

19-7552

No.

Supreme Court, U.S.  
FILED

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In The  
Supreme Court of the United States

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JOSEPH MICHAEL GUARASCIO,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Petition for a Writ of Certiorari to the  
Fourth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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JOSEPH MICHAEL GUARASCIO

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ORIGINAL

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## QUESTIONS PRESENTED

**CAN THE GOVERNMENT RETAIN INDEFINITELY PETITIONER'S SEIZED BUSINESS AND PERSONAL ELECTRONIC FILES, DIGITAL DATA AND OTHER PHYSICAL PROPERTY WHEN SAID PROPERTY WAS NOT ABANDONED, FORFEITED, NOR CONSIDERED CONTRABAND AND WHEN THE SAID PROPERTY, AS EVIDENCE SHOWS, STILL EXISTS, IS IN ACTUAL AND CONSTRUCTIVE POSSESSION OF THE GOVERNMENT, AND SHOULD HAVE BEEN RETURNED?**

The above is addressed as the below subsidiary questions in Arguments 1 through 7 herein.

- I. **DID THE LOWER COURT ERR IN DENYING THE PETITIONER THE OPPORTUNITY TO REPLY TO THE GOVERNMENT'S RESPONSE IN OPPOSITION TO HIS MOTION FOR RETURN OF PROPERTY IN VIOLATION OF DUE PROCESS?**
- II. **DID THE LOWER COURTS ERR IN NOT CONSIDERING THE ADDITIONAL EVIDENCE PRESENTED IN PETITIONER'S "APPELLANT'S REPLY" AND "REPLY SUPPLEMENT" BEFORE RULING ON THE MOTION WHEN THESE FILINGS INTRODUCE NUMEROUS EXAMPLES AND EXHIBITED DOCUMENTS THAT DEBUNK THE GOVERNMENT'S RESPONSE?**
- III. **DID THE LOWER COURTS ERR IN NOT ADDRESSING THE ISSUE OF THE AVAILABILITY, FROM THE GOVERNMENT, OF PETITIONER'S BUSINESS AND PERSONAL ELECTRONIC FILES AND OTHER DIGITAL DATA STORED ON THE MIRROR IMAGE / GHOST COPIES OF THE DEVICES SEIZED, ANALYZED, MAINTAINED AND STILL STORED BY THESE AGENCIES?**
- IV. **WAS THE PETITIONER HARMED BY THE GOVERNMENT'S ALLOWING, AS IT CLAIMS, THE DESTRUCTION OF PETITIONER'S DIGITAL PROPERTY AND OTHER ELECTRONIC FILES THAT WERE IN PHYSICAL AND CONSTRUCTIVE POSSESSION OF THE GOVERNMENT, (WHEN THE GOVERNMENT ADOPTED PETITIONER'S CASE FOR PROSECUTION IN FEDERAL COURT), WITHOUT NOTIFICATION AND IN VIOLATION OF HIS RIGHTS?**
- V. **WAS THE PETITIONER HARMED BY THE GOVERNMENT ALLOWING STATE AND COUNTY AGENCIES TO DESTROY PETITIONER'S PHYSICAL / TANGIBLE PROPERTY, WHILE SAID PROPERTY WAS STILL IN CONTROL OF THE GOVERNMENT, AND PETITIONER'S CASE WAS ACTIVELY ON APPEAL?**
- VI. **DID THE LOWER COURT ERR AND FURTHER HARM THE PETITIONER BY THE CONTINUED RETENTION OF HIS PROPERTY AND THE DENIAL OF ACCESS TO HIS BUSINESS AND PERSONAL FILES, PHOTOS AND OTHER ELECTRONIC DIGITAL DATA STORED ON THE MIRROR IMAGES OF THESE ELECTRONIC DEVICES STILL IN THE CUSTODY OF THE F.B.I. AND NOW, AS THE ADDITIONAL EXHIBITS SHOW, ALSO IN THE CUSTODY OF THE N.C. S.B.I.?**
- VII. **IS THE PETITIONER ENTITLED TO COMPENSATION FOR THE DEPRIVATION AND DESTRUCTION OF HIS PERSONAL PROPERTY AND DIGITAL DATA WHEN RECORDS SHOW HE HAS MADE CONTINUOUS EFFORTS TO HAVE HIS PROPERTY RETURNED AND WAS NEVER NOTIFIED OF ANY ORDERS OF FORFEITURE OR ORDERS TO DESTROY SAID PROPERTY?**

## LIST OF PARTIES

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Respondent

UNITED STATES OF AMERICA

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\*\* Addendum - January 22, 2020, Received photographs from F.B.I. as part of a FOIA request showing the Agency possessed equipment and data seized from his residence. (10 of 32 photos attached).

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**On Petition for Writ of Certiorari to the  
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**PETITION FOR A WRIT OF CERTIORARI**

The Petitioner, Joseph Michael Guarascio, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit, entered in Joseph Michael Guarascio v. United States of America, in Fourth Circuit Case Number 19-6739, filed October 1, 2019, denying Guarascio's request for remand on the denial of his Motion for Return of Property and Motion for Reconsideration. Rehearing was denied by order entered on November 18, 2019. The Orders of the Fourth Circuit are unreported, but true and correct copies are included in Appendix A, *infra*. The United States District Court for the Eastern District of North Carolina had previously denied Guarascio's, 41(g), Motion for Return of Property in three unpublished orders, copies of which are, included in Appendix B.

## OPINION BELOW

The decision and order of the Fourth Circuit was unreported. The decision of the District Court was also unreported.

## JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit denying Guarascio's request for remand back to the District Court pursuant to Title 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure...against unreasonable searches and seizures, shall not be violated.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

[N]or shall any person...be deprived of life, liberty, or property, without due process of law...

The Eighth Amendment to the United States Constitution provides:

[N]or excessive fines imposed, nor cruel and unusual punishment inflicted.

The Due Process Clause of Section One of the Fourteenth Amendment to the United States Constitution provides:

[N]or shall any State deprive ant person of life, liberty, or property, without due process of law...

## STATUTORY PROVISION INVOLVED

28 U.S.C. § 2401(a) provides: The six-year statute of limitations set forth applies to bringing of Fed. R. Crim. P. 41(e) Motion for Return of Property.

41 C.F.R. § 128-50.000 states: This part prescribes the policies for the storage and care of seized personal property; the preparation and maintenance of inventory records of its seized personal property ...

Fed. R. Crim. P. 41(g) provides: A person aggrieved by an unlawful ... seizure of property or by the deprivation of property may move for the property's return.

Fed. R. App. P. Rule 25(b) Service of All Papers Required states: ... a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review.



## STATEMENT OF THE CASE

Presenting issues of importance beyond the particular facts and parties involved, this case addresses questions of whether the Government's retention, deprivation, (or destruction), of the Defendant's property, (to include Electronic Files and Digital Data), seized during the investigation and his arrest causes him harm, violates his constitutional rights as listed in the Fourth, Fifth, Eighth and Fourteenth Amendments, and should be returned.

Petitioner further shows that the Government's misconduct in failing to timely serve Petitioner with is Response prevented Petitioner from submitting the evidence contradicting the Government's false assertions to the Court, again causing him harm and, in violation of due process. The Court then abused its discretion, first in ruling Petitioner's Motion was "untimely" and "meritless" without taking evidence, and then by refusing to consider the evidence provided by the Petitioner showing that his property exists, is available, and thereby establishing his Motion could not be untimely or meritless as he still retains interests in his property.

Petitioner contends that these rulings by the lower Courts are in conflict with this Court and other Circuit Precedent, have National implications, and have violated his rights. Noting that the Fourth Circuit only affirmed based on the decision of the District Court, Petitioner asserts the continued deprivation, (or destruction), of property without due process violates his rights and remand is required with instructions to take evidence, make factual findings as to what digital and tangible property is available for return and to determine what compensation is due for any property or files that were lost or destroyed, as the Government cannot retain a defendant's property indefinitely.

Petitioner presents his arguments based upon the following:

## BACKGROUND

1) On September 21, 2009, Petitioner pled guilty to one count of Production of Child Pornography under 18 U.S.C. §2251(a) and (d). Court records show that subsection (d) was listed in error.

2) On February 9, 2010, Petitioner timely filed his §2255 appeal Motion.

3) On February 5, 2014, the Court dismissed his §2255 Motion.

4) Shortly thereafter, (September, 2014), Petitioner began sending, to all agencies involved in his case, letters attempting to have his seized property returned to no avail.

5) On August 8, 2018, after not receiving a response to several letters to the Government Petitioner files his 41(g) Motion for the Return of Property.

6) On October 29, 2018, the Government was ordered to respond by November 12, 2018. (Appx. B (4)).

7) On November 9, 2018, the Government submitted its response to the Court, but did not mail, (serve), a copy on the Petitioner until sometime after November 30, 2018.

8) On December 7, 2018, Petitioner receives the Government's Response.

9) On December 10, 2018, (Monday Morning), Petitioner mails his Reply refuting the claims made by the Government not knowing that the Court had already issued its ruling on the case, on 12/06/18, without Petitioner's Reply.

10) Later that same day, Petitioner receives additional document evidence from a State Agency that also refutes the claims by the Government. Petitioner then began to construct a Supplement to his Reply Brief including the new evidence for the Court to review.

11) On December 12, 2018, Petitioner receives the Order, (signed 12/06/18), denying his Motion as "untimely" and "meritless". (Appx. B (1)).

12) On December 13, 2018, Petitioner mails his Supplement and a Motion to Vacate the 12/06/18 Order.

13) On February 8, 2019, Petitioner received the second Order, (dated 02/01/19), denying his Motion to Vacate and again stating the claim was without merit. (Appx. B (2)).

14) On February 27, 2019, Petitioner files a Motion for Reconsideration.

15) On May 7, 2019, the Motion for Reconsideration was Denied. (Appx. B (3)).

16) On May 14, 2019, Petitioner filed his Notice of Appeal.

17) On June 10, 2019 Petitioner filed his Appeal the the Circuit Court.

18) On October, 8, 2019, Petitioner received a copy of the Judgment from the Appellate Court, (dated Oct. 1, 2019), affirming the dismissal, finding "no reversible error". (Appx. A, #1)

19) On October 8, 2019, Petitioner files for an extension of time that was granted on October 16, extending the deadline to have his Petition before the Court until October 30, 2019. (Appx. A #2)

20) On October 29th, 2019, a Stay of Mandate was issued by the Appellate Court. (Appx A, #3).

21) On November 18, 2019, the Fourth Circuit Court of Appeals issued its Order denying the petition for rehearing and rehearing en banc. (Appx. A, #4)

22) On November 26, 2019, the Mandate was issued. (Appx. A, #5).

## **ARGUMENTS**

### **1. DID THE LOWER COURT ERR IN DENYING THE PETITIONER THE OPPORTUNITY TO REPLY TO THE GOVERNMENT'S RESPONSE IN OPPOSITION TO HIS MOTION FOR RETURN OF PROPERTY IN VIOLATION OF DUE PROCESS?**

A. Petitioner submits that the lower Court refused to consider the Government/A.U.S.A.'s failure to comply with Rule 25 of the Federal Rules of Appellate Procedure regarding Service of their Response in violation of due process and the Certificate of Service. In doing so, the lower Court did not provide the Petitioner a full and fair opportunity to litigate the issues, thereby depriving him of any opportunity to refute and factually challenge the Government's false assertions.

In such a situation, it is within the Court's power to allow or require the [Petitioner] to supply, by amendment, [Reply], or supplement to the Motion, further particularized allegations of fact deemed to support [Petitioner's] standing.

Worth v. Seldin, 472 U.S. 490, 500 (1975). Petitioner contends, that in accordance with Federal Rule of Criminal Procedure, 41(g), "The Court must receive evidence on any factual issues necessary to decide the motion", Id., and as is clear here, this did not happen.

B. Petitioner avers, he was harmed, first by the actions of the A.U.S.A.'s failure to timely serve him the Government's Response, [D.E. 75], which was filed with the Court on November 9, 2018, but, as the evidence shows, was intentionally not put in the mail to the Petitioner until, at least, November 30, 2018, (Ex. MR-1, [D.E. 79 att.1]). Thereby causing the Petitioner not to receive the Response until December 7, 2018, one day after the District Court Judge had already entered his ruling denying the Motion. Then, he was again harmed by the Court's ruling that failed to consider Petitioner's Reply and Reply Supplement, [D.E. 79, 81], that showed document evidence; 1) that all of his digital / electronic property and at least some of his tangible property still exists contrary to the misinformation supplied by the Government that said was destroyed; 2) and clear and convincing evidence that the Government engaged in misconduct in its failure to comply with the rules concerning Petitioner's Motion for Return of Property, which as a result, prevented him from properly presenting his case. (cf. Hesling v. CSX Transporting, 396 F.3d 632, 641 (5th Cir. 2005)). Failure to remand on this issue is in conflict with this Court and other Circuit precedent and violates Petitioner's due process.

2. **DID THE LOWER COURTS ERR IN NOT CONSIDERING THE ADDITIONAL EVIDENCE PRESENTED IN PETITIONER'S "APPELLANT'S REPLY" AND "REPLY SUPPLEMENT" BEFORE RULING ON THE MOTION WHEN THESE FILINGS INTRODUCE NUMEROUS EXAMPLES AND EXHIBITED DOCUMENTS THAT DEBUNK THE GOVERNMENT'S RESPONSE?**

A. First, Petitioner presents document evidence showing that all of his Electronic Files and other Digital Data still exists in two locations, (see AX-1

through AX-4(b) in Appendix C, and at least some of his tangible personal property exists and is in constructive possession of the Government, (via the North Carolina State Bureau of Investigation), contrary to the assertions of the Government by the A.U.S.A.

Second, Petitioner submits that this document evidence, disputing the Government's unsubstantiated claims, was never viewed by the Court, thus, the Court only considered the misinformation provided by the Government, that the tangible property was destroyed, before it made its ruling in violation of his rights. Petitioner contends that determinations as to possession of property must be based on evidence received from both parties, as per the statute, to resolve any factual disputes. To bolster his claim, Petitioner cites the Seventh Circuit in United States v. Stevens, 500 F.3d 625, 627-29 (7th Cir. 2007) that stated:

The Government contends, and the district court agreed, that Mr. Stevens was not entitled to the return of property under Rule 41(g) because the Government no longer possesses the property he seeks to recover. However, whether the Government still possesses the property at issue is a question of fact. 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). As this provision makes clear, any factual determinations supporting the court's decision must be based on evidence received ... It does require, however, that the district court receive evidence to resolve factual disputes. See United States v. Albinson, 356 F.3d 278, 281-82 (3rd Cir. 2004)(Such evidence may come, for example, in the form of sworn affidavits or documents verifying the chain of custody of particular items.

The Court continued explaining the same facts as in the instant case, stating:

Here, the district court received no evidence regarding the Government's possession of the property Mr. Stevens sought to recover. The court stated simply that it agreed with the Government's arguments in its brief. However, arguments in a Government Brief, unsupported by documentary evidence, are not evidence. See Campania Mgmt. Co. v. Rooks, Pitts and Poust, 290 F.3d 843, 853 (7th Cir. 2002)("[I]t is universally known that statements of attorneys are not evidence."); also Albinson, at 281 ([T]he Government must do more than state, without documentary support, that it no longer possesses the property at issue." citing United States v. Chambers, 192 F.3d 374, 377-78 (3rd. Cir. 1999)).

As such, the District Court failed to receive evidence to support its factual determinations as required by Rule 41(g).

B. Petitioner puts forth, that had the District Court reviewed the information in his Reply and Reply Supplement showing that at least some of the tangible property is available from the N.C. S.B.I., (as confirmed by the Durham County Superior Court Judge's ruling denying its return in its October 18th, and December 12, 2018 Orders, (MRS-05, 07, [D.E. 81, Ex. 5, 7])), that state, "Defendant's motion for the return of seized property is Denied.", it would have been bound by the statute to require the Government to provide document evidence of its whereabouts or destruction. Petitioner notes that this is the same property the Government avows, in its Response, was destroyed 9 years earlier. Petitioner points out:

the Government adopted the case and when it assumed prosecutorial responsibility, it assumed constructive possession of the evidence which was not to be used in any further prosecution,

White v. United States, U.S. Dist. LEXIS 28114 (E.D. Va. 2004), and thus, is responsible for its return.

Notably, when the Government wrongfully stated the property was destroyed, the Court denied the Motion as "meritless". To which, Petitioner argues that this would be of no movement to his request citing United States v. Kanasco, Ltd., 123 F.3d 209 (4th Cir. 1997), that held "a Rule 41(e) action does not become moot when the Government destroys the property sought."

C. Next, Petitioner's "Appellant's Reply" debunked the Government's Response by showing the other assertions by the A.U.S.A. are contrary to the evidence and were not considered by the Court before its ruling. The "Reply" provided:

- i. That he has diligently and continuously Appealed his case, maintaining his innocence even to this day, as represented by the docket, and any suggestion by the Government that he abandoned his property is untrue.
- ii. The Government stated that Petitioner waited eight (8) years before requesting the return of his property. This is contradicted by the evidence submitted in his Reply, [D.E. 72], that clearly shows all the letters written to all agencies involved requesting the return of the said property, one of which responded during the same time period. Petitioner wrote to the U.S. Attorney's Office.
- iii. The Government, A.U.S.A. Ontjes, states he was unaware of letters sent to

his office. To which, Petitioner provided five (5) letters sent to the A.U.S.A. assigned to his case, according to the docket, Ms. S. Kotiya.

- iv. The Government states that he contacted Attorney Marcia Shein to inquire if Petitioner requested his property back. This is also dispelled by the Record that clearly showed Attorney Shein only represented Petitioner for his Sentencing Hearing. The Docket reflects that the Attorney of Record is William Kent, through Edwin West, who represented Petitioner from the date just prior to the filing of his §2255 Motion in 2011. Petitioner notes that it was Attorney Kent who advised Petitioner to write to the Agencies for the return of his property.
- v. The Government states that he inquired to the New Hanover County Sheriff's Office who said the property was destroyed, but fails to mention the N.C. State Bureau of Investigation who initially led the investigation before it was adopted by the F.B.I. The property being destroyed is disputed, first by the Durham County Superior Court Judge's Order that states the S.B.I. is in possession of at least some of the property and is refusing its return, and second, the Government never addresses the Business and Personal Digital Data and other Electronic files and Photos that were copied by both the N.C. S.B.I., (as listed in Exhibits AX-1 thru AX-4(b)), and the F.B.I., as represented by the "Ghost Copy" / "Mirror Image" copies of the devices used to generate the F.B.I. CART Reports.
- vi. The Government then contends that because Petitioner did not "direct appeal", the property was destroyed as per the Sheriff's Office policy, (less than one year after Petitioner's sentencing), without notification or Court order. Petitioner again argues he was harmed as this is in violation of his due process and in direct violation of the six year statute of limitations, as listed in 41 C.F.R. 128-50.101 and 28 U.S.C. §2401, regarding the handling of seized property and claims for such.
- vii. The Government then says in one breath that the action is barred by the "Doctrine of Laches", implying there was some unreasonable delays in bringing the claim, and then in the next breath contradicts itself by stating that the property was destroyed less than one year after he was sentenced. Where the property is available, Laches does not apply.

Petitioner submits, it is obvious that these facts were not taken into account by the District Court before its ruling and certainly overlooked by the Appellate Court as this is a due process violation. Had the Court considered these facts, as submitted, it would have remanded to the District Court with instructions to have the Government acquire whatever physical property is in the possession of the S.B.I., and any and all Business and Personal Electronic Files and other digital data copied from these devices, from both Agencies, returned without delay.

D. Importantly, the Government in its Response nor the Court address

Petitioner's request for his Business and Personal Electronic Files and other digital data that was copied off his electronic devices. In the instant case, Petitioner provides; "the Government maintains mirror-images of the hard-drives indefinitely", United States v. Ganas, 824 F.3d 199 (2nd Cir. 2015), and the State also made and retained "Ghost Copies" / "Mirror-Images", of all his electronic devices and digital data on behalf of the Government, (See AX-1 thru AX-4), thus making this property available from two separate locations, i.e., the F.B.I. and the S.B.I.

[The] federal government is responsible for property that is considered evidence in a federal [case] even if its in actual possession of state officials.

United States v. Bailey, 700 F.3d 1149, 1153 (8th Cir. 2012).

That said, Petitioner contends that regardless of time passed, if the digital data and other property is available, as the evidence presents, it should be returned. This is the consensus of the circuits but was ignored in the instant case by the lower Courts.

Here, the Government suggested that the Petitioner waited 8 years to request his property, but contradicted as misinformation, the record reflects that upon conclusion of the appeal of his criminal case he began requesting his property to be returned. See United States v. Ebert, 39 Fed. Appx. 899; U.S. App. LEXIS 14191 (April 2002)(Some circuits reason that criminal proceedings dont end until appeals are over).

E. The facts remain that Petitioner's property was not abandoned. He was not notified of any forfeiture, sale, or destruction and believed his property would be held, (safe), until his appeals concluded, or at least be notified of any intent to the contrary. Yet the Government, who was in constructive possession of the property, states some of the property was destroyed in 2010, less than one year after his Plea. Adding weight to his argument Petitioner cites the Third Circuit in United States v. Fulani, 368 F.3d 351, 354 (3rd Cir. 2004):



Proof of intent to abandon must be established by clear and unequivocal evidence and we look to the totality of the facts and circumstances in making such a determination. *Id.*

This was not the case here and presents a constitutional question of exceptional importance. That being, do these facts allow the Government to just retain, and not return, Petitioner's Business and Personal Electronic, Files, Digital Data and other tangible property? With the support of the Circuits and affirmed by this Court, Petitioner provides that they do not.

Individuals whose property interests are at stake are entitled to notice 'of the property and the opportunity to reclaim it.'

Dusenbery v. United States, 534 U.S. 161, 167, 122 S.Ct. 694 (2002), and "The Government must provide reasonable notice to federal prisoners." Burman v. United States, 472 F.Supp. 2d 665, 667 (D. MD. 2007), See also, United States v. Minor, 228 F.3d 352, 354 (4th Cir. 2000); United States v. Cardona-Sandoval, 518 F.3d 13, 15-17 (1st Cir. 2008)(Government's assertions regarding disposition of property and notification of defendant was deemed inadequate.), thus remand is warranted.

**F. Addressing the assertion of "Untimely"**

In contention to the District Court's December 6th, 2018, ruling that stated, "There is no property to return. The motion is untimely and meritless." Petitioner adamantly avers the Court was in error and reiterates the previously mentioned facts.

- a) The evidence presented is overwhelming that the Electronic Files and other Digital Data and at least some of the tangible property still exists. Therefore, the Motion cannot be meritless or untimely as Petitioner still retains the right to his property.
- b) The evidence shows that Petitioner began requesting his property in 2014, (within the 6 year statute of limitations), but without any notification from the Government, thus, the accrual date had not begun. To further support this argument, Petitioner cites the Fourth Circuit case in United

States v. Minor, 228 F.3d 352 (4th Cir. 2000), that states:

The accrual date is the date on which [the claimant] was on reasonable inquiry notice about the forfeiture, i.e., the earlier of the following: when he first became aware that the Government had declared the [property] forfeited, or when an inquiry that he could have reasonably been expected to make would have made him aware of the forfeiture. Id.

See also Bailey v. United States, 508 F.3d 736, U.S. App. LEXIS 27315 (5th Cir. 2007)(The Government's formal notice that it would dispose of the property was notice upon which the owner's cause of action accrued.)

c) Petitioner was not notified of any forfeiture, sale or destruction.

Thus, his request could not be untimely and his property should be returned.

d) Petitioner also puts forth, that in accordance with Circuit authority, the alleged destruction of his property does not, and can not, render his Motion meritless. Again citing United States v. Kanasco, Ltd., 123 F.3d 209-10, n.1 (4th Cir. 1997)(Simply because the Government destroys or otherwise disposes of property sought by movant his motion is not thereby rendered moot.); See also Mora v. United States, 955 F.2d 156, 159 (2nd Cir. 1992)("The Government suggests ... that since it is without possession of Appellant's property his claim is moot, Quite the contrary.")

e) As long as the Petitioner can establish that the Government retains the property and digital files, the time past is of no movement, as these are, for the most part, digital files and there acquisition from wherever they are stored is a simple process. Therefore, his request could not be untimely, his property should be returned and failure to do so violates his rights.

**G. Doctrine of Laches**

Petitioner addresses this asserted defense by the Government separately to provide additional context. Adding to the misinformation, when invoking

the Doctrine of Laches the Government suggested that there were unreasonable delays in the request for the property. Although the evidence does not support the Government's theory, Petitioner again submits that the Electronic Files and Digital Property is available in two (2) locations and at least some of the physical property may be available per the documents from the Durham County Superior Court, thus, Laches does not apply.

Whether a claim is barred by Laches must be determined by the facts and circumstances in each case and according to the right and justice. Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. Hutchinson, 105 F.3d 564. Thus, in order to prove the affirmative defense of Laches, the Government must demonstrate that there has been unreasonable delay in asserting the claim and the [Government] was materially prejudiced by the delay. (Emphasis added).

Hutchinson v. Pfeil, 105 F.3d 562, 564 (10th Cir. 1997), as cited in United States v. Rodriguez-Aguirre, 264 F.3d 1195, 1202 (9th Cir. 2001). Rodriguez went on to state that the:

This conclusory allegation of prejudice is insufficient to establish material prejudice to the United States. The seizure occurred only 9 years ago ... The material prejudice arising from faded memories is far from "Obvious". Further the United States has an affirmative obligation to keep and maintain records of seized property ... and consequently cannot blithely argue that the 'retrieval of records will be unnecessarily difficult and potentially impossible' as a means to demonstrate material prejudice. Id.

As such, Laches would not apply in this case, or cases with similar facts.

H. Petitioner submits that the lower Court's overlooked the fact that the Government had a duty to return all non-responsive data, (see United States v. Gladding, 775 F.3d 1149, 1154 (9th Cir. 2014), that the property was no longer needed as evidence, (see United States v. Wilson, 176 U.S. App. D.C. 321, 540 F.2d 1100, 1101 (D.C. Cir. 1976), and that duty does not end because the A.U.S.A. puts forth an unverified representation that some of the property was destroyed. Especially when the Petitioner / Appellant puts forth document evidence disputing those claims and showing the property still exists. "Representations are not evidence unless adopted by the opponent, [in this case, the defendant]". Id. Thus, denial of his Motion on this ground violates

his rights and is in conflict with the decisions of the Circuits, this Court and was not addressed in the Opinion issued by the District Court or the Fourth Circuit Court of Appeals. (See United States v. Albinson, 356 F.3d 278, 281-84 (3rd Cir. 2004)(A Court's denial of defendant's motion for return of property based solely upon the Government's unsubstantiated representations that it no longer retained possession of seized property was abuse of discretion, and even if the Court properly determined Government was no longer in possession of property, court had to further address questions of what happened to it.); see also United States v. Chambers, 192 F.3d 374, 377-78 (3rd Cir. 1999)(If the District Court determines that the Government has surrendered or destroyed property, it must determine whether such action was wrongful, and what remedies are available).

Here Petitioner only wants his Electronic/Digital Business and Personal files returned, and where the property still exists it should be returned. This again raises the question, can the Government retain Petitioner's Digital Files indefinitely and further prevent the return of any tangible property constructively held by the government at the N.C. S.B.I.? To which, Petitioner contends that Circuit precedent is clear as it directs the District Court to hold evidentiary hearing if there are disputed issues of fact related to the status of the property or what happened to it and not doing so harms the Petitioner.

**3. DID THE LOWER COURTS ERR IN NOT ADDRESSING THE ISSUE OF THE AVAILABILITY, FROM THE GOVERNMENT, OF PETITIONER'S BUSINESS AND PERSONAL ELECTRONIC FILES AND OTHER DIGITAL DATA STORED ON THE MIRROR IMAGE / GHOST COPIES OF THE DEVICES SEIZED, ANALYZED, MAINTAINED AND STILL STORED BY THESE AGENCIES?**

A. Petitioner puts forth that the Government's Response does not mention the digital data when it says Petitioner's "property was destroyed". The District Court also does not address the digital data in its denial, but the records show, (AX-4, 4(B)), that the F.B.I. received the devices and made

"mirror images" of each for forensic examination and produced Computer Analysis Response Team, (CART), Reports. What is obvious is that the lower Court intentionally overlooked that the said digital data and other electronic files are still available and should be returned. The District Court's failure to order such return violates Petitioner's rights, causing him harm, is in conflict with the following;

The Government may not by exercising its power to seize, effect a de facto forfeiture by retaining the property seized indefinitely.

United States v. Premises known as 608 Taylor Ave. Apt 302, 584 F.2d 1297, 1303 (3rd Cir. 1978), see also United States v. Ganas, 755 F.3d 125 (2nd Cir. 2014), and the failure to consider the evidence, resting its decision on only the unverified assertions of the A.U.S.A., presents additional conflicts with this Court's precedent and is, in and of itself, basis for remand. "The assertions the Government did make were not supported by the evidence."

Cardona-Sandoval, Id. at 18.

B. As in all pornography cases, the F.B.I. would maintain the complete copy of all data on the device, especially when the case is on appeal in the District Court. Petitioner contends that this establishes physical possession of the devices, his digital data and other files as requested in his Motion, and thus, meeting even the most stringent standard for possession of the property. See United States v. Hill, No. 99 CR 50004, 2004 WL 793309, at \*1 (N.D. Ill. Apr. 12, 2004)(Holding that petitioner must show actual possession by the federal government.)

Petitioner further contends that it would be implausible to believe that the Government would parse through data and delete non-responsive files, possibly damaging the integrity of the evidence, when the cost for storage and maintaining this data is minimal and requires no physical space. Petitioner also points out here that the Government is well versed in this field and even deleted data can be recovered.

C. Most recently, Petitioner presented new evidence that now shows that the N.C. S.B.I., (who does not provide forensic analysis in federal cases), also made and possesses "mirror image" / "ghost copies" of all the Petitioner's devices, to include all of his Business and Personal Electronic Files and other Digital Data, as listed in the Exhibits. Petitioner again declares that this property is still in constructive possession of the Government as;

"the federal government had adopted a case for federal prosecution after the initial investigation was conducted by state authorities."

United States v. Fabela-Garcia, 653 F.Supp. 326, 327-28 (D. Utah 1989).

In the instant case, as in Fabela-Garcia, once the Government took up and controlled the prosecution of the Petitioner, it also assumed control and had constructive possession of all property as the Government had the power to control and use the evidence against the Petitioner, regardless of where it is, or was stored. Hence, the Federal District Court;

"has both the jurisdiction and the duty to ensure the return" to a defendant of "that property seized from him in the investigation but which was not... stolen, contraband or otherwise forfeitable, and which is not needed, or is no longer needed as evidence."

United States v. Wilson, 540 F.2d at 1101, 176 U.S. App. D.C. 321 (DC Cir.1976).

Petitioner contends that this duty required the lower Court to take evidence and make factual findings to identify all items, [or digital data], still in the direct or constructive possession of the Government, and to also identify any items that may be lost, because conflicting evidence existed disputing that some of the tangible property was destroyed and the Government never addressed the digital property requested, failure to account to the Petitioner of where, or what happened to the property, violates his rights. This conflict was never addressed in the Opinion of the lower Court or the Fourth Circuit Court of Appeals and, as such, remand is warranted.

4. **WAS THE PETITIONER HARMED BY THE GOVERNMENT'S ALLOWING, AS IT CLAIMS, THE DESTRUCTION OF PETITIONER'S DIGITAL PROPERTY AND OTHER ELECTRONIC FILES THAT WERE IN PHYSICAL AND CONSTRUCTIVE POSSESSION OF THE GOVERNMENT, (WHEN THE GOVERNMENT ADOPTED PETITIONER'S CASE FOR PROSECUTION IN FEDERAL COURT), WITHOUT NOTIFICATION AND IN VIOLATION OF HIS RIGHTS?**

A. Petitioner puts forth that the Government had a responsibility to return all non-responsive property, to include all non-responsive electronic data related to Petitioner's Business and Personal files, photo, and other data upon adjudication of his case in District Court. The failure to return, and allow the destruction of, said property is in violation of Petitioner's rights.

The general rule is that property in the possession of the Government, whether obtained by seizure or subpoena, other than contraband, should be returned to the rightful owner once criminal proceedings have terminated.

United States v. Wright, 197 U.S. App. D.C. 411; 610 F.2d 930, 935 (D.C. Cir. 1979); United States v. LaFatch, 565 F.2d 81, 83 (6th Cir. 1977). Or, at the very least, Petitioner was entitled to, and should have received, notification of any pending destruction.

Reiterating that the lower Courts, nor the Government in its Responses, ever discuss the digital data and files specifically, the Court concluded all the property was destroyed, based only on the Government's assertion. By referencing the Sheriff's Office who was only in possession of the tangible property and never mentioning the N.C. S.B.I., who as the evidence confirms, made "ghost copies" of all Petitioner's digital data from his devices on behalf of the Government, shows the Court was misled and no evidence was taken.

Such documents[digital or otherwise], do not become the property of the Government or the Court, rather the producing party retains a property interest in them.

Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F.Supp. 1098, 1131-32 (E.D. Pa. 1976).

B. Petitioner has made the case, that as he was adjudicated in the District Court from evidence allegedly obtained from these electronic devices, the Government obviously had to possess and control the device to conduct forensic analysis of each item. The evidence shows the Government made digital copies of each device and submitted Reports on each device to the Prosecutor.

As such, the Government had a duty to protect his property, ensure its return, and more importantly, was obligated to notify him before any destruction of his property, (tangible or electronic digital data), and failed to do so.

Importantly, and in conflict with circuit precedent, the Government also failed to provide any documentation of said destruction of any of the property or copies of any notifications to the Petitioner. "The Government must present evidence of the property's destruction." United States v. Potes-Ramirez, 260 F.3d 1310, 1314-15 (11th Cir. 2001). Petitioner presents to the Court that instances like this occur regularly and effect thousands of defendants, similarly situated, yearly.

C. Noting that the Government never relinquishes its possession of Petitioner's property, regardless of where said property, is, or was stored, or by any other Agency, its responsibility was assumed when the case was adopted. Petitioner again cites United States v. Wright, 197 U.S. App. D.C. 411, where the Court confirms;

a state authority could be holding property ... where the property was seized subject to a federal search warrant, and where such property became the basis of a federal Grand Jury indictment. Id. at 938-39.,

and the Ninth Circuit held that;

Federal Rule of Criminal Procedure 41 applies to any federal search which leads to a federal prosecution, and extends to any actions taken by states authorities "with direct federal authorization."

United States v. Huffhines, 986 F.2d 306, 308 (9th Cir. 1993).

D. Petitioner provides significant circuit precedent concurring that all non-responsive property and files should have been returned, to include all digital data and electronic files, upon completion of his criminal proceedings. (See United States v. Gladding, 775 F.3d 1149 (9th Cir. 2014)). Thus, dismissal or denial on this claim is contrary to this Court's rulings, other Circuit precedent, and presents important questions. Where, as here, the Petitioner, citing United State v. Wilson, 176 U.S. App. D.C. 321, 540 F.



2d 1100, 1101 (DC Cir. 1976)(Acknowledging the District Court's jurisdiction and duty to ensure the return of property seized [from a criminal defendant] in the investigation but which was not ... stolen, contraband, or otherwise forfeitable, and which was ... no longer needed as evidence.), argues the property should be returned.

As the lower Court never addresses this issue in its opinion, Petitioner asserts that the Government failed in its duties and responsibilities to protect and return his property and by its failure to notify him of the pending destruction of said property he has been harmed in violation of his constitutional rights, thus remand is required on this issue.

**5. WAS THE PETITIONER HARMED BY THE GOVERNMENT ALLOWING STATE AND COUNTY AGENCIES TO DESTROY PETITIONER'S PHYSICAL / TANGIBLE PROPERTY, WHILE SAID PROPERTY WAS STILL IN CONTROL OF THE GOVERNMENT, AND PETITIONER'S CASE WAS ACTIVELY ON APPEAL?**

A. Petitioner submits, that if true, the destruction of his property which was not forfeited, abandoned or considered contraband harms him and further violates his due process and other constitutional rights.

First, Petitioner would only presume that his property would remain safe in the possession of the Government while his case was pending appeal or at least until all appeal deadlines have been exhausted in the District Court where his §2255 was filed. In the instant case, Petitioner filed his §2255 actual innocence claim in February, 2011. Well within allowable limits. The Government's Response stated that the physical "property was destroyed" by the New Hanover County Sheriff's Office sometime after February 2, 2010, but before Petitioner had the opportunity to file his appeal, as per some internal policy of the Sheriff's Office. This is clearly contrary to the Government's usual six year policy for maintaining evidence, (see 41 C.F.R. 128-50.100 and 28 U.S.C. §2401), and poses the obvious question of liability. Where the Petitioner had the right to appeal his case, the Government has a duty to protect his property.

Here, just prior to the conclusion of his §2255 petitioner began sending letters trying to have his property returned, yet according to the Government, his property had already been destroyed years earlier, without notification. Petitioner submits that this does not excuse the Government, who was in control of the property being held by another Agency, in not notifying Petitioner of its pending destruction, nor does it alleviate the Government's liability as to those items that were destroyed.

Petitioner also provides that the Government has yet to present any documentation of its destruction. More importantly, the Government's contention that the property was destroyed is dispelled by the submitted documents showing; 1) the State Court in Durham County states in its order that the S.B.I. retains at least some of the Petitioner's property and is refusing to return it, [D.E. 81 ex 5.], "Defendant's motion for the return of seized property is Denied.", and 2) the Exhibits show that the Electronic Files and Digital Data still exists in two locations.

Further, even if some of the property was destroyed, whatever property the S.B.I. is now refusing to return is still in the constructive possession of the Government who is obligated to have it returned.

B. Secondly, this does not address any property, (electronic devices or other physical property), in the Government's actual possession, nor does it address any digital data maintained by the Government or the N.C. S.B.I. in their "Mirror Image / "Ghost Copies" of Petitioner's devices. It is, however, unknown why the N.C. S.B.I. would make copies of these devices when that Agency does not conduct forensic examinations in federal cases, but it is indisputable that the copies were made as listed in the Exhibits, (AX-1 thru AX-4(b)), by this Agency.

As iterated, the Government retains all digital data and files seized in pornography cases.

It may be necessary for the Government to maintain a complete copy of the electronic information to authenticate evidence responsive to the warrant for the purposes of trial.

Google, Inc., 33 F.Supp. 3d 386; 2014 U.S. Dist. LEXIS 98008 14 Mag. 309 (2nd Cir. 2014).

It is not feasible to believe that the Government, (or the State in this case), would parse through Petitioner's Business and Personal Electronic Files and digital data and cull all but the contraband files to retain in the event that he would be granted relief, in the form of a rehearing or trial, requiring the Government to now present digital files and meta-data evidence from the original devices against the Petitioner.

Interspersion of [electronically stored data on hardware] may affect the degree to which it is feasible, in a case involving search pursuant to a warrant, to fully extract and segregate responsive data from non-responsive data.

United States v. Lumiere, No. 16 CR.483, 2016 U.S. Dist. LEXIS 177702, 2016 WL 7188149, at \*4 (S.D. NY. Nov. 29, 2016).

Petitioner also poses the question that if the evidence led to a situation in his appeal process where it was necessary for his defense counsel to review all the underlying data related to his case, it would be implausible to believe that the Government would be unable to produce it.

Retention of the original storage medium or its mirror may also be necessary to afford criminal defendants access to that medium or its forensic copy so that, relying on forensic experts of their own, they may challenge the authenticity of reliability of evidence allegedly retrieved.

United States v. Kimoto, 588 F.3d 464, 480 (7th Cir. 2009).

Petitioner posits that the cost for storing the entire data files is so insignificant compared to the man hours required to separate the files, it would only make sense that these files are still being retained. As for the State Agency, who does not follow the same procedures as the Government, these facts are unknown, but the evidence is clear that they have copies and failure to return them violates Petitioner's rights.

Conversely, the Government's ability to actually segregate the files would only increase the Government's liability for its failure to return Petitioner's digital property. If the government could, or did, actually forensically recover contraband files, then segregated those files, it would have no excusable reason not to return Petitioner's non-responsive data in whole, to include all his Business and Personal files, photos, other digital data, and even the actual devices. Therefore, dismissal on this ground was in error and remand is required. Petitioner submits that his right to his property is inherent and his case, based on these facts, presents questions of great importance to so many similarly situated others who have had their electronic devices seized.

**6. DID THE LOWER COURT ERR AND FURTHER HARM THE PETITIONER BY THE CONTINUED RETENTION OF HIS PROPERTY AND THE DENIAL OF ACCESS TO HIS BUSINESS AND PERSONAL FILES, PHOTOS AND OTHER ELECTRONIC DIGITAL DATA STORED ON THE MIRROR IMAGES OF THESE ELECTRONIC DEVICES STILL IN THE CUSTODY OF THE F.B.I. AND NOW, AS THE ADDITIONAL EXHIBITS SHOW, ALSO IN THE CUSTODY OF THE N.C. S.B.I.?**

A. Petitioner submits that the Government's failure to return or the deletion of his electronic files and digital data has caused him irreparable harm as these devices, or the digital copies, contain or contained, all the Business Records, photos, tax documents, payroll data, trademark and copyright materials for both his businesses. This would include music files purchased and owned by the companies. Additionally, the items contain vast personal data and the memorialization of his life's activities for at least ten (10) years in the form of photos, schedules, banking and financial information, etc. Thus, failure to return and the continued deprivation of these files and this data is in violation of Petitioner's constitutional rights.

Moreover, quantitative measures fail to capture the significance of the data kept by many individuals on their computers. Tax records, diaries, personal photographs, electronic books, electronic media, medical data, ... banking and shopping information - all may be kept in the same device, interspersed among evidentiary material that justifies the search or seizure.

United States v. Ganas, 824 F.3d 199 (2nd Cir. 2015). Other Circuits have concluded that today's cell phones;

have immense storage capacity that may contain every piece of mail [people] have received for the past several months, every picture they have taken, or every book or article that they have read, which can allow the sum of an individual's private life to be reconstructed.

United States v. Galpin, 720 F.3d 436, 446 (2nd Cir. 2013).

B. With this in mind, Petitioner declares that there would be no way to describe the sense of misplacement, knowing this data and these files could be destroyed. Petitioner further notes, the loss in monetary value of these items and data, destroyed or deleted, is surpassed by the invaluable loss of the time and effort it took to compile the information and the memorial value, as it pertains to his life's activities, that could never be recovered or replaced. Petitioner notes for the Court, this harm continues as Petitioner provides evidence to show that these electronic files and other digital data still exists, and the continued deprivation of the data and files only amplifies the loss when the lower Court's ignore the evidence and facts laid out in Argument 2 that dispell any claim by the Government regarding said said property. Notably, the Government cannot, and did not, produce one document, from any agency, confirming the destruction of property, the sale of property, or the deletion of files in regards to Petitioner's case.

The failure of the lower Court to acknowledge that the Government's retention of these files is contrary to its initial responsibility to return all non-responsive files upon completion of his criminal case and is in violation of his rights. (See United States v. Tamura, 694 F.2d 591 (9th Cir. 1982)("We likewise doubt whether the Government's refusal to return the seized [files and other digital data] not described in the warrant was proper."); see also United States v. Ganas, 824 F.3d 199 (2nd Cir. 2015) (Once responsive files are segregated or extracted, the retention of non-responsive documents is no longer reasonable, and the Government is obligated

... to return ... the non-responsive data within a reasonable period of time.) Id.

C. Overlooked by the lower Courts, and further addressing the reference to "untimely", Petitioner provided his continued harm caused by the retention of these files and digital data is of exceptional importance. While the Government never addresses these files in its Response, Petitioner puts forth that this retention is intentional and in violation of his rights.

The Second Circuit has noted that withholding non-responsive documents or files, including copies of those documents and mirror-image files, constitutes an unreasonable violation of the [defendant's] Fourth Amendment rights.

Ganias, Id. at 38. Petitioner also cites Pena v. United States, 157 F.3d 984 (5th Cir. 1998)(The Court remanded the case after denial of his motion for return of property in which he references conduct that would underlie a Bivens action, i.e., the Government depriving him of his property.) "A prisoner has protective ... property interest in items of personal property he legitimately possesses." O'Conner v. Keller, 510 F.Supp. 1359, 1368 (D.Md. 1981).

D. Therefore, Petitioner contends that dismissal or denial on this ground was in error and in conflict with this Court and other Circuit authority. As stated in Petitioner's Appellant's Brief, "The mere seizure of Appellant's property does not give the Government Carte Blanche to do with it what it wants or to allow any other agency, retaining or constructively possessing the property for the government, to do so either." App. Br., p.13. See also United States v. Garcia, 165 F.3d 17-20 (4th Cir. 1995)(If the Government does not have a need to use the property for evidence, it should be returned.); also United States v. Mowatt, U.S. Dist. LEXIS 97134 (4th Cir. 2017).

E. Hence, in light of the above factors, Petitioner has established the continued denial of access to his electronic files and data by the Government, whether by omission, obfuscation, deletion or destruction, causes him continuous and irreparable harm and as such, he requests remand on the issue so his

electronic files and digital data can be retrieved or recovered and returned to him without further delay. Thus, dismissal on this ground is in violation of Petitioner's constitutional rights as listed in the 4th, 5th, 8th and 14th Amendments.

**7. IS THE PETITIONER ENTITLED TO COMPENSATION FOR THE DEPRIVATION AND DESTRUCTION OF HIS PERSONAL PROPERTY AND DIGITAL DATA WHEN RECORDS SHOW HE HAS MADE CONTINUOUS EFFORTS TO HAVE HIS PROPERTY RETURNED AND WAS NEVER NOTIFIED OF ANY ORDERS OF FORFEITURE OR ORDERS TO DESTROYED SAID PROPERTY?**

A. If the Government assertions are true, Petitioner is entitled to compensation for the destruction of his personal property when it was not forfeited or abandoned and not contraband or related to a crime. Petitioner has established that said property was in possession of the Government regardless of where it is, or was, stored. This possession extends, not only, to the tangible property but all digital data and electronic files seized or copied, and maintained by these Agencies.

Petitioner advances that the, [his], title interest in the property seized is inherent and retained, unless forfeited by the Court or abandoned by the owner which did not happen in the instant case. The mere seizure does not provide the Government ownership. Therefore, the Government had the responsibility and obligation to return non-contraband property to the Petitioner.

Property taken under a search warrant is generally returned to its rightful owner when no longer needed in aid of a criminal prosecution if its ownership is undisputed.

79 C.J.S. Search and Seizure § 114 (1952).

When the Government breaches that responsibility, to a defendant, and wrongfully destroys or deletes, or allows to be destroyed or deleted, property of the defendant, in its direct or constructive possession, without notice or order, the Government should be subject to liability in the form of some type compensation to the defendant.

If a defendant seeks damages for seized property which the Government has wrongfully destroyed then the ancillary jurisdiction issue is more complex.

United States v. Brant, 684 F.Supp. 421, 1988 U.S. Dist. LEXIS 4062 (M.D.N.C. 1988). In this case, Petitioner presents clear evidence showing he has continuously maintained interest in said property. First when he filed his §2255, beginning his appeal process, (Noting that Petitioner continues to vigorously appeal his case, maintaining his innocence to this day.), and then by sending more than a dozen letters to all agencies involved in his case trying to have his property returned.

B. Believing his property would be safe during his appeal process, Petitioner attributed the non-responses, from the Government, to his request letters to his continued appeal, (presuming the Government would not release the device data, until completion), as they might be required for court in the event Petitioner received a rehearing or trial.

Yet, the Government's Response sheds a different light on the issues when it reports that the said property was destroyed, long before the filing of his appeal, without notice to the Petitioner or a forfeiture order from the Court. The Government then attempts to divert its liability by stating the property "was destroyed pursuant to the Internal Office Policy of the New Hanover County Sheriff's Office." [D.E. 75 p.2]. This statement is irrelevant, as it is the Government's responsibility to protect Petitioner's property or notify him of, and prior to, any pending destruction. Petitioner also notes that this still does not address the physical property the Durham County Superior Court states the N.C. S.B.I. is in possession of and the Court is refusing to return as represented in its October 18 and December 6, 2018, Orders. (Appendix C). This property, in constructive possession of the Government, led to Petitioner's federal adjudication.

C. Petitioner also puts forth that the government and the N.C. S.B.I. are



both in possession of Petitioner's Business and Personal electronic files and other digital data and are depriving him of this property with their failure to return said data. Petitioner again points out, that although requested in his motion and letters, the Government's Response never mentions the digital data or files, nor does the lower Court in its denial of Petitioner's filings. Supporting his claim, Petitioner provided exhibited documents showing that these files, or copies thereof, exist with the N.C. S.B.I and the F.B.I.

The Government's obfuscation on the issue of the digital files and data has confused the lower Court's into believing that this property has been destroyed, or deleted, as well. Petitioner, as addressed in the previous questions raised to the Court, again asserts that it is implausible to believe the Government, (or the State in this matter), would cull the files and data considering the ease in storing and maintaining them, and the Court not considering these facts presented in his "Appellant's Reply", "Reply Supplement" and the additional exhibits, only continues Petitioner's deprivation of his tangible and digital property.

D. As Petitioner's destroyed tangible property maybe assessed a monetary value, his electronic files and digital data, and their significance to his life, based on the inability to replace the data, files, photos and other information may be deemed invaluable when trying to determine a dollar amount. "One would expect the Government to return the seized property or, if it cannot be found, the current value thereof." United States v. Farese, 1987 U.S. Dist. LEXIS 11466, 1987 WL 28830 (S.D.N.Y. Dec. 15, 1987). Petitioner surmises that this issue may only be resolved on remand as he has presented ample evidence to suggest that the Government has disregarded its obligation to preserve and return his property in violation of his rights. "It is fundamental that due process require that a property interest not be divested finally without some kind of hearing." Davis v. Fowler, 504 F.Supp. 502 (D.Md. 1980).

E. Petitioner reiterates that the Government cannot provide any documentation, from any agency, of any destruction, sale or deletion of his property or files. Thus, Petitioner vehemently argues the Government cannot retain his property indefinitely and reaffirms that he is only trying to have his property returned, to include; whatever physical property is still in the possession of the N.C. S.B.I., whatever devices, if any, are in the possession of the F.B.I., (as described in Exhibits AX-1 thru AX-4(B)), and any and all Business and Personal Electronic files and other digital data, or copies thereof, that are in the possession of the S.B.I. and the F.B.I, without further delay.

#### REASONS FOR GRANTING THE PETITION

A. The holding of the lower Courts is in conflict with Circuit Authority: United States v. Ganas, 824 F.3d 199 (2nd Cir. 2015), United States v. Premises Known as 608 Taylor Ave. Apt 302, 584 F.2d 1297 (3rd. Cir. 1978), United States v. Kanasco, Ltd., 123 F.3d 209 (4th Cir. 1997), United States v. Minor, 228 F.3d 352 (4th Cir. 2000), United States v. LaFatch, 565 F.2d 81 (6th Cir. 1977), United States v. Stevens, 500 F.3d 625 (7th Cir. 2007), United States v. Gladding, 775 F.3d 1149 (9th Cir. 2014), United States v. Rodriguez-Aguirre, 264 F.3d 1195 (9th Cir. 2001), United States v. Wilson, 176 U.S. App. D.C. 321 (D.C. Cir. 1976), Fed. R. Crim. P. 41(g) and 41 C.F.R. 128-50.101.

A court's denial of defendant's motion for return of property based solely upon the Government's unsubstantiated representations that it no longer retained possession of seized property was abuse of discretion, and even if the court determined the Government was no longer in possession of the property, the court had to further address what happened to it.

United States v. Albinson, 356 F.3d 278, 281-84 (3rd Cir. 2004).

#### B. Importance of the Questions Presented

1. This case presents fundamental questions regarding a defendant's inherent rights to his property, to include electronic files and other digital data and the return of such when his electronic devices (containing the data) are

seized and retained, (directly or constructively), by the Government when said property was not forfeited, abandoned or considered contraband.

2. This is of great public importance as thousands of defendants are arrested nation-wide and find themselves similarly situated as the Petitioner. Where, upon arrest, their electronic devices containing digital information, files, photos and other personal data are seized as part of the arrest. And although, when not considered evidence, contraband, forfeited or abandoned the devices should be returned, often they are not. Many times, the devices containing the files, (or data), is disposed of without notification to the defendant, contrary to the rules and procedures for handling seized property and moreover, in violation of a defendant's rights.

In many cases, the files and data are copied and retained by the Government. This poses several problems as described herein. Most defendants are unaware that their files were copied, and by how many agencies, as in the case at bar. It is indisputable that these copies also belong to the defendant as the copies are of defendant's property. Often, and due to the nature of the offense, the Government will maintain these copies indefinitely. Importantly, these "ghost copy" / "mirror image" of electronic files and digital data, as still the property of the defendant, should also be returned.

3. Precedent notes, the mere copying by the Government does not make the files and data Government property as the Government cannot just perform a de facto forfeiture. Noting that there is limited authority showing that the Government returned, or provided proof of return of all non-responsive data and even less proof of deletion of the "ghost copy / mirror image" files and data, Petitioner submits that a defendant's request for return of property that includes digital data / files should require the Government to provide document evidence of its disposal or disposition. In cases where the Government retains the data indefinitely of cannot provide documents to the contrary, the

defendant's motion for the property's return should require hearings to take evidence simply because the continued retention and deprivation of his property violates his constitutional rights. A defendant is entitled to his property and where the property exists a 41(g) Motion for its return cannot be "meritless".

4. Petitioner suggests the shortage of authority on the issue should alone support grounds for certiorari as it appears that the lack of knowledge, by a defendant, of what happens to his digital property when seized has created few challenges to the Courts and multiple scenarios that cause harm to a defendant, specifically when there is no accountability by the Government. By adding this to the initial question raised of, "Can the Government retain a defendant's property indefinitely?", Petitioner believes the writ should issue so the Court can answer when does this retention constitute an unlawful seizure?

5. In regards to the tangible property, any loss, deletion or destruction without a court order or proof of abandonment should provide grounds for compensation to the defendant for the value of the items or data, and again, the Government should be obligated to provide documentation as to the disposition of all his property, i.e., proof of forfeiture, destruction, deletion or sale.

6. The importance is enhanced by, (where, as here, the evidence shows said property exists and is available), the lower Courts wrongfully concluding that the passage of time somehow negates a defendant's inherent rights to his property without notification of forfeiture, or documentation of abandonment. And again in the lower Court's failure to consider Petitioner's inalienable rights to his property by not allowing him the opportunity to; reply to the Government's Response, present evidence disputing the Government's claims, have his digital / electronic data files and other tangible property returned, or take evidence to determine what property is available or was destroyed and provide remedy for such. All of which is an abuse of discretion in violation

of due process and other constitutional rights.

7. The Court should correct this error and address the conflict this decision has created. Further, as these issues affect countless cases and the due process rights of defendants all over the country, Petitioner contends that the Court would be justified in devoting its limited time to hear this case.

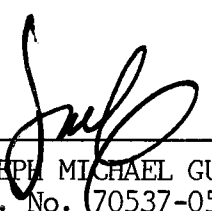
#### CONCLUSION

Petitioner prays this Honorable Court will grant the writ and remand back to the lower Court with instructions directing the Court to take evidence, make factual finding as to what tangible items of Petitioner's property are available from these Agencies, locate any and all of Petitioner's digital property and make such available for return to him, and require the Government to provide a particularized account of when and what happened to Petitioner's property that was not returned and the circumstances of its loss.

Petitioner also prays this Honorable Court would further instruct the lower Court to take into account the egregious actions of the Government in allowing the destruction of any of his property or files, without Order, and the loss to the Petitioner, of his Business and Personal data, and order a hearing to determine if compensation for damages is appropriate and entitled to the Petitioner.

Executed, submitted, and sworn to under penalty of perjury on this

27th day of January, 2020.



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