



Henderson v. U.S. (13-1487)
UNRESOLVED QUESTIONS ABOUT
SURRENDERED FIREARMS

Sandra Tibbetts Murphy

October 2014

The Battered Women's Justice Project

1801 Nicollet Ave South, Suite 102 Minneapolis MN 55403

technicalassistance@bwjp.org

800-903-0111, prompt 1

Funding for this project was made available through the US Department of Health and Human Services, Grant #90EV0375. The viewpoints contained in this document are solely the responsibility of the author(s) and do not represent the official views or policies of the department and do not in any way constitute an endorsement by the Department of Health and Human Services.

Henderson v. U.S. (13-1487)

UNRESOLVED QUESTIONS ABOUT
SURRENDERED FIREARMS

Poised to address another of the many legal tensions that arise in the context of firearm prohibitions and individual property rights, the U.S. Supreme Court granted certiorari earlier this week in the case of *Henderson v. U.S.* (2014 WL 292169, *unpub'd*). In *Henderson* a defendant challenges the 11th Circuit's refusal to recognize certain property rights to surrendered firearms that were not involved in the underlying criminal case when the individual is a prohibited person under 18 U.S.C. §922(g). The outcome of this case will likely have direct and far-reaching effects on efforts that jurisdictions take to enforce firearms surrender in domestic violence cases.

Facts of Case

Henderson worked as a US Border Patrol Agent but was arrested and indicted for distribution of marijuana, among other crimes. As part of his conditions of release, the court ordered Mr. Henderson to surrender any firearms in his possession, citing a concern for his mental health. Two days later, agents went to Henderson's home where he surrendered numerous personal firearms and ammunition. In 2007, Henderson was convicted of the felony crime involving the sale of marijuana, thus making him a prohibited person under 18 USC §922(g). Throughout 2008 and 2009, Henderson communicated with the FBI several times, proposing to transfer the surrendered firearms to other individuals. After the FBI refused to return or transfer the firearms as Henderson wanted, he filed a motion in federal court seeking the court's permission to allow him to transfer ownership of his surrendered firearms to his wife or alternatively a 3rd party buyer. The federal magistrate denied Henderson's motion, relying upon the prohibitions of 922(g) and an earlier federal case of *U.S. v. Howell* (425 F3d 971 (11th Cir. 2005)).

11th Circuit Ruling

Henderson's appeal made its way to the 11th Circuit Court of Appeals, which upheld the trial court's denial of his motion. Like the magistrate, the 11th Circuit also relied on its earlier holding in *Howell*, which denied a felon's request for return of his firearms as 922(g) made it unlawful for him to possess firearms, whether actual or constructive possession. Despite Henderson's argument that his firearms were surrendered, rather than seized, and thus were not contraband, the 11th Circuit ruled that the method in which the government obtained the firearms was irrelevant. As a felon, Henderson was now prohibited from possessing firearms in any way

and any effort by a court to return firearms to him or transfer those firearms to another at his direction would violate 922(g).

Arguments in Cert Petitions

In his petition for certiorari to the Supreme Court, Henderson poses the following question: Do the prohibitions in 922(g) extinguish a person's entire ownership interests in firearms, which were unrelated to the underlying conviction and which were lawfully owned prior to the offense? Henderson argues that the general rule set forth in *Cooper v. City of Greenwood* (904 F2d 302 (5th Cir. 1990)) requires that seized property that is not contraband must be returned to the rightful owner once the criminal case has ended. The ruling by the 11th Circuit allows the government to essentially strip owners of their entire ownership interest, not just their right of possession, thus raising constitutional concerns under due process and the Takings clauses. Citing a split among the federal circuits, Henderson argues that possession is only one incident of ownership and the simple receipt of proceeds from any sale or transfer of such affected property does not qualify as possession. Furthermore, allowing such transfers only permits prohibited persons to dispose of their remaining ownership interests in the property and does not pose a risk of putting guns back with prohibited persons. Under the 11th Circuit's holding, the government can take a person's property interests without notice or hearing as required under due process requirements, creating a forfeiture without any protections.

In its brief opposing certiorari, the United States frames the question more narrowly: after a conviction that prohibits actual or constructive possession of firearms, is a defendant entitled to have non-contraband firearms transferred to a relative or other 3rd party? Relying on the *Howell* decision, the U.S. argues that once a defendant is a prohibited person under 922(g), he is not entitled to the return of seized or surrendered firearms, whether that return is direct or indirect. Furthermore, the rules involving return of property provide no authority for the court to order return of such property to anyone but the original owner and any transfer is essentially a constructive possession. The U.S. also points out that both of Henderson's potential recipients create a significant risk that he would still retain custody or control over the firearms, in violation of 922(g). Finally, disputing Henderson's claims about a split among the federal circuits on this issue, the government argues that the courts simply have made no determination about a defendant's ownership interest in non-contraband and non-forfeited firearms.

Conclusion

The Supreme Court's resolution of the issues presented by this case will take some time; however, the greater issue of how to handle the forfeiture or non-return of surrendered firearms to batterers now prohibited under 922(g) should currently be part of any community's protocols related to firearm safety in domestic violence cases.