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IN THE SUPREME COURT OF THE UNITED STATES

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TONY HENDERSON, :

Petitioner : No. 13-1487

v. :

UNITED STATES. :

- - - - - x

Washington, D.C.

Tuesday, February 24, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

DANIEL R. ORTIZ, ESQ., Charlottesville, Va.; on behalf of Petitioner.

ANN O'CONNELL, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 1314-87, Henderson v. The  
5 United States.

6 Mr. Ortiz.

7 ORAL ARGUMENT OF DANIEL R. ORTIZ

8 ON BEHALF OF THE PETITIONER

9 MR. ORTIZ: Mr. Chief Justice, and may it  
10 please the Court:

11 This case asks whether the felon in  
12 possession statute prevents the court from ordering the  
13 government to transfer firearms in its possession that  
14 are owned by a felon to -- to a suitable third party. The  
15 government now concedes that a court can order transfer  
16 to a licensed gun dealer, who will then sell the  
17 firearms on the owner's behalf.

18 That concession alone requires reversal.  
19 Neither court below understood that it had such power.

20 CHIEF JUSTICE ROBERTS: Why isn't -- is that  
21 enough for your client? He wants to sell the firearms  
22 to -- the government is willing to let a licensed  
23 firearms dealer sell them for him?

24 MR. ORTIZ: Yes, Your Honor. He -- that's  
25 not his preferred remedy, but that is an acceptable

1 remedy for him. In fact, it is one of the remedies that  
2 he -- he suggested below.

3 JUSTICE GINSBURG: Did -- I didn't -- I  
4 thought that before the district court there was only  
5 first, his friend, then his mother, and then another  
6 friend. Where -- where did he ask the court to allow  
7 the guns to be sold by a licensed gun dealer?

8 MR. ORTIZ: Your Honor, you can see the  
9 references on page 71, 170, 132 and page 195 of the  
10 joint appendix. On page 71 in his renewed request for  
11 disposition of property, Mr. Henderson said that the --  
12 said that the owners quote, "have property interest in  
13 the firearms which must be accommodated by the sale,  
14 transfer, or storage of the firearms in spite of his own  
15 possessor rights having been curtailed." On page 170 --

16 JUSTICE GINSBURG: But that doesn't mention  
17 anything about a gun dealer, and he had been quite  
18 specific about the persons to whom he wanted the guns  
19 transferred.

20 MR. ORTIZ: Well, Your Honor, the -- in  
21 the -- in the Miller case, which he cites there for the  
22 proposition that a sale would be an appropriate remedy,  
23 the sale was through -- license -- one of the  
24 possibilities was sale through a licensed gun dealer.

25 JUSTICE GINSBURG: Is there any point in the

1 references that you made where he said to the court, "I  
2 would like these guns to be consigned to a licensed gun  
3 dealer?"

4 MR. ORTIZ: He, twice, Your Honor, did  
5 not -- he did not mention the word licensed gun dealer,  
6 but he said transfer for sale, did not limit it to any  
7 particular person. And on page 132 in his objections to  
8 the magistrate judge's report and recommendation, he  
9 asked the court to grant the request that this Court  
10 ordered that a person lawfully titled-- entitled to own  
11 the subject firearms collection be awarded possession  
12 and control and direct that the payment --

13 JUSTICE SOTOMAYOR: Wasn't he on a futile  
14 mission in this circuit?

15 MR. ORTIZ: Yes, Your Honor, he was on a  
16 futile mission in this circuit.

17 JUSTICE SOTOMAYOR: Because this circuit had  
18 already ruled that any kind of sale by anyone was  
19 prohibited, because he was a felon.

20 MR. ORTIZ: That is clear, Justice  
21 Sotomayor. It is also --

22 JUSTICE SOTOMAYOR: And when he went up on  
23 appeal, he cited the Brown case to the court -- to the  
24 circuit court, which had held that a court-ordered sale  
25 was okay.

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1 MR. ORTIZ: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: And despite him citing  
3 the Brown case, the Eighth Circuit continued with its  
4 own precedent and said no one can sell it, not even the  
5 court.

6 MR. ORTIZ: Yes, Your Honor. He - he -- he  
7 did make that clear to the Eleventh Circuit, but nowhere  
8 in his request for sale or transfer below did he  
9 specifically limit it to someone who was not a licensed  
10 gun dealer. This request at the end of his objections  
11 to magistrate judge's report is broad enough to  
12 contemplate that. He --

13 CHIEF JUSTICE ROBERTS: I would have  
14 thought -- I would have thought you would oppose the  
15 notion that that would be an adequate -- adequate  
16 relief. If we're talking about an attribute of  
17 ownership, the owner gets to decide who -- to whom he's  
18 going to sell what he owns.

19 MR. ORTIZ: Yes, Your Honor. It is -- it  
20 may, in this particular case, because it was one of the  
21 remedies that he actually requested be possible, but it  
22 was not his preferred remedy. This Court should have  
23 the power to approve sales and transfers so long as the  
24 recipients are not under the control or influence of the  
25 owner, so long as they themselves are legally entitled

1 to own and possess the guns, and so long --

2 JUSTICE GINSBURG: How do you -- how does  
3 one tell -- let's take the two people -- two friends  
4 that you opposed -- suggested transferring them to, or  
5 his wife so they could stay within the family. How does  
6 the Court know whether that transfer will give him  
7 access to the guns so that he will have possession?

8 MR. ORTIZ: Your Honor, it's up to the  
9 district court to hold a hearing on the issue. The  
10 standard is reasonableness. There's no equitable  
11 analysis. The court can notify the suggested  
12 transferees that they are giving the -- allowing  
13 Mr. Henderson any access to the guns would constitute a  
14 criminal violation. The court can, as the Seventh  
15 Circuit suggested, require signed statements  
16 from the proposed transferees that they will never let  
17 the owner again have control or influence over the use  
18 of the guns.

19 There are example -- it's a case-by-case  
20 determination however. In some cases the court may be  
21 persuaded that such transfers would be appropriate. In  
22 other cases, the court may well not, and that begins --

23 JUSTICE KENNEDY: And under what statutory  
24 rule or authority does the court hold that hearing?

25 MR. ORTIZ: This is under its traditional

1 equitable principles or authority, Your Honor.

2 JUSTICE KENNEDY: Is there a black-letter  
3 case you can cite for the proposition that the court has  
4 this general equitable authority?

5 MR. ORTIZ: Well, Your Honor --

6 JUSTICE KENNEDY: Because I'm wondering if  
7 the government wants to sue under the Tucker Act or  
8 something. That's what I'm asking.

9 MR. ORTIZ: Yes, Your Honor. No. The lower  
10 courts that have done this, Your Honor, have cited in  
11 cases like Wilson and Wright from the D.C. Circuit  
12 before Rule 41 was amended in 1989, pointed out that  
13 they had ancillary jurisdiction to this, and since which  
14 does not violate Kokkonen or Peacock v. Thomas because  
15 in this case, the -- Mr. Henderson was ordered to give  
16 up the guns as a condition of his release. The court's  
17 returning of the property can be seen as its giving  
18 effect to its own orders and decrees.

19 JUSTICE KAGAN: You agree that --

20 JUSTICE KENNEDY: And 41(g) is too much of a  
21 stretch?

22 MR. ORTIZ: No, Your Honor, we believe that  
23 Rule 41(g) would also work here. The government takes a  
24 much narrower view of the course.

25 Mr. Henderson did not actually ask for



1 relief under 41(g) himself. He asked for it under  
2 general equitable principles, which other courts have  
3 allowed. It is the government that tried to narrowly  
4 characterize his request as one under Rule 41(g) and now  
5 takes a ver-- narrow approach towards the word return,  
6 and suggests that he is unable -- he should be unable to  
7 seek transfers of his guns for that reason.

8 JUSTICE KAGAN: But it's not just return;  
9 right? It's return the property to the movant.

10 MR. ORTIZ: Yes, Your Honor.

11 JUSTICE KAGAN: So how does this fit under  
12 41(g)?

13 MR. ORTIZ: Well, it's a kind of complicated  
14 transaction under Rule 41(g), Your Honor. He is asking  
15 for the guns to be transferred, and as part of that  
16 transfer, for him to receive payment. He is not asking  
17 for the gun itself, admittedly. But he is asking the  
18 court to structure the transaction in such a way that he  
19 would receive the economic benefit.

20 JUSTICE KENNEDY: He's asking for the stick  
21 and the bundle that's called ownership and -- and the  
22 funds from the transfer.

23 MR. ORTIZ: Yes, Your Honor. He is asking  
24 for the ownership; in particular, the right to transfer.  
25 And that -- the Eleventh Circuit held that the right, by

1 transferring the property, he was necessarily receiving  
2 constructive possession of it. And that holding is  
3 wrong for at least six different independent reasons.  
4 It violates the plain language of the statute. It  
5 violates traditional understanding, common law  
6 understandings of what possession entails. It violates  
7 the statutory structure and at least two canons of  
8 statutory interpretation. It violates the statutory's  
9 purpose by preventing felons from completely alienating  
10 their interest in their guns.

11 It also allows the government to accomplish  
12 a forfeiture without any due process at all. And, Your  
13 Honors, it raises serious takings, due process, Fourth  
14 Amendment, Second Amendment, and Eighth Amendment  
15 concerns.

16 JUSTICE KAGAN: Just so I understand the  
17 scope of your position, you say that the district court  
18 has discretion to figure out, you know, whether a  
19 particular person whom your client or someone else wants  
20 to sell the gun to is an appropriate recipient of the  
21 gun. But in the absence of that, does the district  
22 court just have discretion or must the district court  
23 ensure that the gun is sold through a gun dealer?

24 In other words, if -- if your client says  
25 really I want it sold through a gun dealer, is that

1 discretionary on the district court's part or is that  
2 required?

3 MR. ORTIZ: That would be required, Your  
4 Honor, although there might be some argument about the  
5 particular gun dealer. Maybe the one is -- one is  
6 proposed that petitioner believes would be inappropriate  
7 for some reason.

8 JUSTICE SOTOMAYOR: I'm sorry, would you  
9 repeat that?

10 MR. ORTIZ: Sorry. The court -- lower  
11 court, Your Honor, would be required under those  
12 circumstances that Justice Kagan had proposed to order a  
13 sale by a licensed gun dealer. It's possible that there  
14 might be some argument about a particular -- whether a  
15 particular gun dealer would be appropriate or not.

16 JUSTICE ALITO: Can I ask you a question  
17 about your argument that a district court would have the  
18 discretion to prevent the transfer of a gun from the  
19 convicted felon to a third party who has some  
20 acquaintance with the convicted felon? A friend, let's  
21 say. Let's say it's a friend who lives two blocks away.  
22 Now, if this friend doesn't -- is not himself a  
23 convicted felon or doesn't have some other aspect of his  
24 record that would prevent him from buying a firearm, he  
25 could go to a licensed firearm dealer, presumably, and

1 purchase it directly; right?

2 MR. ORTIZ: Yes, Your Honor.

3 JUSTICE ALITO: So why should the  
4 situation -- and that would be true even though he is a  
5 friend of the convicted felon, and there might be some  
6 risk that he would allow the convicted felon to use the  
7 firearm.

8 So why should the situation be different  
9 when the district court is considering whether the  
10 firearm can be transferred from the convicted felon to  
11 this individual?

12 MR. ORTIZ: It shouldn't be any different.

13 JUSTICE ALITO: But I thought you  
14 understood -- I thought you were saying that the district  
15 court would have the discretion to prevent that transfer  
16 if the district court thought there was some risk that  
17 this individual would allow the convicted felon to have  
18 access to the firearm.

19 MR. ORTIZ: If, in its hearing, the district  
20 court is not -- insufficiently convinced that there is  
21 independence between the owner and the transferee, it  
22 might, as an exercise of its equitable  
23 discretion because it is a question of equity, refuse  
24 the direct transfer and put it up for -- put the  
25 firearms for sale through a licensed gun dealer.

1 JUSTICE ALITO: And then that individual  
2 could go to the --the licensed firearm dealer and buy  
3 exactly the same gun.

4 MR. ORTIZ: Yes, Your Honor.

5 JUSTICE ALITO: So I don't see how the two  
6 positions are --

7 MR. ORTIZ: Well, at -- at the extreme -- at  
8 the extreme, Justice -- Justice Alito, imagine a situation  
9 where someone in this position is proposing transfer to an  
10 unindicted drug kingpin, something like that. The  
11 government presumably would object to the transfer, not  
12 because the person is indicted, the drug kingpin hasn't  
13 yet, but because they have suspicions about his  
14 activity. The drug kingpin, in that position, could  
15 presumably go to a gun dealer and buy whatever firearms  
16 the drug ping -- kingpin wanted. But it is not outside  
17 of the court's authority to take that fact into account.

18 Those circumstances, I believe, would be  
19 very few and far between. In most cases, so long as  
20 the -- the transferee is not under the owner's control  
21 and the transferee has the legal ability to own and  
22 possess the guns, the district court, normal course,  
23 should approve the transfer. But there may --

24 JUSTICE GINSBURG: And who -- who makes the  
25 arrangement? Who selects the gun dealer and makes the

1 arrangement for the consignment? Does the court do  
2 that --

3 MR. ORTIZ: I believe --

4 JUSTICE GINSBURG: -- or does Henderson do  
5 it?

6 MR. ORTIZ: In the cases where the district  
7 courts have -- or the courts below have taken this  
8 approach, Your Honor, it's usually a matter of  
9 negotiation between the government and the felon.

10 JUSTICE KAGAN: And, Mr. --

11 JUSTICE SCALIA: Well, I would assume it  
12 ought to be the gun owner's first preference. I mean,  
13 why -- why wouldn't that be the normal situation? His  
14 first preference is that it -- it should be sold to --  
15 to individual X. And if the court cannot reject that,  
16 it should go there. And his second preference is, well,  
17 if you reject that, give it to Y. Wouldn't that be the  
18 normal?

19 MR. ORTIZ: That would be the normal, Your  
20 Honor. We certainly believe that Petitioner should have  
21 that right and the Petitioner's nominee of the gun  
22 dealer should be accepted.

23 JUSTICE SOTOMAYOR: I think Justice Alito's  
24 question is basically why would the district court have  
25 equitable power to turn down any named buyer so long as

1 it is an actual buyer. Meaning I can understand he  
2 can't just designate someone who's himself, okay, but if  
3 he's making a good faith sale, why should the district  
4 court have any power to turn that person down?

5 MR. ORTIZ: Justice Sotomayor, the district  
6 court shouldn't have that power unless the public  
7 interest, which is always a concern in equity, would be  
8 violated by it, and those cases would be few and far  
9 between. The one I mentioned, the sale -- the proposed  
10 transfer to an unindicted drug ping -- kingpin might be  
11 extreme enough for that to be possible, but ordinarily,  
12 the district court should have -- not have that power.

13 JUSTICE KAGAN: And, Mr. Ortiz, why -- why  
14 is it required that the court arrange for some transfer,  
15 whether to a gun dealer or otherwise? Is it principles  
16 of equity that require that? Is it something else?

17 MR. ORTIZ: Well, Your Honor, there's no  
18 statutory bar to it. There's always --

19 JUSTICE KAGAN: Right.

20 MR. ORTIZ: -- principles of equity and  
21 there's no --

22 JUSTICE KAGAN: There -- there's no  
23 statutory bar, but I guess I'm asking a further question  
24 because you said in response to my earlier question it's  
25 not just discretionary, it's required, you know, at

1 least to a gun dealer. And -- and I guess I'm asking:  
2 What is the source of that requirement?

3 MR. ORTIZ: Well, that requirement has  
4 several sources. Part of it is the Due Process Clause  
5 where the government can't basically effect a forfeiture  
6 without affording any process, which the Eleventh  
7 Circuit rule would allow.

8 There are also concerns under the Takings  
9 Clause. There's -- there also may well be an  
10 unreasonable seizure under the Fourth Amendment. There  
11 are Excessive Fine Clause issues. In fact, this Court  
12 has all of those constitutional doubts and concerns that  
13 argue in favor of the remedy that Mr. Henderson  
14 requested.

15 If there are no further questions, Your  
16 Honor, we'd like to reserve the remaining time for  
17 rebuttal.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
19 Ms. O'Connell.

20 ORAL ARGUMENT OF ANN O'CONNELL  
21 ON BEHALF OF THE RESPONDENT

22 MS. O'CONNELL: Mr. Chief Justice, and may  
23 it please the Court:

24 If a convicted felon selects a recipient of  
25 his firearms and negotiates the terms of a transfer but



1 then relies on someone else to deliver the firearms, he  
2 still has the power and intention at a given time to  
3 exercise dominion and control over those firearms, which  
4 amounts to constructive possession.

5 CHIEF JUSTICE ROBERTS: Where did it -- the  
6 ability to sell something depends upon ownership, not  
7 possession. If I leave my car with a garage for a  
8 month, the garage has possession, but they can't sell  
9 the car. I don't have possession, but I can sell the  
10 car.

11 In other words, I don't see how it gets to  
12 be constructive possession. All he's asserting is a  
13 right to ownership, which carries with it the right to  
14 sell.

15 MS. O'CONNELL: The definition of  
16 constructive possession, which everybody agrees is  
17 included within the word "possession" in 922(g), is when  
18 a person has the power and intention at a given time to  
19 exercise dominion and control over the property, either  
20 directly or through others.

21 And it's our position that if he is  
22 selecting the recipient, excluding others from receiving  
23 it, and negotiating the terms of the sale, that he has  
24 the power and intention at that time to exercise  
25 dominion and control over those firearms.

1           We've cited some papers --

2           CHIEF JUSTICE ROBERTS:           But he doesn't -- he  
3 doesn't have much control when the government is holding  
4 them. He's -- he's just trying to sell them. He  
5 doesn't want to control them. He doesn't want to use  
6 them. He doesn't want to possess them, constructively  
7 or otherwise. In fact, he wants to get rid of them,  
8 which is what the statute is supposed to accomplish.

9           MS. O'CONNELL:           Right. So we agree that the  
10 convicted felon can sell the firearms. They can be  
11 sold. There's a question of who should be selling them.  
12 On our end, we think that they should go to a licensed  
13 firearms dealer, a Federal firearms licensed dealer, or  
14 an FFL, who is licensed and expected to sell firearms.

15          JUSTICE KAGAN:           But do you think that the --  
16 the person can pick the firearms dealer?

17          MS. O'CONNELL:           Yes. We think that's fine.

18          JUSTICE KAGAN:           Well, then your -- your  
19 position is internally contradictory, right? You think  
20 he can pick the firearms dealer. Well, that's -- that  
21 fits within your very broad definition of control.

22          MS. O'CONNELL:           I -- I don't think so, and  
23 let me explain why. When he picks the firearm dealer,  
24 he is not exercising any control over where the firearms  
25 land. The firearms dealer is an expected and a licensed

1 seller of firearms, so we don't expect him to keep them  
2 or be subject to the convicted felon's control at all.

3 If he's nominating someone or selling them  
4 to a specific person, then he has exercised control over  
5 where they're going. He has excluded others. And we  
6 think that amounts to constructive possession.

7 JUSTICE KAGAN: Well, then suppose his  
8 friend comes forward and says, I don't really intend to  
9 possess this. I'm going to sell it.

10 That wouldn't be control?

11 MS. O'CONNELL: Well, I think there's -- so  
12 as I was saying, there's a question over who sells it.  
13 We think the FFL. The Petitioner thinks he can sell it  
14 himself to -- to a friend, and we think that amounts to  
15 constructive possession.

16 In the middle, there's a question of can a  
17 neutral third party sell them. And as -- as we think  
18 the -- the Federal firearms licensed dealer is the right  
19 one to sell. But on my theory of constructive  
20 possession I've just laid out, you point out, yes, any  
21 third party could, if the Court determines that they are  
22 not subject to the felon's control, execute this sale.

23 However, a Court sitting in equity should  
24 not be required to accept the convicted felon's  
25 designation of somebody who's going to sell --

1 JUSTICE SCALIA: Why -- well, why do you say  
2 that constructive possession only consists of being able  
3 to decide where they go? Why isn't it constructive  
4 possession to be able to decide who gets them for later  
5 transfer? Why doesn't -- why isn't that an exercise --

6 MS. O'CONNELL: I think --

7 JUSTICE SCALIA: -- of -- of dominion over  
8 them to some extent?

9 MS. O'CONNELL: I think it's harder to say  
10 that you're exercising dominion and control over  
11 something by saying, I want to get rid of these and  
12 please -- please do it.

13 JUSTICE SCALIA: I want so-and-so to sell  
14 them. I -- I don't know why that isn't exercising  
15 dominion and control. It seems to me you're drawing a  
16 very artificial line. You only -- you -- you can only  
17 exercise dominion and control when you determine where  
18 they end up, but I -- I don't see that that comes  
19 within -- within the term "constructive possession."

20 MS. O'CONNELL: If he is just -- if there is  
21 just a party that's appointed to sell the firearms for  
22 him, and we -- we have to get rid of them somehow, and  
23 so we think the best way to do it is to give them to a  
24 licensed firearms dealer.

25 And -- and, Justice Scalia, you know --

1 JUSTICE SCALIA: I'm not saying it doesn't  
2 make sense. I mean, it may make a lot of sense and may  
3 be a very good policy had it been written into this  
4 statute. But you're building this whole -- this -- this  
5 whole palace upon the word "constructive possession."  
6 And I don't see how constructive possession makes --  
7 makes that distinction. It really doesn't.

8 MS. O'CONNELL: We -- it -- it's just  
9 more -- it's -- it's harder to say he's exercising  
10 dominion and control when they are just being given to a  
11 neutral third party who's going to sell them in an  
12 arm's-length transaction to the entire universe of  
13 buyers that are eligible to --

14 JUSTICE SCALIA: I don't think it's harder  
15 at all. He's deciding where they go for sale. Why  
16 isn't that exercising dominion and control?

17 MS. O'CONNELL: We think you can draw a  
18 distinction. I think it's also -- the -- the reason  
19 that we think it's okay -- a practical reason why we  
20 think it's okay for the felon to suggest or say where  
21 he -- which firearms dealer he thinks they should go to  
22 is because the government, when we -- when we said, how  
23 about if we just select it, we've said we -- we don't  
24 really have the resources and the power to be going out  
25 and finding firearms dealers, so we're happy if the

1 felon wants to appoint one.

2 CHIEF JUSTICE ROBERTS: What if -- what if  
3 he wants to donate them to someone? He wants to donate  
4 them to the Texas National Guard? Could he do that? I  
5 mean, the -- the Federal firearms dealer doesn't help  
6 you there.

7 MS. O'CONNELL: No. I mean, I think any --  
8 when it comes --

9 CHIEF JUSTICE ROBERTS: No, I mean, no, he  
10 can't do it or --

11 MS. O'CONNELL: He cannot. I think anything  
12 that it comes -- where it comes down to he is exercising  
13 dominion and control over the firearms through the sale  
14 amounts to constructive --

15 CHIEF JUSTICE ROBERTS: To the Federal  
16 government he says, I -- I'm sorry about the conviction.  
17 I want to give these to the Federal government.

18 Can he do that?

19 MS. O'CONNELL: Well, I --

20 CHIEF JUSTICE ROBERTS: I -- I guess that's  
21 what he's doing.

22 MS. O'CONNELL: He -- he -- he's not. He  
23 could abandon them to the Federal government, and -- and  
24 he's chosen not to.

25 But I think in that situation --

1 JUSTICE SCALIA: Why isn't that exercising  
2 dominion and control? I mean, he says, I'm not going to  
3 propose anything. I'm going to let the Federal  
4 government have them.

5 Why isn't that exercising dominion --

6 MS. O'CONNELL: The reason why is because we  
7 already have them, frankly. So he doesn't have to  
8 transfer possession to us in order for us to have them.  
9 All he would be doing is abandoning any interest in  
10 them.

11 JUSTICE KAGAN: Well, lucky you.

12 (Laughter.)

13 MS. O'CONNELL: Right. We don't -- and --  
14 and let me -- I also want to make clear --

15 JUSTICE KAGAN: Ms. O'Connell, can I ask  
16 why -- why it is that we're looking at it in terms of  
17 the sale? I mean, this is -- this constructive  
18 possession question, it would seem to me to make a lot  
19 more sense to ask the person who's going to end up  
20 getting it, is there a chance that the original owner  
21 can control what that person does with it.

22 In other words, you know, I give it to my  
23 wife, I give it to my best friend, and I'm really in a  
24 position where I'm controlling the use of the firearm.  
25 And that seems to me to make perfect sense, not the

1 question of, like, who controls the sale mechanism.

2 MS. O'CONNELL: I -- I agree with you,  
3 Justice Kagan, that it makes perfect sense to look at  
4 whether the felon has control over the person that gets  
5 the firearms, but I think there's a separate time period  
6 that we need to look at during the sale to determine  
7 whether he's exercising dominion and control over the --

8 JUSTICE BREYER: Where does all this come  
9 from? I mean, to me, when somebody uses the word  
10 "constructive X," that just means it's not X and -- and  
11 it's a way of pretending that it's X when it isn't.

12 So I start with that and say what you're  
13 worried about here -- of course, he doesn't have any  
14 possession of it. You have possession of it. And what  
15 he wants to do is he wants to put it somewhere so he  
16 can't get ahold of it as long as the law prevents him  
17 from having it. And you took it from him. You made him  
18 give it to him.

19 So what's wrong with his saying, you go give  
20 it to somebody? Now, if it's too much trouble, the  
21 judge can say he can't make you go to a lot of trouble.  
22 If it's giving it to somebody who might really do  
23 everything he wants, we'll guard against that. That's  
24 the job of the district judge. End of case.

25 Now, what -- what's -- what's -- simple,



1 realistic, preserves the government's interest. What's  
2 wrong with it?

3 MS. O'CONNELL: I think, Justice Breyer,  
4 that we are not pulling our constructive possession  
5 position out of thin air.

6 JUSTICE BREYER: I --

7 MS. O'CONNELL: If there are --

8 JUSTICE BREYER: -- things like that, and I  
9 don't understand any piece of it that has something in  
10 that like it.

11 MS. O'CONNELL: We have -- the cases we've  
12 cited -- I want to draw your attention to the cases  
13 we've cited on pages 25 and 26 of our brief that involve  
14 convicted felons who are out in the world and they are  
15 negotiating sales of firearms.

16 And they are saying, Hey, buyer, do you want  
17 to buy this firearm? Let's negotiate the terms. And  
18 then since I can't possess them, I'm going to have  
19 somebody else drop them off.

20 And courts have concluded in those  
21 circumstances that's constructive possession.

22 JUSTICE BREYER: Okay. So we don't want  
23 them. So we'll say to the district judge, Judge, use  
24 some common sense. Don't let this gun get into the  
25 hands of the crime boss of the area. Don't let the

1 things that you were just talking about happen.

2 And you look to see how much trouble it is,  
3 what's likely to happen, and where it makes sense. And  
4 if it isn't likely for these bad things to happen, fine.

5 MS. O'CONNELL: Those cases, though, are not  
6 concerned with we -- we want to double check on who the  
7 buyer is and see if that buyer is going to be subject to  
8 the convicted felon's control. They are looking at the  
9 felon's ability to move guns around throughout the  
10 world.

11 JUSTICE KAGAN: But that seems to me very  
12 different than the situation here, Ms. O'Connell,  
13 because in that case, what the gang leader has is a  
14 situation where somebody else is holding a gun for him  
15 and he can say anything to that person. He can say, Use  
16 the gun. He can say, Keep the gun in your closet. He  
17 can say, Sell it to Person A or Person B or Person C.  
18 He has total freedom over it.

19 And that's very different from the situation  
20 here where the only thing that a person would -- a  
21 person in Mr. Henderson's position can do is to sell the  
22 gun to a person whom the court approves.

23 MS. O'CONNELL: I don't -- I don't think  
24 that any of the cases that I was just referring to  
25 involve situations where the convicted felon has control

1 over the person that's receiving the gun. All of them  
2 just have to do with the convicted felon's ability make  
3 a gun appear somewhere when he says to and to show that  
4 he -- he -- he's exercising dominion and control over  
5 the guns by negotiating the terms of their sale and  
6 identifying buyers for them.

7 JUSTICE SCALIA: Yeah, but he doesn't -- he  
8 doesn't have to get anybody to approve the buyer. I  
9 think what Justice Kagan is saying, it's -- it's a lot  
10 harder to say you have dominion and control when you  
11 have to come before an equity court and say, Please, may  
12 I, you know -- please may I have -- have the gun given  
13 to my best friend or to somebody else. That doesn't  
14 sound much like dominion and control to me.

15 MS. O'CONNELL: We -- we acknowledge that  
16 because the guns are in our possession and the  
17 Petitioner needs a court order in order for them to go  
18 somewhere, that the court is exercising, also, some  
19 control over the weapons; but by reserving this right to  
20 nominate somebody to receive them, the convicted felon  
21 is also exercising control over the weapons.

22 I'll point out that in the Petitioner's  
23 opening brief when he described the main attributes of  
24 possession, he said the right to control and the right  
25 to exclude. And his theory in the reply brief that, oh,

1 I'm just nominating somebody, is certainly an exercise  
2 of the right to exclude other people from getting their  
3 hands on the firearms.

4 JUSTICE SOTOMAYOR: Well, the reality is --

5 JUSTICE SCALIA: Is this --

6 JUSTICE SOTOMAYOR: The reality is that the  
7 world is not going to know the guns are there, so -- but  
8 there's no exclusion. If I wanted to go into that case  
9 and ask the court to consider me rather than the  
10 nominee, it's a court of equity. And the court could  
11 say I'm the better owner than the person they nominated.

12 So I don't know what this -- why this  
13 nomination becomes control over the sale if it's the  
14 judge who's approving the sale.

15 MS. O'CONNELL: Well, I think because -- I  
16 don't -- I don't know that it's true that any other  
17 person could just come in and ask for the firearms. I'm  
18 not aware of that.

19 JUSTICE SOTOMAYOR: Well, you're saying the  
20 court is the one who decides whether the person who's  
21 nominated is appropriate or not.

22 MS. O'CONNELL: Right. The court -- the  
23 court can say yes or no after weighing equitable  
24 factors; but if it says yes, then the felon is  
25 exercising a right to control and to exclude --

1 JUSTICE BREYER: But what is it you want to  
2 have happen; that is, the gun was taken away from him.

3 MS. O'CONNELL: Yes.

4 JUSTICE BREYER: He can't possess it  
5 anymore. It's in the hands of the court, I guess, or  
6 the government. Okay.

7 Now, it's his. It's a 1891 collector's  
8 item; he's a gun collector. Nobody is claiming it's  
9 forfeitable, or anything. Okay. What do you think  
10 should happen?

11 MS. O'CONNELL: We think it should go to a  
12 Federal firearms licensed dealer for a sale. And I -- I  
13 want to make clear that if the -- if the Court disagrees  
14 with our constructive possession theory, I think that's  
15 probably where Justice Scalia is and I don't know how  
16 many other people are in that boat, but I think the  
17 Court should certainly make clear in its opinion that  
18 because the -- the district court looking at this relief  
19 is sitting in equity, it is not required to broker a  
20 sale between a convicted felon and his friend. The  
21 court could still order that the firearms instead be  
22 sent to an FFL.

23 CHIEF JUSTICE ROBERTS: But the idea -- the  
24 idea that it should be sold through a Federal firearms  
25 dealer is a late idea. This was not something the

1 government proposed at any stage below until the case  
2 came here, right?

3 MS. O'CONNELL: Right. We certainly didn't  
4 propose it, but I -- I also don't think it's correct to  
5 say that the Petitioner was -- was proposing this as  
6 relief that he wanted. He did say in the --

7 CHIEF JUSTICE ROBERTS: Well, what did you  
8 anticipate -- what was your position before you changed  
9 it here in this Court about what should happen to the  
10 guns?

11 MS. O'CONNELL: I mean, I think in the  
12 Eleventh Circuit, Federal law enforcement officers that  
13 have these guns and are trying to decide what to do with  
14 them when they get the request coming in from the felons  
15 were -- were certainly under the impression that Howell  
16 controlled and that they certainly couldn't give it to  
17 somebody that was selected by the convicted felon, but  
18 also that they couldn't sell it. And --

19 CHIEF JUSTICE ROBERTS: Has the Federal  
20 government ever used these guns?

21 MS. O'CONNELL: No, and if we --

22 CHIEF JUSTICE ROBERTS: Not these particular  
23 ones but guns that were forfeited by a convicted felon  
24 and someone who couldn't sell them to anyone, at least  
25 until you changed the position and said they could sell

1 them to a firearms dealer? They just sat around  
2 gathering dust?

3 MS. O'CONNELL: They -- they do, because we  
4 don't -- if the opinion is affirmed, if there's, you  
5 know, nothing to do with these guns, we don't gain title  
6 to them. I think there would need to be an extra step.  
7 In a lot of the court of appeals cases that present this  
8 issue, when the convicted felon filed his Rule 41(g)  
9 motion, the government filed, in response, a motion to  
10 prefer permission to destroy the firearms, or something  
11 like that. But there is nothing like that in this case.  
12 We wouldn't gain title to them.

13 But -- but we think -- we do agree that our  
14 position, maybe not necessarily in this case, because  
15 the relief that Petitioner was asking for was always to  
16 have it transferred to somebody in specific; but I  
17 completely agree that we have said in briefs before, we  
18 understood Howell to also prohibit a sale.

19 So what I think the appropriate relief for  
20 this Court to -- what the Court should do to dispose of  
21 the case would be to affirm the Eleventh Circuit's  
22 holding that the convicted felon cannot select somebody  
23 to receive his firearms, but then remand for -- if the  
24 Court adopts our Federal licensed firearms dealer  
25 position, to determine whether that relief --

1 JUSTICE SCALIA: Well, that wouldn't --

2 JUSTICE SOTOMAYOR: But the same trap that  
3 you're -- I'm a little bit upset at your brief, frankly,  
4 because in that circuit, he couldn't know that there was  
5 any permissible sale, because that circuit had said  
6 none.

7 And so to come back and say to us that we  
8 should leave it in their discretion as to whether it  
9 should go to a -- a Federal -- a federally licensed  
10 firearms dealer seems as if the government has set a  
11 trap for a pro se litigant.

12 MS. O'CONNELL: We are -- we are certainly  
13 not trying to do that. The position that I think I've  
14 just articulated was if the Court agrees with what we've  
15 said in our brief and our view of constructive  
16 possession, it should affirm what the Eleventh Circuit  
17 said with respect to he cannot transfer the firearms to  
18 a person of his choosing. But we -- we would not oppose  
19 a remand for the court of appeals to -- or the district  
20 court to look at this at that --

21 CHIEF JUSTICE ROBERTS: That's not -- that's  
22 not going to get it done. You still have the problem of  
23 the court below's view of the Unclean Hands Doctrine.  
24 Do you have a position, the Federal government -- does  
25 the Federal Government have a position on that doctrine



1 now?

2 MS. O'CONNELL: We do not think the Unclean  
3 Hands Doctrine applies in this case. I'm sorry if that  
4 was not clear from the footnote in our brief, but we  
5 disavowed that holding of the Eleventh Circuit. We are  
6 perfectly fine with you writing an opinion, and you  
7 should, saying that the Eleventh Circuit should not have  
8 relied on that doctrine. The Unclean Hands Doctrine  
9 typically requires the -- the uncleanness of your  
10 hands, to be tied to the equitable relief you are  
11 seeking.

12 JUSTICE BREYER: Is that going to be your --  
13 your position -- I mean, because I'm getting away from  
14 the -- what I call the legal mumbo-jumbo. Looking at  
15 the word "possessed" there, fine. It's a question of  
16 interpreting that. And now where I thought, well, he  
17 can't just have it sold to anybody. I mean, it could be  
18 sold -- you don't want it sold to somebody who's going  
19 to do his bidding every five minutes. I mean, maybe  
20 he'd even agree with that.

21 And that now you're taking the opposite  
22 extreme. You're saying the only way to administer this,  
23 is the only thing really you can do with it, is you can  
24 sell it to a Federal -- through a Federal firearms  
25 dealer. And there are probably intermediate positions.

1 You know, I mean, somebody has a very valuable antique  
2 weapon the Normans used to shoot or something. And he  
3 says, I don't want to sell it. I'm going to be able to  
4 possess it again in ten years. They'll forgive me for  
5 whatever it is, and maybe you should accommodate that,  
6 or maybe you shouldn't.

7 I have no feeling for how important it is to  
8 have an absolute rule. You've given some good reasons  
9 for it. What am I supposed to do? Just say everybody  
10 agrees here you can't sell it your best friend who will  
11 keep it to you, so they're wrong on that rule. The  
12 government's position's is now let's do something else  
13 with it. Maybe absolute. Maybe not. Go work it out,  
14 Eleventh Circuit. Go work it out, lower court. What  
15 should we do?

16 MS. O'CONNELL: Yeah, I think that's -- that  
17 is a perfectly fine solution. I think whatever the  
18 Court is going to hold with respect to constructive  
19 possession, we certainly hope that the Court will agree  
20 with us that a transfer to a person selected by the  
21 convicted felon is an act of constructive possession.  
22 But we are totally fine with the licensed firearms  
23 dealer option, and I don't -- it's not something we  
24 could have worked out with him now, because he is still  
25 presenting in this Court the -- the preferred option

1 that they be given to his friend.

2 JUSTICE BREYER: Is this Federal license --

3 JUSTICE GINSBURG: Sold -- that is -- is it  
4 the government's position that it's the licensed firearm  
5 dealer or -- in effect, forfeited to the government? Is  
6 there any other transferee in the government's view that  
7 would be appropriate?

8 MS. O'CONNELL: No. We think it would have  
9 to be sold, and that the -- he could obtain the economic  
10 value of it because 922(g) only extinguishes his  
11 possessory interest.

12 JUSTICE GINSBURG: But it would have to be  
13 sold, but the sale would be -- or the consignment would  
14 be to a licensed dealer. You're rejecting the friends.  
15 You're rejecting the wife.

16 MS. O'CONNELL: I'm -- I'm rejecting his  
17 ability to decide who to sell it to. I think I -- I  
18 tried to explain in a -- in response to a question from  
19 Justice Kagan earlier, I don't think it's -- it's  
20 necessarily true that the firearms dealer is the only  
21 neutral third party that can sell firearms. And under  
22 our theory of constructive possession, he wouldn't be  
23 controlling the destination of the firearms if they were  
24 given to somebody other than a licensed firearms dealer,  
25 who was not subject to the control of the convicted

1 felon. But we certainly think that given the statutory  
2 backdrop where firearms are typically sold through an  
3 FFL, that we think that is what Court should do.

4 JUSTICE SCALIA: Can he select the FFL? Can  
5 he select the Federal -- I mean, you know, suppose the  
6 government says we want it sold by a firearms dealer in  
7 San Francisco and he says, what? You know, they don't  
8 sell any guns in San Francisco. I want it -- you know,  
9 I want it in -- in Dallas.

10 (Laughter.)

11 JUSTICE SCALIA: Can -- can he pick the  
12 firearms dealer?

13 MS. O'CONNELL: What we have said is yes, he  
14 can -- the district court has to figure out who's going  
15 to sell these firearms. And maybe the parties can  
16 nominate firearms dealers. What I -- what I tried to  
17 say before was that I don't -- the Federal government,  
18 certainly the agencies that I am here representing, have  
19 said they don't necessarily have the resources to, in  
20 every case like this, go out and try to find a firearms  
21 dealer to do this. So we don't -- and we don't think  
22 it's an act of constructive possession for him to pick  
23 the neutral third party that's going to make an arm's  
24 length transaction to the entire universe of eligible  
25 buyers.

1 CHIEF JUSTICE ROBERTS: Justice -- Justice  
2 Alito.

3 JUSTICE ALITO: Well, what would happen if  
4 someone is on trial for a felony and has in -- in his  
5 house a number of firearms and then the person is  
6 convicted? So what -- how can that person deal with the  
7 firearms in the house without exercising constructive  
8 possession in your view?

9 MS. O'CONNELL: So, this is probably the one  
10 scenario where somebody like -- I don't know that he  
11 couldn't have made arrangements beforehand, but we don't  
12 really expect him to because he could be holding out  
13 hope he's going to be acquitted. I think if he has  
14 firearms in the house and then he is convicted and he  
15 becomes a convicted felon, I mean, maybe he's -- I  
16 presume he's going to jail. Maybe he will stay home  
17 first. But you're right. That does propose sort of a  
18 dilemma where we're saying he can't tell somebody else  
19 what to do with the firearms.

20 I think if courts were looking at that  
21 below -- and, of course, it's not something that is a  
22 problem in this case because this Petitioner pleaded  
23 guilty. And he acknowledged in his plea agreement that  
24 he was about to become prohibited from possessing  
25 firearms. But I think that if courts determined in a

1 particular case that it was a problem, like all of a  
2 sudden I am in a status where I can't possess firearms  
3 and if I go home, I'm immediately in violation of the  
4 statute, that courts could determine that there's like a  
5 statutory background principle that you have a  
6 reasonable amount of time to come into compliance with  
7 this.

8 JUSTICE BREYER: Well, then why can't we do  
9 that here?

10 MS. O'CONNELL: Well, because that -- that  
11 is not the type of -- a petitioner who pleads guilty is  
12 not in that position. He knew when he pleaded guilty  
13 that he was about to lose his ability to possess  
14 firearms.

15 JUSTICE BREYER: I mean, your whole  
16 argument -- the reason I took it that the government  
17 wants this firearm thing, firearm dealer, is they say,  
18 look, there are a lot of guns and these guns should be  
19 safe and we're afraid he'll give them to a friend, and  
20 we're afraid maybe the gang boss will get them, and the  
21 only safe thing to do is really the firearms dealer.

22 Okay. But now we think of a similar kind of  
23 case. It's just happened that the government didn't get  
24 the guns first, they're in his house. And then you say  
25 well, the solution there is it's a reasonable time. He

Official

1 has a reasonable time to do with them what he wants.

2 MS. O'CONNELL: No.

3 JUSTICE KENNEDY: As long as he gets them  
4 out of his possession.

5 MS. O'CONNELL: I think if he --

6 JUSTICE KENNEDY: Are you going to say he  
7 has to give them to a firearms dealer? This is very  
8 complicated, more so than I ever thought, and it seems  
9 to me that it might best be worked out by lower courts  
10 under the principle that we don't want these guns back  
11 in the hands of either his control or people who might  
12 misuse them.

13 MS. O'CONNELL: I think if he is a person  
14 who pleaded guilty, and so he -- he had advance  
15 knowledge that he was about to become somebody who  
16 couldn't possess firearms, including constructive  
17 possession where he couldn't exercise dominion and  
18 control over them, then he should be required to -- to  
19 get rid of those firearms before he pleads guilty. And  
20 if he still has them in his house after he does so,  
21 there is no reasonable period of time for that person  
22 to, you know, exercise his own control over what he  
23 wants to do with them. I think those do have to go to a  
24 firearms dealer.

25 JUSTICE KENNEDY: Can you tell me -- it's

1 not this case, but suppose -- somewhat like Justice  
2 Alito's hypothetical -- a man's living at home with his  
3 wife. Wife owns the firearms. The firearms are in the  
4 bedroom. He's convicted of an offense where 922(g)  
5 controls. Is he in constructive possession of those in  
6 violation of the statute?

7 MS. O'CONNELL: There is a whole body of  
8 case law on that, Justice Kennedy, where the -- the  
9 answer is can the convicted felon exercise dominion and  
10 control over the firearms in -- in their location. So  
11 if they're in like the master bedroom and they're not  
12 locked up and he has access to them any time he wants  
13 it, then he would -- he would be a felon in possession  
14 of a firearm.

15 JUSTICE SCALIA: But the mere fact that his  
16 wife has them is not enough --

17 MS. O'CONNELL: Right.

18 JUSTICE SCALIA: -- for constructive  
19 possession.

20 MS. O'CONNELL: Right.

21 JUSTICE SCALIA: But you say that in this  
22 context, the mere fact that a friend of his would have  
23 them is enough for constructive possession.

24 MS. O'CONNELL: Yes. And it's because --

25 JUSTICE SCALIA: Why is that?



1 MS. O'CONNELL: Because he is the one that  
2 is selling the firearms to the friend. He is selecting  
3 the friend. He's excluding other people from owning  
4 them. He is exercising control over the sale or the  
5 transfer to his friend.

6 JUSTICE KAGAN: Ms. O'Connell, I think it's  
7 implicit in what you're saying, but I just wanted to  
8 make it clear. Although you say that Rule 41(g) is not  
9 the appropriate mechanism, you have no doubt that courts  
10 do have the equitable authority to do this. Is that  
11 correct?

12 MS. O'CONNELL: That's correct. And I -- I  
13 mean, I hope that, Justice Sotomayor, that it's not the  
14 case that people are upset with -- with the government's  
15 brief. I think that in our brief, we tried to correct  
16 some wrongs that had happened in this case. We have  
17 abandoned that 41(g) argument, we have abandoned the  
18 Unclean Hands argument. The weapons that are not  
19 firearms were -- have been returned to Mr. Henderson.  
20 And we think we've come up with a solution transferring  
21 the weapons to a Federal licensed firearms dealer that  
22 allows him to obtain the economic value of the firearms  
23 without exercising control over them.

24 JUSTICE GINSBURG: Would you agree that the  
25 Unclean Hands part, that should not remain the law of

1 the circuit?

2 MS. O'CONNELL: Right.

3 JUSTICE GINSBURG: So we should -- we should  
4 address that and reject it?

5 MS. O'CONNELL: Yes. In our footnote on the  
6 unclean hands, we did describe that if these are - if  
7 the -- obviously, if the - if the property that we have  
8 is contraband, it's not being returned to anybody. But  
9 we also would reserve the right to make arguments in cases  
10 where the property we're holding is derivative contraband,  
11 like it's a firearm that's been used to shoot somebody or  
12 it's something that is used to for drugs --

13 JUSTICE SOTOMAYOR: But you have to file for  
14 forfeiture in those situations.

15 MS. O'CONNELL: Well, what I'm saying is, if  
16 we miss those deadlines or something like that, we would  
17 reserve the right in a derivative contraband case to  
18 make an unclean hands argument --

19 JUSTICE BREYER: What about just forgetting  
20 the words "dominion" and "constructive" and just look to  
21 the word "possession" and say that that sometimes  
22 includes control? And what you want to prevent is that  
23 he disposes of these arms in a way that allows him,  
24 possibly, to control them in the future or control them  
25 now in a way that likely puts them in the hands of bad

1 people for the future.

2 Now, that way, all we have to do is look at  
3 the word possession. We have to add that it includes,  
4 for purposes of this statute, certain kinds of control.  
5 And then you have to say this is the simple rule, and  
6 this will prevent two bad kinds of control.

7 Now, is there something wrong with that? If  
8 so, we then send it back so that you can argue to the  
9 district court why your rule is necessary to prevent  
10 these two bad kinds of control.

11 MS. O'CONNELL: Justice Breyer, I think  
12 your -- your second part we would go a little bit  
13 further under the government's theory. Surely we think  
14 that if the firearms are given back to somebody over  
15 whom the convicted felon is going to exercise control,  
16 that would be constructive possession. But we also  
17 think that regardless of the person who's on the  
18 receiving end of the firearms is a good person or a bad  
19 person, is an exercise of dominion.

20 JUSTICE BREYER: I know, that's the part  
21 that it's hard for me to accept.

22 MS. O'CONNELL: Well --

23 JUSTICE BREYER: Because you're willing to  
24 allow that control in the case that Justice Alito put  
25 where he was convicted and it's in his house. And I

1 don't see anything bad that flows from that kind of  
2 control. And I don't see why you have to read the  
3 statute to include that kind of control to achieve any  
4 purpose that the statute has. So therefore, I tend,  
5 tentatively, to reject that kind of control as falling  
6 within what the statute forbids.

7 MS. O'CONNELL: If you are going to reject  
8 that kind of control --

9 JUSTICE BREYER: What bad will happen?

10 MS. O'CONNELL: -- then we would just ask  
11 that the Court, you know, make clear in its opinion that  
12 a district court acting in equity is not required to  
13 accept the convicted felon's choice or direction about  
14 where he wants the firearms to go, and that, instead of  
15 having to broker that transaction between a convicted  
16 felon and his friends, that the Court say, you know --

17 JUSTICE BREYER: That might be another way  
18 to do it, you know. All right. You have a difficult  
19 conceptual case.

20 MS. O'CONNELL: And I don't think, you know,  
21 even if you don't think that it's bad to have firearms  
22 go to necessarily anybody or maybe there's a very good  
23 person that the convicted felon knows and wants to have  
24 it, the line is drawn when you become a convicted felon.

25 JUSTICE ALITO: Would the firearms dealer

1 charge a commission for selling these guns?

2 MS. O'CONNELL: Yes.

3 JUSTICE ALITO: And who would pay that?

4 MS. O'CONNELL: It would -- it would come  
5 out of the -- the sale price.

6 JUSTICE ALITO: So that if the -- if the  
7 convicted felon could sell this without going through a  
8 dealer for a certain amount, then that person would lose  
9 the commission by having it sold through a firearms  
10 dealer?

11 MS. O'CONNELL: Yes. And we simply think  
12 that that's -- I mean, if the economic value is, you  
13 know, that we're selling them through a firearms dealer  
14 and he's going to charge a commission, then that's just  
15 part of determining what the economic value of the guns  
16 is. But -- but we certainly think -- I mean, this is --

17 CHIEF JUSTICE ROBERTS: You can finish your  
18 sentence.

19 MS. O'CONNELL: There's Montana -- or  
20 State v. Fadness, one of the Montana Supreme Court  
21 cases, includes a fact scenario where the person wanted  
22 to designate their father to sell them and the court  
23 said, I'm not required -- the father has no plan to sell  
24 them, I'm going to give that, the felon said.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Ortiz, you have 14 minutes remaining.

2 REBUTTAL ARGUMENT OF DANIEL R. ORTIZ

3 ON BEHALF OF THE PETITIONER

4 MR. ORTIZ: Your Honor, just four very quick  
5 points:

6 First, on the question of whether  
7 Mr. Henderson asked with sufficient particularity for  
8 relief, please remember that he was proceeding pro se.  
9 And second, the law is clear that post-conviction  
10 motions for return of transfer of property are treated  
11 as civil actions. Under Rule 54(c) of the Federal Rules  
12 of Civil Procedure, he's entitled to whatever relief is  
13 appropriate even if he did not request it. Second --

14 JUSTICE SCALIA: You -- you started off --  
15 you were going to give us five pages in -- in the record,  
16 and you only got to two of them, I think. You want --

17 MR. ORTIZ: Oh, sorry .

18 JUSTICE SCALIA: Just in case I'm  
19 unfortunate enough to get assigned this opinion.

20 (Laughter.)

21 MR. ORTIZ: Justice Scalia, on page 71 and  
22 on page 170. The first was a reference to his renewed  
23 motion for return/disposition of property, and the  
24 second was the motion hearing itself. He said that  
25 he -- he claimed -- he argued that he had a property of

1 some firearms which must be accommodated by the sale,  
2 transfer or storage of the firearms. But Justice  
3 Ginsburg is correct, he did not particularly reference a  
4 licensed gun dealer. His objections to the magistrate  
5 judge's report and recommendation which appears on  
6 page 132 of the joint appendix, he asks the court for  
7 the relief -- to grant the request that this Court  
8 ordered that a person lawfully entitled to own the  
9 subject firearms collection be awarded possession and  
10 control and direct the payment for the firearms be  
11 awarded to Petitioner or his wife.

12 And finally, in his Eleventh Circuit brief,  
13 he said, "Alternatively, I request the court recognize  
14 my continued ownership interest in the property value  
15 and order its sale for my benefit or my wife's or adult  
16 children's benefit or allow me to designate a neutral  
17 third party to take possession as his own."

18 Second, remind the Court that the  
19 government's proposed Federal firearms dealer  
20 remedy would allow an owner's friend to take -- to buy  
21 the firearms without the lecture and warning from the  
22 district court that might be a criminal offense.

23 Third, in this case, the firearms were  
24 turned over long before Petitioner pleaded guilty. They  
25 were turned over by order of the court setting the

1 conditions of his release, pretrial.

2 And finally, despite my friend's suggestion,  
3 Petitioner firmly does not believe that affirmance is  
4 appropriate relief here. Thank you.

5 JUSTICE SOTOMAYOR: Mr. Ortiz, you do  
6 understand -- I thought it was clear from what the  
7 government said earlier, that it's waived any claim --  
8 that you waived the request for this relief.

9 MR. ORTIZ: No --

10 JUSTICE SOTOMAYOR: So that's not at issue.  
11 You think there's still --

12 MR. ORTIZ: Your Honor --

13 JUSTICE SOTOMAYOR: -- they're going to go  
14 back down and say that you're not entitled to the relief  
15 because you didn't ask for the right relief?

16 MR. ORTIZ: That's one fear . If this Court  
17 were to dispose of the case other than by reversal,  
18 there's also the other problem that -- not only would  
19 that not resolve the circuit conflict, because the  
20 government is taking a very different view of the  
21 Eleventh Circuit's role than the Eleventh Circuit itself  
22 does, but there is also the issue of unclean hands,  
23 which would still be out there. And that would bar  
24 going forward anyone in Petitioner's position from  
25 taking advantage of the government's new position.



Official

1           If there are no further questions, we rest  
2 our case. Thank you.

3           CHIEF JUSTICE ROBERTS:           Thank you, counsel.

4           The case is submitted.

5           (Whereupon, at 10:58 a.m., the case in the  
6 above-entitled matter was submitted.)

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