

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TONY HENDERSON, :

4 Petitioner : No. 13-1487

5 v. :

6 UNITED STATES. :

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8 Washington, D.C.

9 Tuesday, February 24, 2015

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

14 APPEARANCES:

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

17 ANN O'CONNELL, ESQ., Assistant to the Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 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.

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

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.

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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