replica and a Japanese Arisika rifle, one (1) bow & arrow Crossbow, and ammunition valued at approximately \$8,000.00. The total Collection consisted of eighteen (18) firearms including two inoperable rifles, one (1) bow & arrow Crossbow and five (5) assorted rifle ammo magazines.

The Collection pieces were all 20 to 100 years old. In addition to the pieces that were part of an inheritance, the other pieces were purchased during my marriage with marital assets with my wife, Linda.

B. Surrender for Safekeeping

On June 7, 2006 I was arrested as a result of a complaint issued in the Middle District of Florida, Jacksonville Division. After being charged with a criminal offense, the Judge had stated that as a condition of my bond, he was requesting that I voluntarily turn over all firearms at my home to the FBI, due to my mental distress and because I was a law enforcement officer. On June 9, 2006, I voluntarily turned over the entire contents of my firearms for safe keeping.¹ When I turned over my Collection, the FBI provided me a property receipt and inventory which indicated the listed property was "received from" Tony Henderson.² (Exh.1). The firearms in the Collection have never

¹ The FBI attempted to take possession of the entire contents of my safe which also included non-firearms items such as my collection of baseball trading cards and coins. My attorney objected to this expanded taking.

² Note the property receipt is incorrectly numbered, as the number 10 listed twice. There were actually 20 items of property turned over.

been alleged to be involved in any criminal activity or to have been purchased from proceeds of criminal activity³.

C. Judicial Proceedings

On November 30, 2007, I pled guilty to a drug offense. The plea agreement made no mention of the Collection and did not include a forfeiture count. On April 21, 2008, I was sentenced to six months imprisonment and probation. I was granted early termination of probation as of June 11, 2010. The conditions of the bond were fully satisfied when I presented myself to serve my sentence in July 2008.

D. Attempt to dispose of property

On December 1, 2008, upon my return from incarceration, I transferred ownership of the Collection to William Boggs. (Ex. 2). The FBI contacted Mr. Boggs and intimidated and discouraged him to the extent that he withdrew his request for possession of the Collection and cancelled the agreement to purchase the firearms and crossbow for his own collection.

On February 4, 2009, Robert Rosier expressed interest in owning the entire Collection. A Bill of Sale was signed and submitted to the FBI by Mr. Rosier. The FBI advised him they would contact him about taking possession. On December 14, 2009, I contacted the FBI regarding making arrangements for Mr. Rosier to take possession and complete the sale agreement. I was told by Agent Eubanks that the FBI was aware of the request and they were trying to work with the U.S. Attorney's Office regarding the situation and they would be in touch with us.

³ The Cross Bow and two non-functional rifles are not considered firearms or contraband.

By letter dated December 16, 2009, 10 months after Mr. Rosier filed a claim, the FBI sent me a "Waiver of Ownership of Firearm, Asset ID: A-06-FBI-00141." The Form reads: "On June 9, 2006, the Federal Bureau of Investigation seized miscellaneous firearms from Tony Henderson. I understand that the C.F.R. requires that the FBI inform me that I have the opportunity to claim this firearm (41 C.F.R. 128-48.102.1). I understand that if I do not claim this firearm with 30 days of signing this document, the title to the firearm will vest in the U.S. Government." Additionally, the form included a hold harmless clause. This notice was received three years six months and seven days after the property was "received from" me. It was the first notification I had that the FBI considered the property "seized."

Neither Mr. Rosier, Mr. Boggs, my wife, Linda Henderson, my children, nor I received notice of seizure and an opportunity to file a claim for their interest in the Collection. I signed receipt of the document on December 28, 2009, and the same day Mr. Robert Rosier and I filed a letter claiming interest in the Collection. The written claim included a statement of facts and circumstances justifying granting the claim. The claim was also supported by documentary evidence establishing valid, good faith, innocent owner interest in the property. (Ex. 3) On January 5, 2010, I received a letter from the FBI Counsel stating they were conducting an investigation into the merits of the claim.

On May 21, 2010, I received a letter from the FBI Property Management Officer stating that the claim filed on January 4, 2010 was reviewed and denied. It stated that since I did not have the authority to legally possess firearms, I cannot delegate the

authority to any other person. On June 3, 2010, I requested reconsideration of that decision, which was denied on January 26, 2011.

E. Lack of Notice

Although the Collection was never included as part of any criminal case, I was never given a notice of seizure citing any statute under which the Collection, in whole or in part, was to be seized and potentially forfeited. Mr. Boggs, Mr. Rosier, my wife Linda Henderson, my son, stepson and daughter also received no notice or any opportunity to file a claim for the Collection. In my son's and stepson's case, they were not provided an opportunity to claim their own two rifles.

On June 13, 2010, I filed a Motion to Return or Dispose of Property with the Middle District of Florida, Jacksonville, Florida Division. (Ex. 4) At that time, I requested return of the Collection and that the property rights of my wife, Linda Henderson, be recognized. I asked that possession and control of the Collection be awarded to her, or in the alternative that Robert Rosier, a non-relative third-party.

On May 27, 2011, the U.S. Magistrate denied the Motion. (Ex. 5) I timely appealed that Denial. On August 8, 2012, the U.S. District Court Judge adopted the Report and Recommendation as the Opinion of the Court and denied my request to return the property. (Ex. 6).

Law

Congress has established a strict procedure, placing limits on federal courts by enacting general rules for civil forfeiture proceedings, including proceedings to forfeit firearms. 18 U.S.C. § 983. Congress requires that "any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within 120 days of such

seizure." 18 U.S.C. § 924(d)(1); U.S. v. 52 Firearms, 362 F. Supp. 2d 1308 (M.D. Fla., Feb. 10, 2005). The plain and unambiguous meaning of the statutory term "any action or proceeding" includes not only administrative, but also judicial proceedings. Id.

The 11th Circuit held that "forfeitures are not favored, and those seeking forfeiture in this circuit must strictly comply with the letter of the law." See U.S. v. One 1936 Model Ford V-8 DeLuxe Coach, 307 U.S. 219, 226 (1939); U.S. v. \$38,000.00 in U.S. Currency, 816 F.2d 1538, 1547 (11th Cir. 1987). When the government misses the deadline to provide notice of seizure and forfeiture to an owner or a party who may have an interest, the government has disabled itself from obtaining an order of forfeiture. U.S. v. Leroy F. Miller, 588 F.3d 418 (7th Cir., Nov. 19, 2009).

Title 18 U.S.C. § 922(g)(1) makes it unlawful for any person with a felony conviction to possess any firearm or ammunition. The term "possess" has been broadly interpreted to include constructive possession. The law is silent as to any other interest that a convicted felon may retain in spite of not being allowed to possess such property. However, owners of firearms that have been seized by the government in connection with a search or criminal activity are entitled to due process and notice before their property rights are extinguished.

Some Courts have held that under such circumstances, the U.S. must sell the weapons for the felon's account, if, by missing the statutory deadline, it disables itself from obtaining an order of forfeiture. Cooper v. Greenwood, 904 F.2d 302, 304 (5th Cir. 1990).

Although public policy favors law enforcement's requests to confiscate firearms from criminals, it does not relieve them from complying with the statutory requirements

set forth by Congress. Courts of equity can no more disregard statutory provisions than can courts of law. United States v. Luis Armando Rodriguez, 2011 U.S. Dist. LEXIS 133109, *16 (W.D.Tex. February 2011); see Holland v. Florida, 130 S. Ct. 2549, 2563 (2010) (“Courts of equity can and do draw upon decisions made in other similar cases for guidance”). “Exercise of a court’s equity powers . . . must be made on a case-by-case basis.” Id.

Analysis:

The government persuaded me to temporarily give up possession of my Collection, failed to lawfully seize the Collection or give notice of seizure to me or any other interested claimant, and now proposes to take title of the \$8,000 collection, permanently. Equity forbids this result.

The December 2009 FBI letter stated, for the first time, that the firearms were “seized” on June 9, 2006; however, no basis for seizure was provided and none existed. The FBI letter specifically cited an abandonment provision, at 41 C.F.R. 128-48.102-1, stating that if the owner of firearms is known, he “shall be notified within 20 days of finding such property” and he would then have thirty (30) days from the date of the notification letter to claim the property.⁴ Under the most generous reading of this statute, and if the Court holds that forfeiture could not be commenced until the release of the bond, July 8, 2008, notice was not provided until December 2009, 17 months later. Thus, both the forfeiture and the abandonment statutory notice requirements were not met.

⁴ By including a hold harmless provision in the notice of seizure provided by the FBI on December 16, 2009, it endeavored to protect its agents from legal action under 42 U.S.C. § 1983. It was at a minimum, deceitful, and calculated to protect its own shortcomings. However, a legal action under the Tucker Act may be more appropriate, but is still additional litigation over an issue that can be resolved within equitable legal precedent.

There is no question that the FBI failed to give proper notice of either abandonment and/or seizure to all parties that it knew had an actual interest or an apparent interest in the property. Whether or not any party could have prevailed is not relevant to the analysis of whether or not the government had a statutory duty to provide notice. The result of failure to give notice and an opportunity for due process is that the government is now unable to obtain an order from the Court for forfeiture.

Based on the government's failure to provide timely notice and due process, my interest in the property continues even though my possessory interest has been curtailed. U.S. v. Leroy F. Miller, 588 F.3d 418, 420 (7th Cir., Nov. 2009). Due to the government's own inaction, it is now disabled from obtaining an order of forfeiture. Id. at 419, Cooper v. Greenwood, 904 F.2d at 304. That is exactly the posture that this Court finds itself today with this case.

What that failure of notice has done is also to divest my wife of her marital asset. My wife has no bar to owning and possessing any firearm in her own right. Just because she owns a firearm cannot just be assumed to be constructive possession for me without offering her a procedure to state her claim. There are numerous alternatives for her to store and maintain her own firearms which do not afford me influence and control. Such a holding would unconstitutionally interfere with her own right to own and bear arms as provided by the Second Amendment without due process. By failing to give proper notice and an opportunity to claim their own property, my son, stepson and daughter are having their rights trampled. My children are adults and have the right to have access to the Collection their grandfather intended them to have. The government seeks to deny them access and rights to their property without benefit of due process

based on a criminal conviction of which they had no part and have not been alleged to have had any part. As explained, all of the Collection was either purchased with marital assets, independently owned by my son and stepson, or were inherited from my father to inure to my children's benefit in the future. There has been no explanation or consideration of their legitimate interests.

This case is not about 18 U.S.C. § 922(g). I am not asking for the return of the Collection to my possession or constructive possession. However, there is no language in 18 U.S.C. § 922(g) that automatically divests a convicted felon of all of his property interest and the attending financial value. While the language does curtail actual possession and interstate commerce, it does not, in any way, limit my residual property interest that could be transferred by process of intestate inheritance, marital dissolution property settlement of marital assets, or sale by trust for the benefit of the owner, as a few examples of potential ownership rights. There is certainly no language that divests my wife, son and stepson from their own interests. The Crossbow (bow and arrow) is not even a firearm and the inoperable Black Powder replica wall hanger and nonfunctional Japanese Arisika are not even covered by 18 U.S.C. § 922(g), but no distinction has been made as to what may be prohibited.

Under the circumstances as described here, the other impairment is that the government had no basis for seizure or forfeiture and has yet to provide any such legal basis. The government could have avoided this situation from the first day by putting me on notice that I was at liberty to sell or otherwise dispose of the firearms at any time prior to the final resolution of the case. The Court could have put me on notice of the consequences of a plea while my Collection remained with the FBI for my own

convicted felon cannot legally possess a gun, he continues to have a property interest, limited to an ownership interest. Id. at 306. Every claimant has a right to his day in court and, regardless of his chances of success. He has a right to apply for remission or mitigation. Id. With proper notice, other persons who had an interest could have had the opportunity to also assert their claims. Id. The 5th Circuit concluded that because the government did not institute a forfeiture action, the United States must sell the weapons for the felon's account because, by missing the statutory deadline, it disabled itself from obtaining an order of forfeiture. Id.

The 7th Circuit held that if the United States does not want to sell firearms for the felon's benefit, that it must offer him some other lawful option: having a trustee sell or hold the guns, or giving them to someone who can be relied upon to treat them as his own. United States v. Miller, 588 F.3d 418, 420 (7th Cir., Nov. 2009). In this case there is no evidence that my wife, adult children, or Mr. Rosier have abandoned their right to own and treat the Collection as their own, if so entrusted.

Persuasively, the Second Circuit, just a few months ago, had occasion to weigh in on this issue and adopted the position taken in U.S. v. Miller, 588 F.3d 418. That Circuit concluded that under limited circumstances a convicted felon may arrange to benefit from the sale of otherwise lawful, unforfeited firearms by a third party without actually or constructively possessing them. U.S. v. Zaleski, 212 U.S. App. LEXIS 14435, *7-*8 (2nd Cir. July 2012). The possibility that a felon will receive a financial benefit from a trustee's sale of firearms to compensate him for his non-possessory property interest in them does not, standing alone, mean that he constructively possesses them. Id. The Zaleski court also found that it is not a windfall to allow a felon

to retain the value of property that he lawfully possessed before he was convicted and that is not subject to forfeiture, nor did it appear that the arrangement would impose a substantial burden on the government because the transferee would liquidate the weapons. Id. at FN3.

Similarly is the case, U.S. v. Brown, In re: Claim of Bernhard Bastian Jr., 2010 U.S. Dist. LEXIS 35358 (D.N.H. 2010) where as a condition of bail, Brown voluntarily surrendered his firearms and it was agreed the firearms would be held by a neutral third party pending the resolution of the charges and that he would pay all storage charges. While the government argued that a convicted felon cannot lawfully divest himself of mere legal title to firearms that he can no longer lawfully possess, without thereby “constructively possessing those firearms,” the court held that such a conclusion stretched the concept of “constructive possession,” as the term is used in the criminal statute prohibiting possession by felons. (18 U.S.C. 922(g). Id. at *7. The court noted that no precedent was cited by the government that held that mere continuing ownership of firearms following a felony conviction, without more, amounts to constructive possession. “It seems inconsistent to contend on the one hand that continued ownership of firearms does not amount to constructive possession, but, on the other hand, terminating one’s ownership interest does.” Id. *8-9. “Firearms subject to neither lawful forfeiture nor confiscation as contraband remain valuable tangible personal property belonging to the convicted felon.” Id. at *10. The Brown court rejected the premise that “firearms lawfully owned must, following the owner’s unrelated felony conviction, sit wherever they may be, unalienable and wasting, not subject to forfeiture, not subject to confiscation as contraband, and not subject to disposition by

the owner, or by anyone else, or by the court for the owner's benefit." The court further rejected that the property could be destroyed in the absence of due process or payment of just compensation." Id. at * 14.

Finally, in U.S. v. Parsons, the District Court for the Northern District of Iowa, distinguished that case from U.S. v. Felici, 208 F.3d 667 (8th Cir. 2000), in that in Parsons, the convicted felon asked to have his personal collection of firearms transferred to his friend who would sell some and keep some, and would alone determine what to do with the proceeds. 474 F. Supp. 2d, 1169, 1175. In Felici, the defendant sought to have the firearms in trust for him by a third party. Id. The court noted that the two cases each had a defendant who was not a convicted felon at the time he acquired the firearms. The government had no basis to seize the firearms as part of any criminal matter. But the court found that a defendant like Parsons would have been free to lawfully dispose of his firearms in the manner he sees fit prior to pleading guilty but for the intervention of the government's seizure and continued possession of the firearms. Id. at 1177. That is exactly the facts in my case. The government has no basis for seizure and has never alleged that to the contrary. Rather they were acting as a bailee for the convenience of the court while the case was pending. Nothing happened that converted that mere bailee relationship into a forfeiture of my ownership interest. The Parsons court noted that "as a general principle, equity abhors waste, and delights to restrain it in a proper case." Id. at 1175, citing Finney County Water Users' Ass'n v. Graham Ditch Co., 1 F.2d 650, 652 (D. Colo. 1924). Therefore, the court allowing Parsons to designate a friend to receive the property to treat as his own did not give him constructive possession.

The Court below incorrectly relied on the decision in U.S. v. Howell, 425 F.3d 971,972-73 (11th Cir. 205). That decision held that the United States is not obliged to confer a benefit on a felon by selling guns as his agent, and that transferring the guns to a straw owner would permit the felon to maintain unlawful constructive possession of the weapons. However, the facts in my case are distinguishable in that my Collection was never seized. In Howell, the firearms were part of a search and were ultimately seized during the arrest. It appears that Howell had a receipt indicating that that property was "seized." He, and any other potential claimants, were on notice. In my case, the Judge in the bond hearing indicated the weapons were being held as a means to ensure my own safety and not for any other purpose than custodial safeguarding. That was the reason that my wife's and my son's, stepson's and daughter's property were also turned over at that time. The property receipt specifically did not check the box for seizure or abandonment. It listed the firearms as "received" giving no indication of urgency in divesting myself of ownership. In my case, there is no straw owner. Therefore, the holding in Cooper and Zaleski , rather than Howell, applies.

The examples in Cooper, Zaleski , Miller and Parsons give this Court guidance as to how to fashion an equitable remedy without running afoul of 18 U.S.C. § 922(g). These decisions are all post-Howell and show the trend of the District and Circuit courts throughout the country. As an appropriate remedy, the Court has broad authority to define an equitable solution so the government does not profit from its own violation of statutory notice requirements and I do not control the property, in violation of law. Equity can accomplish both goals.

The court may separate out the items that are not subject to the bar under 922(g), and return them to me. The court can order the transfer of title to the remaining Collection and order a sale for my account. U.S v. Miller, 588 F.3d at 419. That would preclude me, as a convicted felon, from unilaterally dictating or directing disposition, as some courts have found objectionable, and it avoids the constitutional issues arising under the *Takings Clause*, while it fully protects my legitimate property interests. I am not setting the value, directing the sale or purchase of the firearms, but am merely compensated for the value of my property by a neutral third-party, subject to any commission for such sale. The court can set such conditions as it deems necessary. See U.S. v. Rodriguez, 2011 U.S. Dist. LEXIS 133109, at *54. Finally, the court can allow me to designate a third-party who can lawfully take possession of the Collection and treat it as his own.

The Supreme Court expects the Circuits to be able to define equity on a case-by-case basis and fashion remedies that are appropriate. Holland v. Florida, 130 S. Ct. 2549, 2563 (2010). This Court can recognize that early notice would have remedied this situation and that I am without fault in that regard. The government should not profit from its refusal to notify or consider claimants, by gleefully taking title to an \$8,000 collection. I immediately took all steps to attempt to resolve the issue while the FBI failed to do the bare minimum, and even led me to believe that they could/would turn the Collection over to Mr. Boggs or Mr. Rosier. Until December 16, 2010, after my extensive efforts to resolve the issues with my property, I had no idea that safeguarding my property would result in the loss of any financial benefit associated with my lawful ownership.

Finally, failing to grant equitable relief, results in imposition of a fine or penalty not imposed by the sentencing judge at the time of the conviction. It was not contemplated by the sentencing judge and the loss of value of my Collection without compensation results in a windfall to the government and no legal basis to do so. Equity requires this Court to do better.

Conclusion:

I hereby respectfully request that this Court recognize my wife and my adult children's independent ownership interest in the Collection turned over to the FBI as a condition of my bond. I also request that the Court separate and return the property to me that is not covered by 18 U.S.C. § 922(g), i.e., the Crossbow and inoperable replica wall-hanging Black Powder and nonfunctional Japanese Arisika. Alternatively, I request that the Court recognize my continued ownership interest in the property value and order its sale for my benefit or my wife's or adult children's benefit or allow me to designate a neutral third party to take possession as his own..

Dated: October 10, 2012.

Respectfully submitted,



Tony Henderson, Pro Se
6195 Oakdale lane
MacClenny, FL 32063
Phone: 904-259-1436
904-233-3613

Certificate of Service

I hereby certify that a copy of the above document was served on this 10 day of October, 2012, by U.S. First Class Mail, to the following:

U.S. 11th Circuit Court of Appeals
Attn: Walter Pollard, C
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Russell C. Stoddard
U.S. Attorney's Office
U.S. District Court
Middle District of Florida
300 N. Hogan Street
Jacksonville, FL 32202


Tony Henderson

EXHIBIT

"1"

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

Page 1 of 2

On (date) 6/9/06

- Item(s) listed below were:
- Received From
 - Returned To
 - Released To
 - Seized

(Name) Tony Herlason
 (Street Address) 6195 Oakdale Ln
 (City) MacLenn, FL 32063-5509

Description of Item(s):

- ① Rugger Special 101 Serial # 571-46662
5 shot Revolver
- ② Jennings Firearms .22 (J-22) & Magazine - Serial # 157827
- ③ Smith & Wesson .357 magnum Serial # 72954
- ④ Foremost Model 40 -12 gauge shotgun # 3078949
- ⑤ Champion -16 gauge rifle - Serial # 62850XH
- ⑥ Iver Johnson Slide Action 22 w/ Bushnell scope
Serial # 003561
- ⑦ Smith & Wesson - Border Patrol .357 Magnum
Serial # USBP 1243 & case
- ⑧ Chrymunk .22 Bolt Action - Serial # 62724
- ⑨ M1 Grod Rifle (WWII) - Serial # 05432
- ⑩ Powermate Crossbow - no Serial #
- ⑪ Little Fox 410 - Rifle - Serial #

Received by: [Signature] 6/9/06 Received from: [Signature]
 (Signature) (Signature) TOTAL P.03

UNITED STATES DEPARTMENT OF JUSTICE
ICE
FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

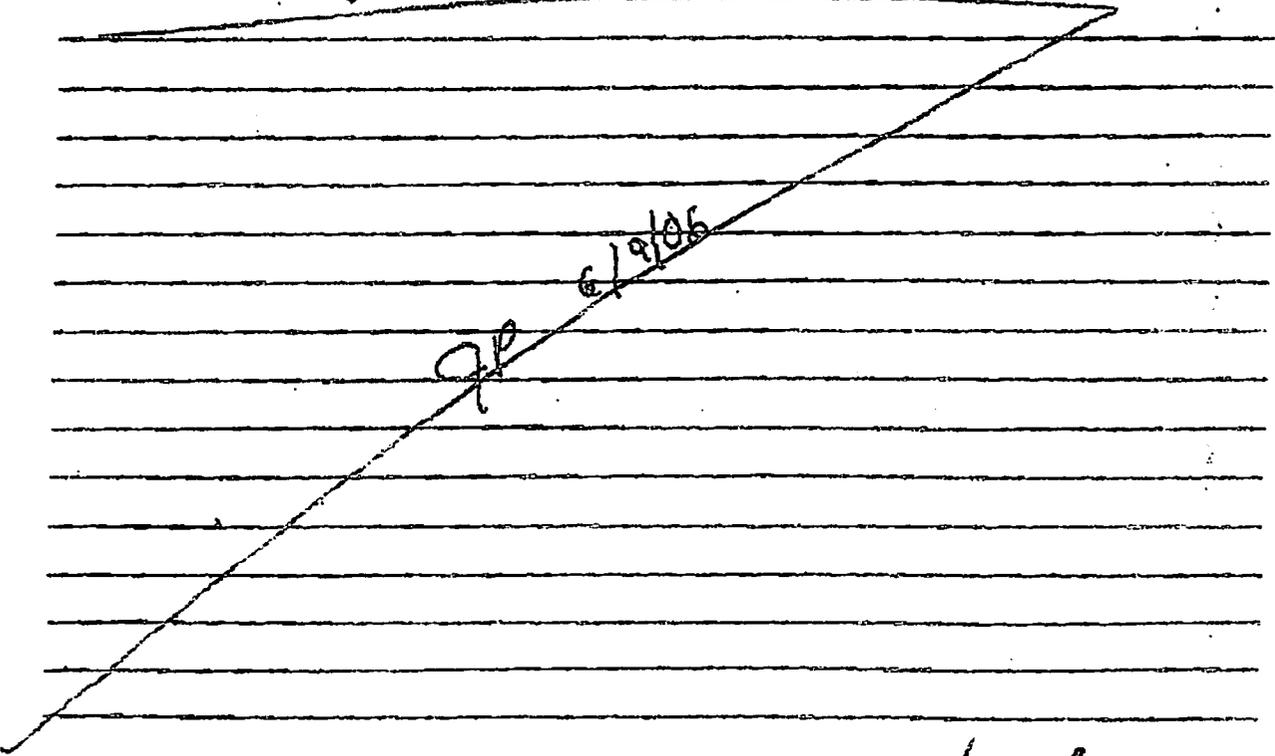
On (date) 6/9/06

- item(s) listed below were:
- Received From
 - Returned To
 - Released To
 - Seized

(Name) Tony Henderson
 (Street Address) 6195 Oakdale Ln
 (City) Macedonny, FL 32063-5509

Description of Item(s):

- ① MI Custom - serial # 10667
- ② Remington 550 .22LR Semi-auto Serial # 550-L
- ③ Mosburg Made 152K .22 long Rifle - Serial # + magazine
- ④ MI Grand - Ref # H499 + Magazine
- ⑤ Black Powder - wall Hanger - 12lb. can # 53-126855
- ⑥ Greenfield - Model 60 .22 - Serial # 24275308 + Scope
- ⑦ Rossi JWH Guns .22 # 1023232
- ⑧ Keltec .40 cal - Serial # 06581 + magazine
- ⑨ 3 NY magazines



Seized by: Pat Puller (Signature) Received from: Tony Henderson

EXHIBIT

"2"

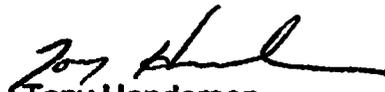
EXHIBIT

"3"

of Sale for all of the property currently being held as under the above Asset ID Number. Mr. Rosier will be filing a claim and in the event that Mr. Rosier's claim is granted and the property is released to him, I relinquish any property interest I have in the firearms. In the event that Mr. Rosier's claim is denied for any reason, I hereby retain my interest in the property and file this claim and my right to transfer my interest to a person of my choosing.

Because this property has not been properly seized, I have drafted a settlement agreement for your consideration to resolve all issues related to the listed firearms.

Please contact me as to how to proceed to a mutually agreeable resolution.

 12/28/09

Tony Henderson
6195 Oakdale Lane
Macclenny, FL 32063

Attached List of Property
Attached Claim Form
Attached Proposed Settlement Agreement

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

Page 1 of 2

On (date) 6/9/06

- Item(s) listed below were:
- Received From
 - Returned To
 - Released To
 - Seized

(Name) Tony Henderson
 (Street Address) 6195 Oakdale Ln
 (City) MacLenn, FL 32063-5509

Description of Item(s):

- ① Rugger Special 101 Serial # 571-46662
5 shot Revolver
- ② Jennings Firearms .22 (J-22) & Magazine - Serial # 187827
- ③ Smith & Wesson .357 magnum Serial # 72954
- ④ Foremost Model 40 -12 gauge shotgun Serial # 3078949
- ⑤ Champion -16 gauge rifle - Serial # 628504H
- ⑥ Iver Johnson Slide Action 22 w/ Bushnell scope
Serial # 003561
- ⑦ Smith & Wesson - Border Patrol .357 Magnum
Serial # USBP 1243 & case
- ⑧ Chysmerk .22 Bolt Action - Serial # 62724
- ⑨ M1 Grand Rifle (WWII) - Serial # 05432
- ⑩ Powermate Cross bow - no serial #
- ⑪ Little Par 410 - Rifle - serial #

Received by: [Signature] 9/9/06 Received from: [Signature]
 (Signature) (Signature) TOTAL P.03

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

Page 2 of 2

On (date) 6/9/06

- item(s) listed below were:
- Received From
 - Returned To
 - Released To
 - Seized

(Name) Tony Henderson
 (Street Address) 6195 Oakdale Ln.
 (City) Macklenny, FL 32063-5509

Description of Item(s):

- (1) M1 (Cushman) - serial # 10067
- (2) Remington 550 .22LR Semi-Auto Serial # 550-6
- (3) Mosburg Made 152LR .22 long Rifle - Serial # [unclear] Magazine
- (4) M1 Grub Ref # H499 Magazine
- (5) Black Powder - wall Hanger - 12lb. ca # 53-126855
- (6) Greenfield - Model 60 122 - Serial # 24275308 + Scope
- (7) Rossi Javelin Guns .22 # 15023232
- (8) Keltec .40 cal - serial # 06581 + magazine
- (9) 3 M4 magazines

[Large diagonal scribble across the page with the date 6/9/06 and initials JP written over it.]

Seized by: [Signature] (Signature) Received from Tony Henderson

**FEDERAL BUREAU OF INVESTIGATION
WAIVER OF OWNERSHIP OF FIREARM
Asset ID: A06-FBI-00141**

On June 9, 2006, the Federal Bureau of Investigation seized Miscellaneous firearms (See Attached List) from Tony Henderson, 6195 Oakdale Lane, Macclenny, FL. I understand that the Code of Federal Regulations (C.F.R.) requires that FBI inform me that I have the opportunity to claim this firearm (41 C.F.R. 128-48.102-1). I understand that if I do not claim this firearm within 30 days of signing this document, the title to the firearm will vest in the United States Government.

- I hereby acknowledge receipt of the notice that I have a right to claim this firearm.
- I hereby knowingly and voluntarily waive any right, title and interest in the firearm and agree not to contest the vesting of title in the United States Government.

I unconditionally release and hold harmless the FBI, its officers, employees and Agents, from any and all claims, demands, damages, causes of actions or suits, of whatever kind and description, and wheresoever situated, that might now exists or hereafter exist by reason of or growing out of or affecting, directly or indirectly, the seizure or waiver of ownership interest in the described firearm.

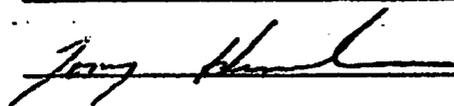
Name: Tony Henderson

Address: 6195 Oakdale Lane, MacClenny, FL 32063

Telephone: 904-534-3377

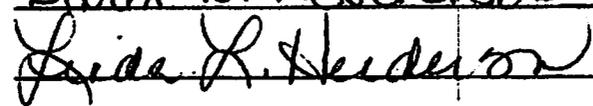
Date of Birth: 05/09/1961

SSN: 452-27-0049

Signature: 

Date: 12/28/09

Witness: Linda K. Henderson

Signature: 

Title: Wife

Date: 12/28/09

SETTLEMENT, INDEMNIFICATION, AND HOLD HARMLESS AGREEMENT

**Federal Bureau of Investigation No.: A06-FBI-00141
Assest Description: Miscellenous firearms -- attached list
Abandonment Number: 333010A002
Claimant: Tony Henderson**

1. On or about June 9, 2006, U.S. Department of Justice, Federal Bureau of Investigation (FBI) received the above referenced property owned by Tony Henderson as voluntarily turned over pending a criminal investigation unrelated to the above firearms.
2. On or about December 28, 2009, Tony Henderson filed a claim for the listed property.
3. U.S. Department of Justice and Tony Henderson agree to settle the claim in the following manner: (1) Tony Henderson agrees to withdraw his claim to the claimed firearms and (2) within 30 days of the execution of this agreement, the listed miscellaneous firearms will be returned to Robert Rosier, 6222 Hunter's Lane, St. Augustine, Florida 32092, 904-940-6888 upon presenting personal identification and a Bill of Sale to the Federal Bureau of Investigation, Jacksonville, Florida 32211.
4. By signing this agreement, Tony Henderson's claim is withdrawn.
5. Tony Henderson does not contest that U.S. Department of Justice, FBI has authority to turn over the above referenced property to Robert Rosier.
6. Tony Henderson hereby releases and forever discharges the United States, its officers, agents, servants, and employees, its heirs, successors, or assigns, from any and all actions, suits, proceedings, debts, dues, contracts, judgments, damages, claims, petitions, and/or demands whatsoever in law or equity which Tony Henderson, his heirs, successors, or assigns ever had, now have, or may have in the future in connection with the possession, detention, seizure, and/or release of the above listed property.
7. Tony Henderson agrees to hold and save the United States, its officers, agents, servants, and employees, its heirs, successors, or assigns, harmless from any claims by any others, including costs and expenses, for or on account of any and all lawsuits or claims of any character whatsoever in connection with the possession, detention, seizure, and/or release of the above listed property.


Tony Henderson

12/28/09
Date

SETTLEMENT, INDEMNIFICATION, AND HOLD HARMLESS AGREEMENT

Federal Bureau of Investigation No.: A06-FBI-00141
Asset Description: Miscellenous firearms – attached list
Abandonment Number: 333010A002
Claimant: Tony Henderson
Signature Page -2-

For U.S. Department of Justice
Federal Bureau of Investigation

Date

FIREARM BILL OF SALE

Case: 12-14628 Date Filed: 03/28/2013 Page: 35 of 59

Buyer certifies that they are not restricted or forbidden by law to own a firearm and buyer states that he/she:

- Has NEVER been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year.
- Is NOT a fugitive from justice.
- Is NOT an unlawful user of or addicted to any controlled substance.
- Has NEVER been adjudicated as a mental defective or has never been committed to a mental institution.
- Is NOT an alien illegally or unlawfully in the United States or an alien admitted to the United States under a nonimmigrant visa.
- Has NOT been discharged from the Armed Forces under dishonorable conditions.
- Having been a citizen of the United States, has NEVER denounced his or her citizenship.
- Is NOT subject to a court order that restrains the person from harassing, stalking, or threatening anyone..
- Has NOT been convicted of a misdemeanor crime of domestic violence.
- CAN lawfully receive, possess, and transport a firearm.
- Is NOT a person who is under indictment or information for a crime punishable by imprisonment for a term exceeding 1 year.

I truthfully state that I AM NOT a person who cannot legally buy, receive, and posse's firearms and/or ammunition.

I understand that the seller has been convicted of a felony and cannot possess any firearms.

Firearm(s) sold

ALL FIREARMS AND PROPERTY AS INDICATED ON ATTACHED FBI FORMS FD-597

Seller certifies that:

- None of the weapons are prohibited or illegally altered.
- None have been reported lost, stolen or used in any crime.
- He is legally entitled to sell and/or transfer title of his firearms.
- He has been convicted of a felony and cannot own or possess any firearm.
- Transfers sole ownership and possession of property to buyer.

Buyer:
(NAME) Robert L. Rosier
ADDRESS: 6222 Hunters Lane
St. Augustine, FL 32092
(DL#)
(Contact #) 904-940-6888
904-858-0639

Seller:
(NAME) Tony Henderson
(ADDRESS): 6195 Oakdale Lane
MacClenny, FL 32063
(DL#) H536-800-61-169-0
(Contact #) 904-259-1436
904-233-3613

Buyer: Robert L. Rosier Signature:  Date: 02/04/09

Seller: Tony Henderson Signature:  Date: 02/04/09

6222 Hunter's Lane
St. Augustine, FL 32092
December 28, 2009

Special Agent Janet Pellicciotti
6061 Gate Parkway
Jacksonville, FL 32256

Ref: Asset ID Number: A06-FBI-00141
Asset Description: Miscellaneous firearms
Abandonment Number: 333010A002

Dear Agent Pellicciotti:

My name is Robert L. Rosier. This letter is to notify you that as of December 28, 2009, I hereby make a claim for the above property. I am claiming the property as "received from" Tony Henderson and turned over to the FBI on or about June 9, 2006. I have a right to submit a written claim for the property and do so by this writing and attached form.

On 2/4/09 Tony Henderson contacted me about selling and transferring ownership and possession of some firearms that he had voluntarily turned over to the FBI on 06/09/06. Mr. Henderson stated that he needed to sell the firearms in order to help with the dept that his family had incurred since his arrest and conviction. I agreed to buy the firearms in order to help him and his family with their financial situation.

Mr. Henderson provided me with a receipt and a list of the firearms and property. I am enclosing a copy of the receipt, claim form and a list of the property. I am a good friend of Mr. Henderson, and a person who has no involvement with his criminal case and no statutory bar from possessing the property.

I met Tony Henderson in March 2004. He and his wife Linda joined our camping club and we have since become good friends. I have always known Mr. Henderson to be an honest and trustworthy man. I have never had any reason not to trust his character both professionally or personal.

I understand that in the event that my claim is granted and the property is released to me the that Tony Henderson will relinquish all interest he has in the firearms and property. In the event that my claim is denied for any reason, I understand that Tony Henderson will retain ownership and interest in the property and has the right to transfer ownership to a person of his choosing.

**Please contact me as to how to proceed to a mutually agreeable resolution.
I can be contacted at the below address or phone 904-940-6888.**

**Robert L. Rosier
6222 Hunters Lane
St. Augustine, FL 32092**

**Attached List of Property
Attached Claim Form
Attached Firearm Bill of Sale**

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

Page 1 of 2

On (date) 6/9/06

- Item(s) listed below were:
- Received From
 - Returned To
 - Released To
 - Seized

(Name) Tony Henderson
 (Street Address) 6195 Oakdale Ln
 (City) Macklenny, FL 32063-5509

Description of Item(s):

- ① Rugger Special 101 Serial # 571-46662
5 shot Revolver
- ② Jennings Firearms .22 (J-22) & Magazine - Serial # 187827
- ③ Smith & Wesson .357 magnum Serial # 72954
- ④ Foremost Model 40 -12 gauge shotgun # 3078449
- ⑤ Champion -16 gauge rifle - Serial # 62850XH
- ⑥ Iver Johnson Slide Action 22 w/ Bushnell scope
Serial # 003561
- ⑦ Smith & Wesson - Border Patrol .357 Magnum
Serial # USBP 1243 & case
- ⑧ Chysmunk .22 Bolt Action - Serial # 62724
- ⑨ M1 Grad Rifle (AWP) - Serial # 05432
- ⑩ Powermate Crossbow - no serial #
- ⑪ Little Par 410 - Rifle - serial #

Received by: [Signature] Received from: [Signature]
 (Signature) (Signature)

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
Receipt for Property Received/Returned/Released/Seized

Page 2 of 2

On (date) 6/9/06

- item(s) listed below were:
- Received From
- Returned To
- Released To
- Seized

(Name) Tony Henderson
 (Street Address) 6195 Oakdale Ln.
 (City) Macleenny, FL 32063-5509

Description of Item(s):

- (1) MI (Citation) - serial # 10067
- (2) Remington 550 .22LR Semi-Auto Serial # 550-L
- (3) Mosburg Made 152K .22 Long Rifle - Serial # + Magazine
- (4) MI Grad Ref # H 499 + Magazine
- (5) Black Powder - wall Hanger - Pink can # 53-126855
- (6) Greenfield - Model 60 .22 - Serial # 24275308 + Scope
- (7) Rossi Twin Guns .22 # 1023232
- (8) Keltec Model - Serial # 06581 + magazine
- (9) 3 M4 magazines

[Large diagonal scribble across the page]
 JP
 6/9/06

Seized by: [Signature] (Signature) Received from Tony Henderson

**FEDERAL BUREAU OF INVESTIGATION
CLAIM OF OWNERSHIP OF FIREARMS
Asset ID: A06-FBI-00141**

I Robert L. Rosier hereby make a claim for the property associated with the above asset ID number. On 06/09/06, the Federal Bureau of Investigation seized Miscellaneous firearms (See Attached List) from Tony Henderson, 6195 Oakdale Lane, MacClenny, FL. On 02/04/09 Tony Henderson contacted me about selling and transferring ownership and possession of the above said property. I have purchased the firearms and property as listed on the attached property forms and have enclosed a "Bill of Sale". This form is to serve as notice to the FBI as to my right to claim the property as described on attached list. I understand that the (C.F.R.) requires that FBI inform me that I have the opportunity to claim the firearms (41 C.F.R. 128-48.102-1). I understand that if I do not claim the firearms within 30 days of signing this document, the title to the firearms will vest in the United States Government.

I unconditionally release and hold harmless the FBI, its officers, employees and Agents, from any and all claims, demands, damages, causes of actions or suits, of whatever kind and description, and wheresoever situated, that might now exist or hereafter exist by reason of or growing out of or affecting, directly or indirectly, the seizure or waive of ownership interest in the described firearms.

Name: Robert L. Rosier

Address: 6222 Hunters Lane

Telephone: 904-940-6888

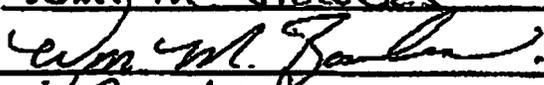
Date of Birth: 27 Nov. 1942

SSN: _____

Signature: 

Date: 12-30-09

Witness: Wm M. Rowles

Signature: 

Title: VP. W.W. BAG

Date: 12/30/09.

FIREARM BILL OF SALE

Case: 12-14628

Date Filed: 03/28/2013

Page: 41 of 59

Buyer certifies that they are not restricted or forbidden by law to own a firearm and buyer states that he/she:

- Has NEVER been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year.
- Is NOT a fugitive from justice.
- Is NOT an unlawful user of or addicted to any controlled substance.
- Has NEVER been adjudicated as a mental defective or has never been committed to a mental institution.
- Is NOT an alien illegally or unlawfully in the United States or an alien admitted to the United States under a nonimmigrant visa.
- Has NOT been discharged from the Armed Forces under dishonorable conditions.
- Having been a citizen of the United States, has NEVER denounced his or her citizenship.
- Is NOT subject to a court order that restrains the person from harassing, stalking, or threatening anyone..
- Has NOT been convicted of a misdemeanor crime of domestic violence.
- CAN lawfully receive, possess, and transport a firearm.
- Is NOT a person who is under indictment or information for a crime punishable by imprisonment for a term exceeding 1 year.

I truthfully state that I AM NOT a person who cannot legally buy, receive, and posse's firearms and/or ammunition.

I understand that the seller has been convicted of a felony and cannot possess any firearms.

Firearm(s) sold

ALL FIREARMS AND PROPERTY AS INDICATED ON ATTACHED FBI FORMS FD-597

Seller certifies that:

- None of the weapons are prohibited or illegally altered.
- None have been reported lost, stolen or used in any crime.
- He is legally entitled to sell and/or transfer title of his firearms.
- He has been convicted of a felony and cannot own or possess any firearm.
- Transfers sole ownership and possession of property to buyer.

Buyer:

(NAME) Robert L. Rosier

ADDRESS: 6222 Hunters Lane

St. Augustine, FL 32092

(DL#)

(Contact #) 904-940-6888

904-858-0639

Seller:

(NAME) Tony Henderson

(ADDRESS): 6195 Oakdale Lane

MacClenny, FL 32063

(DL#) H536-800-61-169-0

(Contact #) 904-259-1436

904-233-3613

Buyer: Robert L. Rosier Signature: _____

Date: 02/04/09

Seller: Tony Henderson Signature: _____

Date: 02/04/09

EXHIBIT

"4"

UNITED STATES OF AMERICA
DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

UNITED STATES,

Plaintiff,

v.

CASE NO. 03:06-CR-211-J-32HTS

TONY HENDERSON,

JUDGE MONTE C. RICHARDSON,
MAGISTRATE

Defendant.

MOTION TO RETURN/DISPOSITION OF PROPERTY

The above defendant, Tony Henderson, pro se, files this Motion for the Return/Disposition of Property. This Motion seeks restoration of the non-possessory interest in property pursuant to U.S. v. Edward L. Brown and Elaine A. Brown, 2010 U.S. Dist. LEXIS 35358, April 9, 2010. In support thereof, the Defendant states the following:

1. On June 8, 2006, Judge Monte C. Richardson requested that I turn over all firearms in my possession to the FBI during the time criminal charges were pending against me.
2. On June 9, 2006, I was provided a property receipt for 19 firearms that were voluntarily turned over to the FBI. (Ex. 1)
3. The above firearms were never found to be involved in any criminal activity. The above firearms were never determined to be purchased from proceeds from criminal activity. No notice of seizure was ever provided citing any statute under which such firearms were to be seized.
4. Upon my plea and subsequent conviction, the FBI considered the property to be abandoned. On February 4, 2009, I transferred my non-possessory interest in the firearms to Robert Rosier. Mr. Rosier filed a claim for the property which was denied after the FBI alleged that I had no right to transfer title or direct a disposition of my firearms due to my conviction for Possession of Marijuana on April 22, 2008. (Ex. 2)
5. On June 3, 2010, I filed an appeal of that decision to the FBI in Washington, D.C. No decision has been made.

In U.S. v. Brown, In Re: Claim of Bernhard Bastian, Jr., 2010 U.S. Dis. LEXIS 35358 (April 9, 2010)(attached), see also U.S. v. 627 Firearms, 589 F. Supp. 2d 1129, 1140 (S.D. Iowa 2008), the facts are virtually identical to the facts in this case. In Brown, the court rejected "the proposition that firearms lawfully owned must, following the owner's unrelated felony conviction, sit wherever they may be, unalienable and wasting, not subject to forfeiture, not subject to confiscation as contraband and not subject to disposition by the owner, or by anyone else, or by the court for the owner's benefit." The court further rejected "that such property is subject to government confiscation and destruction in the absence of due process or payment of just compensation." The remedy fashioned by the Brown court, the judge exercised equitable powers and ordered the transfer of title to firearms lawfully owned, but later convicted of a felony (which were not subject to forfeiture or confiscation as contraband) for the felon-owner's benefit as outlined in 627 Firearms.

Courts have fashioned solutions that preclude convicted felons from unilaterally dictating or

directing disposition of their lawfully owned firearms while avoiding the serious constitutional issues under the *Takings Clause* while protecting the felon-owner's legitimate property interests.

Wherefore, I respectfully request that my spouse, Linda Henderson, be given possession and control of the firearms collection for the benefit of our adult children and heirs. In the alternative, I respectfully request that this court order that Robert Rosier be lawfully entitled to own the subject firearms collection and be awarded possession and control and direct that payment for the firearms be awarded to me as the lawful non-possessory owner.

Dated: June 13, 2010

Respectfully submitted,



Tony Henderson, Pro Se
6195 Oakdale Lane
MacClenny, FL 32063
Phone: 904-259-1436
904-534-3377

Attachments

CERTIFICATE OF SERVICE

A copy of this Motion was served on the following persons on July 13, 2010 by regular U.S. Mail:

**U.S. Magistrate Honorable Monte C. Richardson
U.S. District Court
Middle District of Florida
300 N. Hogan Street
Jacksonville, FL 32202**

**U.S. District Court
Clerk of the Court
Middle District of Florida
300 N. Hogan Street
Jacksonville, FL 32202**

**Russell Stoddard
Assistant U.S. Attorney
300 N. Hogan Street, Ste. 700
Jacksonville, FL 32202**



Tony Henderson

EXHIBIT

"5"

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 RECOMMENDATION¹

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 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

¹Within 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.

²The 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).

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

³The 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

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 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

is desired.

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

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) days 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 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

⁵The 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 977 n4. 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.

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 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**.

⁶The 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 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.

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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U.S. District Court

Middle District of Florida

Notice of Electronic Filing

The following transaction was entered on 5/27/2011 at 6:07 PM EDT and filed on 5/27/2011

Case Name: USA v. Henderson
Case Number: 3:06-cr-00211-TJC-TEM
Filer:
Document Number: 169

Docket Text:

REPORT AND RECOMMENDATION as to Tony Henderson. re [155] MOTION for return of property. See R&R for details. Signed by Magistrate Judge Thomas E. Morris on 5/27/2011. (DLC)

3:06-cr-00211-TJC-TEM-1 Notice has been electronically mailed to:

Mark Rosenblum mark@markrosenblumlaw.com, cyndi@markrosenblumlaw.com

Bonnie Ames Globber bonnie.globber@usdoj.gov, JaxDocket.Mailbox@usdoj.gov, Peggy.Fuller@usdoj.gov

Russell C. Stoddard Russell.Stoddard@usdoj.gov, Sarah.Masini@usdoj.gov, jaxdocket.mailbox@usdoj.gov

3:06-cr-00211-TJC-TEM-1 Notice has been delivered by other means to:

Tony Henderson(Terminated)
6195 Oakdale Lane
MacClenny, FL 32063

The following document(s) are associated with this transaction:

Document description:Main Document

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Electronic document Stamp:

[STAMP dcecfStamp_ID=1069447731 [Date=5/27/2011] [FileNumber=8842409-0
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[217b12bcc283e35b13576ef6ead1a26d2cbf0cb8fd43885d6b19786dd5a0b7be4e8
94ad527a7e7c1333aa59a7147df6a97f98f993c76e16b953b59c2c9c5946f]]

EXHIBIT

"6"

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.


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