

Disposing of a Defendant's Guns after a Felony Conviction

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On Monday, the United States Supreme Court unanimously decided a case about the disposition of a defendant's guns after the defendant has been convicted of a felony. The case is [Henderson v. United States](#). This post discusses the case and its implications for North Carolina.

Background. Tony Henderson was a gun owner. He was charged with a felony drug offense in federal court. He surrendered his guns to the FBI as a condition of his pretrial release, and eventually pled guilty to a felony, rendering him ineligible to possess firearms under federal law. 18 U.S.C. § 922(g)(1). He asked the FBI to transfer the guns to a friend who, according to Henderson, had agreed to purchase them. The FBI refused, asserting that transferring the guns at Henderson's direction would amount to giving him constructive possession of the guns. Henderson took the matter to court.

Ruling. The trial judge and the court of appeals sided with the FBI, but the Supreme Court reversed unanimously. It noted that federal law prohibits felons from *possessing* guns, not *owning* them. Possession includes constructive possession, so a court can't order a felon's guns transferred to someone who will allow the felon to access them or control their use. But so long as the recipient will not do that, it is an "incident of ownership" that the felon may "sell or otherwise dispose of" his or her guns as he or she sees fit. The Court also noted that reading section 922(g) to prohibit a felon from selling his or her guns would not advance the public safety purpose of the statute.

The Government suggested that a felon could transfer his or her guns to a licensed dealer for sale on the open market, and the Court agreed that was a permissible course of action. But it ruled that was "not the only [option] available," so long as the sale or transfer did not leave the felon in control of the guns. (The Court suggested that a court could "ask the proposed transferee to promise to keep the guns away from the felon," and could disapprove a transfer if dissatisfied with the likely outcome.)

Limits of the ruling. The decision doesn't mean that all felons can direct the disposition of their guns. At least four limitations arise from the opinion. First, the decision involves the Court's interpretation of a federal statute and the equitable powers of the federal courts and is directly binding only in federal proceedings. (The possible effect on state court is discussed below.) Second, as noted above, a court may not permit a felon to sell or transfer his or her guns to a person who will allow the felon to control them. Third, a felon who used his or her guns in a crime may not have the same right to dispose of them as Henderson did. Henderson's drug offense "had nothing to do with his firearms," and the Court suggested in footnote one that the unclean hands doctrine may have supported a denial of Henderson's request had it been otherwise. This is particularly relevant for defendants who are convicted of possession of a firearm by a convicted felon. Fourth, the Court repeatedly expressed its view that a court *may* order a law enforcement agency to dispose of a felon's guns at his or her direction, but never stated that a felon in Henderson's position is *legally entitled* to direct the disposition of his or her firearms. Nonetheless, the opinion seems to assume that in the usual case, a court will allow a defendant in Henderson's position to direct the disposition of his or her guns, and it seems to me that doing otherwise might amount to an unlawful taking. *See United States v. Brown*, 754 F. Supp. 2d 311 (D.N.H. 2010) (in a case in which the defendant was convicted of offenses that did not subject his firearms to forfeiture or confiscation as contraband, ordering the destruction of firearms lawfully owned by a defendant subsequently convicted of a felony "would seem to raise serious Takings Clause issues" because such guns "remain valuable tangible

personal property belonging to the convicted felon” and the government may not “simply confiscate and destroy such valuable property without first affording due process and payment of just compensation”).

Applicability in state court. As noted above, *Henderson* directly concerns the authority of the federal courts. North Carolina law is different than federal law in at least two important ways. First, our felon-in-possession statute, G.S. 14-415.1, does prohibit felons from owning guns, not just possessing them. Second, G.S. 15-11.1, the statute concerning the disposition of evidence, gives a judge several options for disposing of firearms, and transferring firearms at the direction of the defendant is not among them. Thus, it does not appear that *Henderson* is directly relevant to North Carolina. However, some the concerns that animate *Henderson* may arise in North Carolina cases as well, and I am not at all certain that depriving newly-minted felons of the power to direct the disposition of firearms that they owned lawfully prior to their convictions is constitutionally permissible, even if it is authorized by statute, unless the guns are subject to forfeiture or confiscation as contraband.