

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL A. BACON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Courts widely recognize the general rule that seized property, other than contraband, should be returned to its rightful owner once criminal proceedings have ended. Federal Rule of Criminal Procedure 41(g) provides a mechanism whereby “a person aggrieved...by the deprivation of property may move for the property’s return.” Rule 41(g) states that the district court “must receive evidence on any factual issue necessary to decide the motion.” This case raises the question of what evidentiary inquiry is required when the government responds to a post-conviction motion under Rule 41(g) by asserting that it lacks physical possession of the seized property.

May a district court dispense with the evidentiary inquiry required under Rule 41(g) if the government says it does not have physical possession of the seized property, as the Tenth Circuit allows, or must the district court first receive evidence and resolve factual disputes to determine what happened to property requested under Rule 41(g) but never returned, as the plain language of the Rule requires and the federal circuit courts uniformly hold?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Alexander Bacon respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on August 21, 2018.

DECISION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is published at *United States v. Bacon*, 900 F.3d 1234 (10th Cir. 2018) and is reproduced in the Appendix at A-1. The decision of the district court denying Mr. Bacon's motion under Federal Rule of Criminal Procedure Rule 41(g) is included in the Appendix at A-12.

JURISDICTION

The Tenth Circuit entered judgment on August 21, 2018. *See* App. at A-1. Mr. Bacon did not file a petition for rehearing. Justice Sotomayor extended the time in which to file this petition until January 18, 2019. *See* App. at A-16. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Federal Rule of Criminal Procedure 41(g)

(g) Motion to Return Property. 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.

STATEMENT OF THE CASE

I. Mr. Bacon’s property is seized by state officials and held for use as evidence in his federal prosecution.

In March 2014, Mr. Bacon was arrested by state police on state charges. *See* App. at A-1. During the arrest, police seized property in Mr. Bacon’s possession, including keys, the title to a vehicle, a wallet, clothing, a bank robbery demand note, a small container with a substance that tested positive for methamphetamine, and numerous other personal items.

In November 2014, the federal government indicted Mr. Bacon on five counts of bank robbery, in violation of 18 U.S.C. § 2113(a). Federal officials asked the state authorities to hold all of Mr. Bacon’s seized property for use as evidence in the federal case. In April 2015, Mr. Bacon entered a guilty plea in the state prosecution that resolved all of the state charges against him. That same month, while Mr. Bacon’s federal case was pending, state police, ignoring the federal hold on the seized property, released several of the seized items to Mr. Bacon’s ex-wife.

A few months later, Mr. Bacon pleaded guilty under a plea agreement to three counts of bank robbery in the federal case. Before he was sentenced, Mr. Bacon asked the court to order the government to return his seized property. *See* App. at A-20. The district court asked who was holding Mr. Bacon’s property. *Id.* at A-21. Defense counsel believed the state police had physical possession of the property, but given the federal prosecution, it was, as a matter of constructive possession, “ultimately in

the federal authority's hands now." *Id.* The district court then released any hold the federal government had on Mr. Bacon's property. *Id.* at 37-39. Mr. Bacon was ultimately sentenced to prison for eighty months.

After Mr. Bacon's time to appeal expired, defense counsel went to the Salt Lake City Police Department to retrieve Mr. Bacon's property for him. Several items were returned to him. But there was a major discrepancy between what had been seized and what was turned over by state officials. *See App.* at A-17.¹

II. Mr. Bacon seeks the return of his seized property under Federal Rule of Criminal Procedure 41(g).

In February 2016, Mr. Bacon filed a *pro se* motion under Federal Rule of Criminal Procedure 41(g) asking the federal government to show cause why he had not received all of his seized property. He sought an itemization of and accounting for all of the seized property, as well as money damages for lost property.

The district court re-appointed defense counsel to represent Mr. Bacon in the Rule 41(g) proceeding. At the hearing, the prosecutor denied there was a significant disparity between what was seized and what was returned. The prosecutor admitted, however, that, while the federal hold was pending, state officials had released the title

¹ This chart was included in Mr. Bacon's opening brief in the Tenth Circuit. It is a side-by-side comparison created by undersigned counsel of the property inventories in the appellate record. The arrows (added by counsel) show the items seized and returned; the question marks (also added by counsel) show the items seized but unaccounted for. *See Appellant's Opening Brief, United States v. Bacon, No.16-4106, 2017 WL 1710364, *26 (10th Cir. Aug. 21, 2018).*

to Mr. Bacon's van, as well as a wallet and keys, to his ex-wife. *See* App. at A-37-39. The prosecutor seemed to admit that the federal government did still have some of Mr. Bacon's property: "we only have contraband and anything that was taken as evidence during [Mr. Bacon's] robbery cases[.]" *Id.* at A-38. The government did not elaborate on what property was withheld as contraband, and the district court did not receive evidence at the hearing.

After the hearing, the district court denied Mr. Bacon's Rule 41(g) motion in a written order. App. at A-12. The court found it undisputed that Mr. Bacon's property had been seized by state officials but held for use as evidence in his federal prosecution. The district court determined that any property not returned to Mr. Bacon was contraband. Ultimately, the court denied relief because the government was not in physical possession of the property that Mr. Bacon claimed was missing, and the court lacked jurisdiction to award money damages for the missing items under Rule 41(g). Mr. Bacon timely appealed.

III. The Tenth Circuit affirms the denial of the Rule 41(g) motion.

Mr. Bacon made three arguments in the Tenth Circuit in support of reversal. First, the district court erred by failing to order the release of property in federal constructive possession. Second, the district court erred by failing to resolve material factual disputes, as required by Rule 41(g), including which property was seized and which was returned, whether all the seized property was accounted for, whether Mr.

Bacon's property was wrongfully released to his ex-wife while the federal criminal case was pending, and whether any evidence supported the prosecutor's assertion that the property being withheld was, in fact, contraband. Third, the district court erred by denying Mr. Bacon's motion on the ground that he had adequate legal remedies.

The Tenth Circuit affirmed. The Court of Appeals held the district court did not abuse its discretion by denying Mr. Bacon's Rule 41(g) motion on the ground that he had adequate legal remedies under state law. The Tenth Circuit reasoned:

The disputed property in this case was seized by state officials pursuant to a state warrant and held as evidence for state charges. While the federal government later informed the state that it would be filing federal charges and asked the state to hold the property as evidence for the pending federal case, there is no indication in the record that the property ever physically changed hands. Even when the property was in the constructive possession of the federal government, the state retained actual, physical custody over it. Appellant has presented no persuasive argument as to why he cannot use available state processes to obtain the return of, or compensation for, property that was seized by the state, retained in the physical custody of the state, and allegedly lost or improperly disposed of by the state.

App. at A-8.

The Court of Appeals also concluded that, because the motion was denied on adequate-remedy-at-law grounds, the district court was not required to resolve disputed issues of fact regarding the seized property. The Tenth Circuit acknowledged that Rule 41(g) says a district court "must receive evidence on any factual issue necessary to decide" the motion. *Id.* at A-9. However, the Court of Appeals reasoned: "[T]he district court was not required to resolve all of the disputed

factual issues in this case—who owned the van, what property was missing, whether the withheld property was contraband *per se* or derivative contraband, etc.—in order to decide that Appellant has an adequate remedy at law[.]” *Id.* According to the Tenth Circuit, because “these factual issues were … not ‘necessary to decide’ the Rule 41(g) motion,” the district court “did not err in declining to receive evidence regarding them.” *Id.*

This petition follows.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Tenth Circuit’s decision is wrong—it mistakenly relieves a district court of its obligation, made plain in the text of the Rule, to receive evidence and resolve disputed issues of fact before deciding a Rule 41(g) motion. The Tenth Circuit’s decision also conflicts with decisions in other federal circuits, which uniformly hold that a district court may not simply rely on the government’s bare assertions that it lacks physical possession of the seized property and must conduct the evidentiary inquiry required by Rule 41(g) as a predicate to deciding the motion. Finally, this case presents an opportunity to establish with clarity and uniformity the district court’s fact-finding obligations under Rule 41(g)—an issue of great and recurring practical importance to criminal defendants and fundamental to the integrity of the criminal justice process.

I. The Tenth Circuit’s decision is wrong because it is contrary to the plain text of Federal Rule of Criminal Procedure 41(g).

Rule 41(g) provides that the district court “must receive evidence on any factual issue necessary to decide the motion.” Fed.R.Crim. P. 41(g). The decision below is wrong because, contrary to the plain language of Rule 41(g), the Tenth Circuit’s affirmance improperly relieved the district court of its obligation to conduct an evidentiary inquiry before deciding whether to grant or deny Mr. Bacon’s post-conviction motion for return of property.

First, the decision below affirms the denial of Rule 41(g) relief, even though the key factual determination in this case—that the state, not the federal government, had physical possession of the seized property—was not based on evidence received by the district court. The district court said it relied on two types of “evidence” to conclude that the state had physical possession of all of Mr. Bacon’s seized property: (1) the parties’ representations and (2) the property inventories submitted by Mr. Bacon. App. at A-14. It is well-settled that unsworn representations of lawyers are not evidence. *See, e.g., Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 853 (7th Cir. 2002) (“[I]t is universally known that statements of attorneys are not evidence.”); *Mora v. United States*, 955 F.2d 156, 158 (2nd Cir. 1992) (“Research has revealed no authority for the proposition that a district court must rely on a representation, made by the government or any other litigant for that matter. Instead, in making a determination, a trial court must rely on the evidence before it.”).

Moreover, even if credible, the prosecutor’s representations could not support the district court’s conclusion. The prosecutor admitted there was property in the federal government’s possession: “we only have contraband and anything that was taken as evidence during his robbery case[.]” App. at A-38. This statement, at minimum, triggered the court’s fact-finding duties under Rule 41(g). Although the court received no evidence on the issue, it determined the withheld property was contraband. *See* A-13.

Likewise, the inventories are not evidence of the government’s possession or disposition of the seized property. It is obvious from even a cursory review of the inventory lists, *see* App. A-17, that only a sub-set of the seized property was identified and accounted for before the court denied Mr. Bacon’s motion. Significantly, there are items on the returned property inventory that do not appear on the seized property list. The property inventory is not evidence that supports the court’s factual determination—it only establishes that property seized from Mr. Bacon is missing and raises questions, in need of resolution, about what happened to those items, including evidence improperly released by state officials while Mr. Bacon’s federal case was pending.

Second, the decision below acknowledges that the district court left disputed issues of fact unresolved but holds that resolution of those factual disputes was unnecessary “to decide that Appellant has an adequate remedy at law[.]” App. at A-9.

The Tenth Circuit misstated, and misapplied, the law. Rule 41(g) directs a district court to “receive evidence” on issues of fact necessary to determine whether the movant is entitled to the return of property, and not, as the decision below says, to determine whether the movant might have some other available remedy in some other forum. As the Third Circuit has explained in this context: “[T]he question of remedies should arise only after the district court has investigated the status of the seized property...a fact finder may not deny a Rule 41(g) motion based on a prospective assessment of the remedies that might (or might not) be available.” *United States v. Albinson*, 356 F.3d 278, 282–83 (3rd Cir. 2004). Here, the Tenth Circuit was wrong to conclude that the availability of relief under state law excused the court’s fact-finding duties under Rule 41(g).

Accordingly, the decision below is contrary to the plain language of Rule 41(g). Certiorari is warranted because the Tenth Circuit incorrectly interpreted and misapplied the evidentiary-inquiry requirement in Rule 41(g), relieving the district court of its obligation to resolve material factual disputes on the basis of evidence before ruling on the motion.

II. The Tenth Circuit’s decision is inconsistent with the weight of judicial authority on the issue.

The decision below affirmed the denial of a Rule 41(g) motion on the ground that the state had physical possession of the seized property, and therefore, Mr. Bacon should have pursued a remedy under state law. The Tenth Circuit never contended

with the fact that Mr. Bacon's property was in the federal constructive possession of the United States. Mr. Bacon's case would have been remanded for fact-finding in every other circuit that has considered the issue.

Unlike the Tenth Circuit, the majority of circuits hold it is error to deny a post-conviction motion under Rule 41(g) based on the government's bare assertion that it does not have physical possession of the seized property. Rather, in every other circuit that has considered the issue, the district court must first determine what happened to property sought but not returned, and must engage in this inquiry on the basis of evidence, to comply with the plain language of Rule 41(g). *See, e.g., United States v. Cardona-Sandoval*, 518 F.3d 13, 16–17 (1st Cir. 2008) (vacating denial of Rule 41(g) motion and remanding for evidentiary determination, where district court relied only “on the government's bare assertion that it no longer retain[ed] possession of the property” to support its decision); *Rufu v. United States*, 20 F.3d 63, 65 (2nd Cir. 1994) (reversing denial of Rule 41(g) motion because “[a]t the very least, the district court was required to take evidence and make factual findings to identify any items still in the possession of the Government and any items that might have been lost”); *United States v. Chambers*, 192 F.3d 374, 377-78 (3rd Cir.1999) (vacating denial of Rule 41(g) motion and remanding because “[t]he government must do more than state, without documentary support, that it no longer possesses the property at issue”); *United States v. Hess*, 982 F.2d 181, 187 (6th Cir. 1992) (vacating denial of Rule 41(g) motion and

remanding where district court took no evidence to resolve disputed issues of fact); *United States v. Stevens*, 500 F.3d 625, 628–29 (7th Cir. 2007) (vacating denial of Rule 41(g) motion and remanding, because “whether the Government still possesses the property at issue is a question of fact” and “district court failed to receive evidence to support its factual determinations as required by Rule 41(g)’’); *United States v. Burton*, 167 F.3d 410, 410–11 (8th Cir.1999) (reversing denial of Rule 41(g) motion and remanding where district court did not receive evidence to determine who had custody of subject property); *United States v. Gladding*, 775 F.3d 1149, 1153 (9th Cir. 2014) (reversing denial of Rule 41(g) motion and remanding because government’s “representations are not evidence” and thus, cannot discharge court’s duty to receive evidence and resolve factual disputes); *United States v. Potes Ramirez*, 260 F.3d 1310, 1314 (11th Cir. 2001) (reversing denial of Rule 41(g) motion and remanding where district court did not require the government to submit at least some evidence in support of its representation that it did not possess the property).

The Third Circuit’s approach is particularly instructive because it has articulated specific guidance on the scope of the evidentiary inquiry required under Rule 41(g). See *United States v. Chambers*, 192 F.3d 374 (3rd Cir.1999). In *Chambers*, the defendant filed a Rule 41(g) motion for return of property seized by the government during his arrest. *Id.* at 375. The government argued the motion was moot because it no longer retained possession of the seized property. *Id.* at 376. The district court agreed, and

denied Rule 41(g) relief based on the government's representation that the property at issue was not in its physical possession and therefore could not be returned. *Id.*

The Third Circuit reversed, holding the "government cannot defeat a properly filed motion for return of property merely by stating that it has destroyed the property or given the property to third parties." *Id.* at 377. Rather, "[t]he government must do more than state, without documentary support, that it no longer possesses the property at issue." *Id.* at 377-78. The Third Circuit reasoned:

The government asserts that it is obvious that in order for a District Court to grant a motion for return of property there must be something to return. This argument might succeed if the government had never had actual or constructive possession of the property at issue [.] However, that is not the case here. In essence, the government argues that Chambers' motion under Rule 41[g] is moot because the government no longer has anything to return. Such an argument has been rejected uniformly by the Courts of Appeals.

192 F.3d 374, 376-77 (3rd Cir. 1999) (internal citations omitted).

The Third Circuit reasoned that Rule 41(g) requires a district court to make certain evidentiary inquiries before deciding a motion for return of property:

If ... the government asserts that it no longer has the property sought, the District Court must determine, in fact, whether the government retains possession of the property; if it finds that the government no longer possesses the property, the District Court must determine what happened to the property. The District Court must hold an evidentiary hearing on any disputed issue of fact necessary to the resolution of the motion..... If the District Court concludes that the government's actions in either regard were not proper, it shall determine what remedies are available.

Id. at 378 (citations omitted). The Third Circuit made clear, however, that an evidentiary *hearing* is not needed in every case—but an evidentiary *determination* is

required in every case by the plain language of Rule 41(g). *See Albinson*, 356 F.3d at 281 (holding “affidavits or documentary evidence, such as chain of custody records, may be sufficient to support a fact finder’s determination” under Rule 41(g)).

Here, as the Tenth Circuit acknowledged, the district court’s main factual finding—the one that animated the decision to deny Rule 41(g) relief—was that the government did not have physical possession of the seized property and therefore, Mr. Bacon should pursue relief in state court. This finding anchored the district court’s reasoning (and compelled the affirmance), but it was made without receiving evidence to resolve disputed issues of fact, including an inquiry into the status of property held in federal constructive possession. The weight of judicial authority counsels for a different result in Mr. Bacon’s case—a remand for fact-finding, consistent with the requirements of Rule 41(g), where the district court must determine, on the basis of evidence, what happened to property that Mr. Bacon claims was seized but never returned.

III. Granting the petition will allow this Court to establish with clarity the district court’s fact-finding obligations under Rule 41(g)—a procedural question of great and recurring practical importance to criminal defendants and fundamental to the integrity of the criminal justice process.

The government is clearly permitted to seize evidence for use in investigations and trial. Rule 41(g) provides a mechanism for a criminal defendant to recover property wrongfully withheld after the criminal proceedings have terminated. A

motion under Rule 41(g) “represent[s] a means by which a criminal defendant can determine her rights in property[.]” *Hunt v. U.S. Dept. of Justice*, 2 F.3d 96, 97 (5th Cir. 1993). Moreover, “reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property.” Fed. R. Crim. P. 41(g) advisory committee’s notes to the 1989 amendments. It is reasonable to expect, as the plain language of the Rule requires and the weight of judicial authority holds, that complete relief under Rule 41(g) will include an evidentiary determination of what happened to property seized by the state but held as evidence in a federal case, when the government cannot account for it.

As this Court has acknowledged: “the procedural aspects of law deal with the practical affairs of men and do not constitute an abstract system of doctrinaire notions.” *Di Bella v. United States*, 369 U.S. 121, 124 (1962). Clarifying the fact-finding procedure under Rule 41(g) has practical implications. “[T]he required evidentiary determination [under Rule 41(g)] may prove beneficial in a number of ways. It might assist in the recovery of property by triggering an investigation that results in the discovery or recovery of property the government initially thought to be lost or destroyed. It also provides an incentive for the government to retain accurate records of seized property, consistent with its regulatory obligations, as record-keeping renders the burden of an evidentiary inquiry minimal.” *Cardona-Sandoval*, 518 F.3d at 17. The district court’s fact finding in the Rule 41(g) context also “may result in other

benefits... such as uncovering violations by government officers, identifying third parties in possession of the property, and encouraging accurate inventory-keeping by the government.” *Peloro v. United States*, 488 F.3d 163, 177 n. 15 (3rd Cir. 2007).

Moreover, “[i]t is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner.” *United States v. Wilson*, 540 F.2d 1100, 1103 (D.C. Cir. 1976). By establishing with clarity the evidentiary inquiry required under Rule 41(g), this Court will ensure that federal courts properly exercise their jurisdiction and duty to meaningfully accomplish this goal.

CONCLUSION

Mr. Bacon respectfully asks this Court to issue a writ of certiorari.

Respectfully submitted,

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