

No. 13-1487

IN THE
Supreme Court of the
United States

TONY HENDERSON,
Petitioner,
v.
UNITED STATES,
Respondent.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS AMICUS
CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Section 922(g) of Title 18 of the U.S. Code makes it unlawful for a person convicted of specified crimes “to ... possess ... any firearm” (emphasis added).

The question presented is whether a conviction under § 922(g) prevents a court under Rule 41(g) of the Federal Rules of Criminal Procedure or under general equity principles from ordering that the government (1) transfer noncontraband firearms to an unrelated third party to whom the defendant has sold all his property interests or (2) sell the firearms for the benefit of the defendant.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.¹

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of federal criminal law. NACDL files numerous amicus curiae briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association frequently appears as amicus curiae in cases involving the Fifth Amendment and its state analogues,

¹ No counsel for a party authored this brief in whole or in part and no person other than the amicus, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of the brief.

speaking to the importance of ensuring that no person is deprived of life, liberty, or property without due process of law. As relates to the issues before the Court in this case, NACDL has an interest in protecting the right of persons convicted of crimes to assign their ownership rights to non-contraband property that they may no longer lawfully possess to third parties or to reap the proceeds of a judicial sale of the property.

SUMMARY OF ARGUMENT

Section 922(g) of Title 18 of the U.S. Code makes it unlawful for a person convicted of specified crimes “to ... possess ... any firearm” (emphasis added). According to the court below, a person with a disabling conviction who *owns* a firearm, but does not possess it—because it is under the government’s exclusive control and dominion—cannot arrange for its transfer to a third-party or otherwise benefit from a government-forced sale, because such acts would require *constructive* possession of the firearm, and hence violate § 922(g). As a result of that construction of § 922(g), the owner is completely divested of his property interests in the firearm, without any of the constitutional and statutory due process protections that would be afforded in a forfeiture proceeding or other type of government property seizure.

That result cannot be reconciled with the Due Process Clause or with the language, structure, and function of § 924(d)(1), a provision closely related to § 922(g) that governs the forfeiture of firearms actually *used* in the commission of certain offenses—unlike the firearms at issue here. Section 924(d)(1) explicitly distinguishes between *ownership* and *possession*, confirming petitioner’s argument that under

§ 922(g), ownership is not equivalent to possession. Section 924(d)(1) also distinguishes between an “owner or possessor” and a “delegate,” allowing the release of a firearm to a delegate if return to the owner would violate § 922(g). This provision further confirms that a person may have ownership interests in a firearm but no possessory interests, either actual or constructive.

More generally, § 924(d) ensures that property interests in firearms allegedly used in specified offenses can only be forfeited through an actual forfeiture proceeding, with all the special protections those proceedings entail. As construed by the Eleventh Circuit, however, § 922(g) effectively authorizes the government to permanently forfeit a firearm-owner’s property interest in firearms *not* used in any offense, without any of the procedural protections of an actual forfeiture proceeding. That is, if petitioner here had actually violated § 922(g) by possessing a firearm, his property interest in the firearm could not be extinguished without a forfeiture proceeding. But petitioner has never violated § 922(g), and yet the Eleventh Circuit holds that his property interest *can* be extinguished without a forfeiture proceeding. That result is as wrong as it sounds.

The result is wrong for other reasons as well, starting with the history of the statute. The prohibition on receipt and possession of firearms by persons with disabling convictions and the basis and procedures for forfeiture of firearms may be traced from the Federal Firearms Act of 1938, to the Gun Control Act of 1968, and then to the Firearms Owners’ Protection Act of 1986. Nothing in this statutory development suggests any Congressional intent to allow

deprivation of firearms without any process. Instead, this statutory history shows that Congress designed and redesigned forfeiture law governing firearms carefully to allow forfeiture in some instances but to preclude it in others.

The fact that a person's legal disability from possession may be temporary is also inconsistent with a rule extinguishing the person's ownership rights and allowing the government to retain the firearm permanently.

Finally, like a formal forfeiture, permanent retention of a firearm by the government may be an excessive fine under the Eighth Amendment. Review for excessiveness may be applied not only to an owner who did not use the firearm in any offense, but also to a person such as a spouse to whom the owner may have transferred rights.

ARGUMENT

I. THE DUE PROCESS CLAUSE AND § 924(d) REQUIRE THAT A FIREARM BE SUBJECT TO FORFEITURE TO EXTINGUISH OWNERSHIP INTERESTS

“No person shall . . . be deprived of life, liberty, or property, without due process of law” U.S. Const., Amend. 5. To deprive a person of ownership interests in property that is not contraband, forfeiture laws are fashioned to specify the grounds upon which a person may (or may not) be deprived of the property and the procedures for doing so, which include notice and an opportunity to be heard.

This case involves property in the form of firearms lawfully owned by petitioner but in the exclusive possession and control of the government. Peti-

tioner wants to extinguish his ownership rights by transferring them to a third party, or by accepting the proceeds of a sale by the government. The court below held that in order for petitioner to assign his ownership rights or to receive the proceeds of their sale, petitioner would have to be deemed in “constructive possession” of the firearms and therefore would be in violation of § 922(g). *United States v. Henderson*, 555 Fed. Appx. 851 (11th Cir. 2014).

Firearms are recognized as lawful property under federal law, and individuals have a constitutionally protected right to “keep and bear arms.” U.S. Const., Amend. 2; *see District of Columbia v. Heller*, 554 U.S. 570 (2008).² Section 922(g) makes it unlawful for a person convicted of specified offense to “possess” a firearm, 18 U.S.C. § 922(g), but § 924(d)(1) requires the government to use standard forfeiture proceedings to divest those persons of their firearm property: “Any firearm ... involved in or used in any knowing violation of [§ 922(g)] ... shall be subject to seizure and forfeiture.” 18 U.S.C. § 924(d)(1). It follows that a firearm *not* involved or used in a viola-

² See *Brewer v. Commonwealth*, 206 S.W.3d 343, 347 (Ky. 2006) (“the Commonwealth’s argument in favor of automatic forfeiture [of firearms] cannot be correct, especially in light of the fact that citizens have a constitutional right to bear arms and a right to due process of law”); *State v. Spiers*, 119 Wash. App. 85, 93, 79 P.3d 30 (2003) (a law making it a crime for a person free on bond and charged with a serious offense to “retain[] ownership of a firearm, even if he relinquishes possession and control of the firearm” held violative of the right to bear arms).

tion of § 922(g) (or any other specified offense) is not subject to forfeiture under this provision.³

Petitioner lawfully owned (and owns) the firearms at issue, but relinquished their possession to the government, and was later convicted of a crime disabling him of possession under § 922(g). His firearms thus were never “involved in or used in” a violation of § 922(g), and thus are not subject to forfeiture under § 924(d)(1). For the government nevertheless to keep them for itself—not permitting him to sell them, or even to benefit from their sale—unambiguously deprives petitioner of his property without due process of law.

Notably, a firearm that *is* alleged to have been involved in or used in a knowing violation of § 922(g) is not subject to seizure and forfeiture unless the government initiates and successfully litigates a forfeiture action according to the procedures of § 924(d). Among other procedures, § 924(d)(1) requires that “[a]ny action or proceeding for the forfeiture of firearms ... shall be commenced within one hundred and twenty days of such seizure.” § 924(d)(1). Section 924(d)(2) authorizes an award of attorneys’ fees to a person who successfully recovers a firearm seized by the government pursuant to § 922(g). Section 924(d)(2)(C) further provides:

Only those firearms ... particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder

³ A firearm “intended to be used in any offense referred to” in § 924(d)(3) is also subject to forfeiture (see § 924(d)(1)), but § 922(g) is not referred to therein.

der, or any other criminal law of the United States ... shall be subject to seizure, forfeiture, and disposition.

Thus, a forfeiture action that was not timely filed could not be maintained. Firearms not “particularly named and individually identified as involved in or used in” violations would not be subject to forfeiture.⁴ Moreover, “all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms” as defined in 26 U.S.C. § 5845(a) apply “so far as applicable.” § 924(d)(1).

Further procedural requirements are set forth in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S.C. § 983, which also applies to firearm forfeitures. *United States v. Ferro*, 681 F.3d 1105, 1109 (9th Cir. 2012). One such requirement is a 60-day limit from seizure to file an administrative forfeiture, and a 90-day limit thereafter to file the complaint. § 983(a)(1)(B)-(D),(3)(A).⁵

In addition to the explicit statutory requirements governing forfeiture of firearms and other property, there is a general rule that “[f]orfeitures are not fa-

⁴ “The Government bears the burden to establish that each of the ... firearms at issue were ‘involved in’ [defendant’s] offense.” *United States v. Approximately 627 Firearms*, 589 F. Supp. 2d 1129, 1135 (S.D. Iowa 2008) (finding that it failed to do so).

⁵ Provisions of the Supplemental Rules for Admiralty or Maritime Claims & Asset Forfeiture Actions also apply to firearm forfeitures. See, e.g., Rule G(2)(f) (complaint must “state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial”).

vored” and “should be enforced only when within both the letter and the spirit of the law.” *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939).

Generally, forfeiture statutes are strictly construed against forfeiture and in favor of the person whose property rights are affected. Every element justifying the forfeiture must be clearly shown and the rules of procedure are to be construed so as to narrowly circumscribe the remedy of forfeiture.

United States v. Seven Miscellaneous Firearms, 503 F. Supp. 565, 579 (D. D.C. 1980). The government could not simply keep a firearm based on its knowledge or belief that its owner possessed it after having been convicted of a crime punishable by imprisonment for a term exceeding one year. The owner could not be deprived of the property without due process of law as specified in the forfeiture requirements.

Yet that is precisely what happened to petitioner here. Even though a person with a disabling conviction who possesses a firearm in violation of § 922(g) could not be deprived of his property rights in the firearm without the protections of a forfeiture proceeding, petitioner—who did *not* possess a firearm in violation of § 922(g)—*is* being deprived of his property rights with no process whatsoever.

II. THE STATUTORY HISTORY OF § 922(g) DOES NOT SUGGEST ANY INTENT TO ALLOW DEPRIVATION OF OWNERSHIP INTERESTS WITHOUT ANY PROCESS

The history of the federal prohibition on firearm possession by persons with disabling convictions and of the associated forfeiture laws confirms that Congress never intended that persons be deprived of their ownership interests without due process. To the contrary, the statutory history reveals the care with which Congress has developed the conditions under which a person may or may not be deprived of firearm ownership.

The Federal Firearms Act of 1938 (FFA) made it “unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” C. 850, 52 Stat. 1250, 1251 (1938).⁶ The FFA did not include a forfeiture provision, but one was added in 1950: “Any firearm or ammunition involved in any violation of the provisions of this Act or any rules or regulations promulgated thereunder shall be subject to seizure and forfeiture” C. 2, 64 Stat. 3 (1950). The predicate for forfeiture was that a firearm had to be “involved in” such violation.

⁶ This Court declared as violative of due process the Act’s burden-shifting provision that “the possession of a firearm or ammunition by any such person shall be presumptive evidence” of such receipt, shipment, and transport. *Tot v. United States*, 319 U.S. 463 (1943) .

A dramatic test of this provision arose regarding whether the government could retain possession and obtain title to the rifle used by Lee Harvey Oswald to assassinate President Kennedy, which was thereafter sold by Marina Oswald to a third party. *See United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle*, 250 F. Supp. 410, 411 (N.D. Tex. 1966). The issue was “whether the government may obtain such title by forfeiture, without compensation to the owner, or must resort to condemnation by the exercise of eminent domain, in which event the owners must be compensated.” *King v. United States*, 364 F.2d 235 (5th Cir. 1966).

Oswald’s rifle was held to be outside the bounds of forfeiture under the FFA. As the court explained, the FFA imposed two requirements for forfeiture: a violation of the FFA itself, and the firearm “be ‘involved in’ the violation.” *Id.* at 236. While Oswald had lied about his identity when he ordered the rifle from a licensed dealer, that was not an offense under the FFA, which was not otherwise violated. “Since no violation of the Act was proved, the weapons are not subject to forfeiture.” *Id.* at 241.

In response, Congress enacted a statute providing for the acquisition of “all right, title, and interest” in evidence pertaining to the assassination and provided a cause of action for owners of the items to obtain just compensation. P.L. 89-318, 79 Stat. 1185 (1965). The claimant to the rifle pursued this remedy. *King v. United States*, 292 F. Supp. 767 (D. Colo. 1968). In short, in the case involving the worst possible facts of firearm usage and ownership, the law ensured that the purported owner’s property rights

were extinguished only through the provision of due process and just compensation.

The Gun Control Act of 1968 (GCA) expanded the coverage of the FFA. The GCA made it “unlawful for any person – (1) . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” P.L. 90–618, 82 Stat. 1213, 1220–21 (1968) (enacting 18 U.S.C. § 922(h)). The GCA further expanded the scope of the forfeiture provision as follows: “Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture” *Id.* at 1224 (enacting 18 U.S.C. § 924(d)).

Separately, Title VII of the Omnibus Crime Control and Safe Streets Act (“OCCSSA”) imposed punishment on “[a]ny person who – (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony ... and who receives, possesses, or transports in commerce or affecting commerce ... any firearm.” P.L. 90-351, 82 Stat. 236 (1968), enacting 18 U.S.C. App. § 1202(a)(1).

The Firearms Owners’ Protection Act (FOPA), P.L. 99-308, 100 Stat. 449, 452 (1986), consolidated the GCA and OCCSSA prohibitions into the current provision codified at § 922(g). But FOPA also repealed the GCA’s broad forfeiture power and, among other revisions, substituted the particularity re-

quirement in current § 924(d)(2)(C). 100 Stat. at 457-58. According to the relevant Senate Report, “only those firearms particularly and individually identified as used, involved in or, in certain cases, intended to be used in a violation of Chapter 44, regulations issued thereunder, or any other Federal criminal law, may be seized or forfeited.” Senate Report 98-583, 98th Cong., 2d Sess., 25-26 (1984).⁷ The limitation was intended “to prevent wholesale forfeiture of collections or inventories upon a claim of general intent to use them illegally.” *Id.*

Indeed, as its title reflects, FOPA as a whole was intended to broadly protect the constitutional rights of firearm owners, including, *inter alia*, Second, Fourth, and Fifth Amendment rights. In findings set forth in the text of the statute itself, FOPA declares:

The Congress finds that –

(1) the rights of citizens –

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

(C) against uncompensated taking of property, double jeopardy, and assur-

⁷ “There was no Senate Report on Pub.L. No. 99-308. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308.” *National Rifle Ass’n v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990).

ance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and tenth amendments; require additional legislation to correct existing firearms statutes and enforcement policies

§1(b), 100 Stat. 449.

In sum, the FFA began with a narrow conception of who could be disabled from firearm possession, which was substantially expanded by the GCA and OCCSSA and consolidated by FOPA. The FFA's 1950 amendment adding a modest forfeiture provision was also greatly expanded in the GCA, but the latter was significantly narrowed by FOPA. The specificity with which Congress designed and redesigned the forfeiture law governing firearms undermines any inference that Congress envisioned or intended any circumstance in which the government could extinguish a person's entire property interests in a firearm absent a proper forfeiture action.

III. SECTION 924(d) EXPLICITLY DISTINGUISHES BETWEEN AN “OWNER,” A “POSSESSOR,” AND A “DELEGATE”

Section 924(d)(1) provides that “upon acquittal of the owner or possessor” (or in certain other circumstances) a seized firearm “shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner

or possessor or his delegate in violation of law.”⁸ That language expressly distinguishes between an “owner or possessor” (meaning the possessor at the time of the seizure), a clear recognition that “ownership” is not equivalent to “possession.” The express statutory distinction in § 924(d)(1) precludes any conclusion that by using only the term “possesses” in § 922(g)—a closely related provision of the same statute—Congress *also* meant to refer to *ownership* rights, such that the exercise of a non-possessory ownership right by assigning the property or reaping its proceeds would create a form of “possession” that would violate § 922(g).

Section 924(g) also distinguishes both the “owner or possessor” from “a person delegated by the owner or possessor.” Section 924(d)(1) thus allows a firearm to be returned to the owner’s delegate if returning it to the owner himself (thereby giving him possession) would place the owner in violation of § 922(g)’s prohibition on possession. That structure confirms that a person who may not lawfully possess a firearm does not commit an act of possession by assigning his or her ownership interest in a firearm to a delegate.

⁸ The Court held in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), that “a gun owner’s acquittal on criminal charges involving firearms does not preclude a subsequent *in rem* forfeiture proceeding against those firearms under § 924(d).” *Id.* at 366. The FOPA amendment was “intended to reverse” the result in *89 Firearms*. Senate Rep. No. 98-583, *supra*, at 25 n.56.

IV. ABILITY TO TRANSFER POSSESSION TO A THIRD PARTY IS CONSISTENT WITH THE FACT THAT A DISABILITY MAY BE TEMPORARY

The fact that legal disabilities from gun possession can be temporary is also inconsistent with the Eleventh Circuit’s theory that a person with such a disability cannot lawfully transfer his ownership interests.

Under § 924(g)(8), for example, a person subject to a court order restraining him from certain activities involving an intimate partner may not lawfully possess a firearm. Section 926(a)(3) authorizes the Attorney General to adopt “regulations providing for effective receipt and secure storage of firearms relinquished by or seized from persons described in” § 922(g)(8). Upon “lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms … shall be returned forthwith to the owner or possessor” or delegate thereof. § 924(d)(1).

Under this provision, the government may take possession of and store a firearm for a person under a legal disability, but the owner is also free to transfer the firearm to a third party—the point is to prohibit the person’s *own possession*. The person does not lose ownership rights as a result of the disability; rather, the law mandates that the firearm be returned to the owner if the disability is removed.

By the same token, even under § 922(g), a conviction for a crime punishable by imprisonment for more than one year may be overturned, at which

point he is entitled to recover his firearms. For instance, Senator Ted Stevens was convicted of a crime punishable by imprisonment for more than one year, but that conviction did not extinguish his ownership interests in any firearms that he may have had. His conviction was set aside, *see United States v. Stevens*, No. 08-cr-231, 2009 WL 6525926 (D. D.C. April 7, 2009), and at that point he could have regained possession of his firearms. The same result could obtain in a successful appeal of a disabling conviction, or in a habeas challenge mandating vacatur of a state-court conviction. Section 921(a)(20) addresses such situations expressly:

Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

See also 18 U.S.C. § 921(a)(33)(B)(ii) (similar for person convicted of misdemeanor crime of domestic violence). As this Court has explained, the foregoing provision “does not simply say that a person whose civil rights have been restored is exempted from § 922(g)’s firearms disqualification. It says that the person’s conviction ‘shall not be considered a conviction.’” *Beecham v. United States*, 511 U.S. 368, 372 (1994).

The same could be said about all of the above scenarios, each of which demonstrates that a disabling conviction may not be permanent. It would be a gross violation of due process to extinguish a per-

son's property interests in a firearm the moment the disabling conviction occurs, leaving him with nothing if and when the conviction is erased.

V. LIKE FORFEITURE, PERMANENT RETENTION OF FIREARMS MAY BE AN EXCESSIVE FINE UNDER THE EIGHTH AMENDMENT

Forfeitures are subject to the Eighth Amendment's guarantee that "excessive fines [may not be] imposed." *United States v. Bajakajian*, 524 U.S. 321 (1998). CAFRA provides that a claimant "may petition the court to determine whether the forfeiture was constitutionally excessive." 18 U.S.C. § 983(g)(1). The court must weigh the "gravity of the offense" and whether the forfeiture is "grossly disproportional" to the offense. 18 U.S.C. § 983(g)(2)-(3).

The permanent retention by the government of a firearm without any process is equally subject to the Eighth Amendment's prohibition on excessive fines. The retention may not be formally labeled a "fine," the only difference is that the government takes not money, but a firearm.

In *United States v. Ferro*, 681 F.3d 1105 (9th Cir. 2012), the Ninth Circuit applied the Eighth Amendment and CAFRA to "the largest civil *in rem* forfeiture proceeding against firearms unlawfully possessed by a convicted felon in American history," involving "hundreds of collectable guns valued at \$2.55 million." *Id.* at 1106. Many of the guns were so rare that the government wanted to place them in the ATF museum. "Some of the firearms are gold-plated; others are early twentieth-century rarities; several are valued at \$10,000 or more." *Id.* at 1108.

Although he had assigned his ownership interest in the collection to his wife before his disabling conviction, the husband had access to the firearms at the family home, and thus possessed them in violation of § 922(g). *Id.* at 1107. The court held that the wife was not an innocent owner, since she knew of her husband's conviction, even if she did not know the legal ramifications. *Id.* at 1113.

While those facts made the entire collection subject to forfeiture under § 924(d)(1), the *Ferro* court held that “forfeitable property is subject to review under the Excessive Fines Clause even if it can be considered an ‘instrumentality’ of an offense.” *Id.* at 1114. “After CAFRA,” the court observed, “we think it clear that all types of civil forfeitures—save perhaps forfeitures of contraband, such as unregistered hand grenades or illegal drugs—are subject to review for excessiveness.” *Id.* The firearms were an instrumentality of the offense of possession of a firearm by a felon, but the person being punished by the forfeiture was the wife-owner, not the husband-felon. “Because we conclude that the Constitution requires consideration of the culpability of the property’s owner, a district court must undertake that analysis, even if it is not required to do so under the statute.” *Id.* at 1117. That “excessiveness review must consider the individualized culpability of the property’s owner and, when analyzing the offending conduct, it must focus only on the conduct that actually gave rise to the forfeiture of the property at issue, not other criminal conduct by the same person.” *Id.* at 1107.

The facts here are in sharp contrast with *Ferro*. Petitioner duly surrendered his firearms to the gov-

ernment for storage before his conviction. After his conviction, he never possessed his firearms, which were thereby not instrumentalities of crime subject to forfeiture under § 924(d). He sought to transfer his ownership of the firearms to a buyer or to his wife, but the court refused to allow them to take possession. *Henderson*, 555 Fed. Appx. at 853. Under these facts, the government's extra-legal expropriation of the firearms constitutes an excessive fine under the Eighth Amendment.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the judgment should be reversed.

Respectfully submitted,

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