

TO: GEOFFREY BERMAN
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, NY 10007

Attn: **Jacob Warren**

NOTICE OF MOTION

Morris Wilson hereby moves this Court, pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, to order the return of his personal property seized by the government. Specifically, Mr. Wilson seeks the return of three items: 1) his 32 GB iPhone 6; 2) his 128 GB iPhone 7; and 3) his 16 GB 7th Generation iPod.

JURISDICTION

The district court where a defendant has been convicted and sentenced has ancillary jurisdiction to decide the defendant's post trial motion for return of property under Rule 41(g) of the Federal Rules of Criminal Procedure. See Soveiro v. United States, 967 F.2d 791, 792-93 (2d Cir. 1992); Mora v. United States, 955 F.2d 156, 158 (2d Cir. 1992).¹ Where criminal charges are not pending, courts "should construe a motion requesting return of property under Rule 41(g) as initiating a civil action in equity." Lavin v. United States, 299 F.3d 123, 127 (2d Cir. 2002) (citing Mora, 955 F.2d at 158-59).

FACTUAL BACKGROUND

The Government charged Mr. Wilson by information on March 12, 2018, with one count of firearms trafficking. Mr. Wilson pled guilty that same day before United States Magistrate Judge Sarah Netburn. This Court sentenced Mr. Wilson

¹ Although Soveiro addressed Rule 41(e), in 2002 the Advisory Committee renumbered Rule 41(e) as Rule 41(g) with minor "stylistic (changes) only." See Fed. R. Crim. P. 41, Advisory Committee Notes, 2002 Amendments.

on July 24, 2018 to 24 months' imprisonment. The case is now complete, and Mr. Wilson is not appealing his conviction.

The Government seized Mr. Wilson's electronic devices upon his arrest, pursuant to a search warrant authorized by Magistrate Judge Andrew J. Peck. See PSR at 14. The Government still possesses the devices and has not initiated forfeiture proceedings. A paralegal in my office, Dante O'Connell, first contacted Mr. Warren about returning the devices on July 30, 2018. The government through AUSA Warren indicated that he would "contact the agents and revert back." See Exhibit A, Federal Defenders Email Correspondence with AUSA Warren. Mr. O'Connell followed up on August 9 with no response. *Id.* For weeks to follow, (August 24, and up to today), AUSA Warren has not returned the property and has yet to provide any legal authority that allows them to retain the devices. Each request asking for legal authority they rely on to support their continued seizure has been ignored and the Government's response has been to prevaricate and state that they still needed to download one of the phones. *Id.* For weeks we have asked them to provide legal support for their seizure and they have yet to respond. Left with no other option, we file this motion for the immediate return of the devices. *Id.*

LEGAL STANDARDS

When the government seizes property but fails to commence a forfeiture proceeding in a timely way, a 41(g) motion is the appropriate means to seek the return of the property. Mora, 955 F.2d at 158. Rule 41(g) provides as follows:

A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

To prevail on a 41(g) motion, petitioner “must demonstrate that (1) he is entitled to lawful possession of the seized property; (2) the property is not contraband; and (3) either the seizure was illegal or the government’s need for the property as evidence has ended”. Ferreira v. United States, 354 F. Supp. 2d 406, 409 (S.D.N.Y. 2005).

Where, as in this case, criminal proceedings are no longer pending against the defendant, such a motion is treated as a civil equitable proceeding. Soveiro, 967 F.2d at 792-93; De Almeida v. United States, 459 F.3d 377, 379 (2d Cir. 2006).

ARGUMENT

This Court should exercise its equitable jurisdiction to order the return of Mr. Wilson’s cell phone. While the government has a right to seize evidence for use in investigation and prosecution, upon the termination of criminal proceedings, seized property other than contraband, should be returned to the rightful owner. United States v. David, 131 F.3d 55, 59 (2d Cir. 1997); see also United States v. Bein, 214 F.3d 408, 411 (3d Cir. 2000) United States v. Chambers, 192 F.2d 374, 376 (3d Cir. 1999); United States v. Wilson, 540 F.2d 1100, 1103 (D.C. Cir. 1976) (district court has both the jurisdiction and duty to return property against which no government claim lies). Here, Mr. Wilson satisfies all of the criteria for return of his cell phone

under Rule 41(g): he is entitled to lawful possession of his phone; it is not contraband; and the government's need for the phone as evidence has ended.

1. Petitioner Is Entitled to Lawful Possession of His Cell Phone.

Mr. Wilson has a presumptive right to the return of his cell phone because the criminal proceedings against him have ended and the device is not needed as evidence. When a criminal proceeding has come to an end, as is the case here, the evidentiary burden for a Rule 41(g) motion shifts to the government. Santos v. United States, No. 04 Civ. 9716(JFK), 2005 WL 637427, at * 1 (S.D.N.Y Mar. 17, 2005); see also United States v. Chambers, 192 F.3d 374, 377 (3d Cir. 1999) ("But when criminal proceedings have ended, as they have here, that burden shifts to the government."); McSurley v. Ratliff, 398 F.2d 817 (6th Cir. 1968) ("The general rule is that seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated.").

2. The Cell Phone Is Not Contraband.

The government does not allege that petitioner's cell phone is contraband and there are no facts to indicate otherwise. Indeed, the government has offered no legitimate reason to keep or further search the phone following Mr. Wilson's plea and sentencing. The government has advised that it believes the phone was used in furtherance of firearms trafficking – the same crime for which Mr. Wilson has already been convicted and sentenced.

3. The Government's Need for the Cell Phone Has Ended.

The government seized petitioner's cell phone pursuant to a valid search warrant more than seven months ago. Investigators have thus had ample opportunity to search it. Yet the government advises that it has recently sent the phone to a third-party for the purpose of unlocking it. Presumably the government intends to copy and search its contents. But whatever interest the government may have had in petitioner's cell phone prior to his criminal prosecution, it can no longer justify its ongoing seizure of the device or further efforts to search it.

As the Second Circuit noted in United States v. Ganas, there may be good reason for the government to retain a digital device "*during the course of an investigation and prosecution*" in order to preserve, authenticate, and effectively present the evidence at trial. 824 F.3d 199, 219 (2d Cir. 2016) (en banc) (emphasis added). But at the same time, the court cautioned that the government may violate the Fourth Amendment by seizing and indefinitely retaining the device or its contents. Id. at 217.

The "general touchstone" of reasonableness governs the execution of a warrant. United States v. Ramirez, 523 U.S. 65, 71 (1998). Consequently, the government may seek to justify a lengthy off-site review of seized data based on several variables, including the storage capacity of the device, difficulties created by encryption, and computer-lab workload. See Fed. R. Crim. P. 41(e)(2)(B), Advisory Committee Notes, 2009 Amendments. But these factors do not provide an "independent basis" for retaining digital devices or the data they contain. United

States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1171 (9th Cir. 2010) (en banc) (per curium). In sum, the fact that the government once obtained a valid warrant has no bearing on the reasonableness of its continued possession of Mr. Wilson's cell phone *after* he has been sentenced and waived his right to appeal.

Rule 41(g) provides a statutory mechanism for addressing the question of reasonableness and retention time. Ganias, 824 F.3d at 219. And where, as here, the government's need to retain evidence has ceased, the "Court's equitable powers confer on it the jurisdiction as well as the duty to return such evidence to its owner." United States v. Farese, 1987 WL 28830 (S.D.N.Y. 1987). Now that the criminal proceedings against Mr. Wilson are concluded, his property should be returned to him, not copied and searched without a new warrant.

Additionally, the government would not be entitled to retain any data that it might copy from Mr. Wilson's cell phone. And to the extent the government has already copied the phone's contents, petitioner is entitled to the return or destruction of those copies. See Lake v. Ehrlichman, 723 F. Supp. at 834-35. (D.D.C. 1989) (exercising the court's inherent equitable authority to order the expungement of wiretap logs); Smith v. Nixon, 664 F. Supp. 601, 604–605 (D.D.C. 1987) (same). Indeed, any future search of Mr. Wilson's cell phone would be a significant and unjustified invasion of his Fourth Amendment privacy rights.

The government's interest in the cell phone evaporated when Mr. Wilson was convicted and sentenced. It no longer has any legitimate need to keep the phone or continue its efforts to search it. This Court should therefore order the return of Mr.

Wilson's cell phone and the destruction of any copies of it that the government may have made.

CONCLUSION

For the reasons stated, the Court should grant this motion for return of petitioner's property.

Dated: September 24, 2018

Respectfully submitted,
Federal Defenders of New York

By: /s/
Sabrina Shroff
Attorney for Defendant
Federal Defenders of New York
52 Duane Street, 10th Floor
New York, New York 10007
Tel.: (212) 417-8713