No. 19-8366

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Andres Fernando Cabezas — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Appeal No.: 19-12117
Eleventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andres F. Cabezas, # 68854-018
(Your Name)

Federal Correctional Complex
P.O. Box 1031 (Low Custody)
(Address)

Coleman, Florida 33521-1031
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1.

The Eleventh Circuit holds that a notice of appeal is a per se divestiture of a district court's jurisdiction over a motion for return of property under Federal Rule of Criminal Procedure 41(g). No other circuit in the Court of Appeals adopts that rule of law.

> Does a district court have subject-matter jurisdiction to decide 41(g) motions for recovery of property that is unrelated to a criminal judgment on appeal?

2.

Implicitly, the Eleventh Circuit resolved an issue of national importance——must the contents of a media storage device be forfeited separately from the storage device. The Eleventh Circuit resolved that question in a manner that conflicts with both the civil and criminal rules of procedure.

> Are the untainted contents of a multimedia storage device, such as an iPhone, forfeited when the storage device is forfeited or must the electronically-stored contents be forfeited separately and specifically?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Statutes, Rules, and Other Authority

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[X] reported at 2019 U.S. App. LEXIS 32521; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 23, 2019, and a copy of the order denying rehearing appears at Appendix A.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including May 23, 2020 (date) on March 19, 2020 (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure

FRCrP 41. Search and Seizure

(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 of 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

In 2017, the United States seized an iPhone from Andres Cabezas. (Appx. G at 1). Later in 2017, Mr. Cabezas entered a guilty plea, which consented to the forfeiture of the iPhone but not to the iPhone's content. (Appx. G at 1). The iPhone's content had no nexus to the purported crime. (Appx. E at 2).

In early 2018, the district court sentenced Mr. Cabezas to 151 months in prison and forfeited the iPhone, the storage device. (Appx. E at 1-2). In September 2018, Mr. Cabezas requested the district court order the return of the non-contraband, non-forfeited electronically-stored property. (Appx. E at 2)

After multiple filings, the magistrate issued a dispositive order denying the request. (Appx. G). Mr. Cabezas appealed the magistrate's order. (Appx. F). The district court transmitted the appeal to the Court of Appeals instead of the district court. (Appx. F). The appeals court dismissed the appeal for want of jurisdiction. (App. F)(explicitly authorizing Mr. Cabezas to request the district court review the magistrate's order).

Upon remand, the district court requested a new report and recommendation from the magistrate. (Appx. E). The magistrate issued a new report. (Appx. E). The district court reviewed the report and addressed Mr. Cabezas's objections and adopted the magistrate's report. (Appx. D). Mr. Cabezas appealed. (Appx. B at 1). The Court of Appeals again decided that it lacked jurisdiction. (Appx. B at 1). This time the appellate court reasoned that it lacked jurisdiction over the appeal because the district court lacked jurisdiction over the 41(g) motion. (Appx. B at 2)("Here, the district court lacked jurisdiction to entertain the merits of Cabezas's Rule 41(g) motion due to Cabezas's act of filing a notice of appeal that triggered the opening of his direct appeal in this Court."). Mr. Cabezas motioned for reconsideration. (Appx. A at 1). In that motion, Mr.

Cabezas emphasized that his 41(g) motion sought return of non-forfeited, non-contraband property thus the properties' return (or not) could not possibly affect the outcome of the appeal, nor the government's obligation to return the property dependent on the outcome of the appeal. The Eleventh Circuit held that the nature of the property did not matter because (necessarily) the notice of appeal divested the district court of all jurisdiction. (Appx. A at 2)("[B]ecause we did not address the merits of Cabezas's forfeited versus non-forfeited property contentions."). The appeals court denied the reconsideration motion. (Id.). This petition ensued.

Summary Argument

By basing its decision on its unique jurisdictional view, (Id.), the appellate court obfuscates the core issue, (Appx. A, B), which is whether the forfeiture of a storage device necessarily forfeits the electronically-stored property contained within the device.

Mr. Cabezas's facts provides an excellent vehicle for this Court to decide the substantial and important forfeiture issue. Plus, the case is a pristine vehicle for defining the jurisdictional effect of a notice of appeal. The Eleventh Circuit expressly denied jurisdiction regardless of whether the sought after property was subject to forfeiture or otherwise contraband. (Appx. A at 2). As the record shows, it is undisputed that the electronically-stored property was not listed on the plea agreement or the forfeiture orders. (Appx. E, Compare 6 and 7). Equally uncontested, the electronically-stored property is neither contraband nor related to criminal activity. In other words, the government seized the electronically-stored property that is untainted by any criminal activity and refuses to return it.

In order to avoid addressing this issue, the Eleventh Circuit Court of Appeals adopted a rule that conflicts with every other circuit to have addressed the same or a similar question. The Eleventh Circuit held that since Mr. Cabezas's direct appeal of the criminal conviction remained pending, the district court did not have jurisdiction over the Rule 41(g) motion regardless of whether the seized property was contraband, evidence, or forfeited. (Appx. B)("the district court lacked jurisdiction to entertain the merits of Cabezas's Rule 41(g) motion due to Cabezas's act of filing a notice of appeal that triggered the opening of his direct appeal ... ").

This brings us to the two questions presented in this petition:

1. Does a district court have subject-matter jurisdiction to decide a 41(g) motions for recovery of property that is unrelated to a criminal judgment then pending on appeal?

2. Is the untainted electronically-stored property contained within a storage device, such as an iPhone, automatically forfeited when the storage device is forfeited, or must te stored property be forfeited, specifically?

REASONS FOR GRANTING THE WRIT

Electronic property's unique nature and its preeminent importance[1] in the modern era illuminates a substantial question of federal-court jurisdiction that has created a division in the Court of Appeals and for which the lower courts require this Court's guidance.

> Does a district court have jurisdiction over a Federal Criminal Rule 41(g) motion to return property, which is unrelated to criminal activity, while an appeal of the criminal conviction remains pending?

The federal appellate circuits are divided on the answer to this question and this Court has not definitively answered whether a notice of appeal divests a district court of jurisdiction over a Federal Rule Criminal Procedure 41(g)

/1 The modern mobile telephone is a storage device as well as communication device; and the law recognizes a privacy and a property interest in a container's contents, distinct from the interests in the container. Cf. **Riley v. California**, 134 S. Ct. 2473, 2489 (2014)("One of the most notable distinguishing features of modern cell phones is their immense storage capacity."); **United States v. Babcock**, 924 F.3d 1180, 1190-91 (11th Cir. 2019)(Its "likely a modern day traveler would rather lose their luggage than their phone" and contents: "hotel directions, hotel reservations, ride-share apps" and especially "payment apps," etc.).

motion; especially where the 41(g) motion involves property that has no evidentiary value and is otherwise unrelated to the offense.[2]

By adopting the outlier rule, the Eleventh Circuit spotlights a substantial issue of national importance that this Court should answer:

> Does forfeiture of a multimedial storage device vicariously forfeit the electronic property contained within the device?

1. The Eleventh Circuit holds that a notice of appeal is a per se divestiture of a district court's jurisdiction over a motion for return of property under Federal Rule of Criminal Procedure 41(g). No other circuit in the Court of Appeals adopts that rule of law. This Court should resolve the conflict between the circuits.

"The filing of a notice of appeal is an event of jurisdictional significance——it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." **Griggs v. Provident Consumer Dis. Co.**, 459 U.S. 56, 58 (1982)(per curiam). All federal appellate circuits accept the proposition that two courts should not simultaneously exercise dominion over the same matter. **Dunn v. Price**, 139 S. Ct. 1312, 1315 (2019)(Breyer, J., Dissenting). Correspondingly, the general rule is that a notice of appeal divests the district court of all aspects of the case encompassed by the appeal.[3] **Manrique v. United States**, 137 S. Ct. 1266, 1271 (2017)("filing a notice of appeal transfer adjudicatory authority from the district court to the court of appeals.").

Furthermore, the appellate courts agree that two exceptions exist to the general rule:

> (1) when the post-appeal matter is "outside the scope of the appeal"; and
>
> (2) when the post-appeal is "in aid of the Court of Appeals jurisdiction ...."

/2 A 41(g) motion should be denied "if the defendant is not entitled to lawful possession of the seized property, the property is contraband or subject to forfeiture, or the government's need for the property continues." **United States v. Chambers**, 192 F.3d 374, 377 (3d Cir. 1999)(quoting **United States v. Von Cauwenberghe**, 934 F.2d 1048, 1061 (9th Cir. 1991)).

/3 This court observed that "the Eleventh Circuit has long recognized, 'a district court generally is without jurisdiction to rule in a case that is on appeal' ...." **Zaklama v. Mt. Sinai Medical Center**, 906 F.2d 645, 649 (1990). **Price v. Dunn**, 139 S. Ct. 1533, 1537 (2019)(Thomas, J. concurring).

Dunn, 139 S. Ct. at [1315] (Breyer, J. dissenting)(citing 16 A. Wright and Miller, **Federal Practice and Procedure** § 3949.1, p. 50).

What the appellate courts disagree on is whether 41(g) motions fall within the exceptions. The straightforward answer would seem to turn on the nature of the property the movant wants to recover. If the movant wants property that may serve a purpose in some potential prosecution, or the property is subject to forfeiture then the appellate court should dismiss the cause, because the core of the 41(g) action is covered by the appeal. That is, if the conviction is not vacated, then the property is recoverable, thus the appeal is (in great part) determinative.

The Eleventh Circuit held that the district court lacked subject-matter jurisdiction over the Rule 41(g) motion, thus the appellate court summarily vacated the district court's order and remanded. (Appx. A at 2).

The Fifth Circuit, on the other hand, allows a district court to rule on a 41(g) motion when the property's not forfeitable or ownership is not directly implicated by the issues presented in the primary appeal. **United States v. Oduu**, 564 Fed. Appx. 127 (5th Cir. 2014)("While his appeal was pending, Oduu filed a second pro se Rule 41(g) for return of personal property not subject to forfeiture.").

The Seventh Circuit upheld a district court's exercise of its discretion to defer addressing a 41(g) motion until after the merits appeal concluded, but the Seventh implicitly acknowledges it was within the district court's jurisdiction to have resolved the 41(g) motion if it chose. **United States v. White**, 582 F.3d 787, 806 (7th Cir. 2009)("[T]he district court shifted course and simply denied the motion as premature, saying that if Thompson's sentence was affirmed, it would 'promptly decide' a new Rule 41(g) motion.").

The Third Circuit found that a district court had jurisdiction to deny a 41(g) motion while a merits appeal of the conviction and sentence was pending. **United States v. Smith,** 253 Fed. Appx. 242, 242-43 (3d Cir. 2007)(unpublished)("Smith has appealed the judgment of conviction and sentence; his appeal is pending in this Court ...." The appellate court holds "[w]e summarily affirm the order of the District Court denying the Rule 41(g) motion for the return of property.").

In sum, the federal appellate circuits disagree on the jurisdiction-divesting reach of a notice of appeal in the context of a 41(g) motion.

2. The Eleventh Circuit resolved an issue of national importance——whether the contents of a multimedia storage device is separate from the storage device. The resolution stands in stark contrast to both the civil and criminal rules of procedure. An issue of this importance requires this Court's guidance. This Court should correct the Eleventh Circuit's departure from the law.

The Eleventh Circuit expressly states it does not address the forfeiture question of whether the property was forfeited or not. (Appx. A at 2)("we did not address the merits of Cabezas's forfeited versus non-forfeited property contentions"). Two necessary implications arise from that decision: (1) a notice of appeal constitutes a per se transfer of jurisdiction to the appellate court (supra at 7-9); and (2) its jurisdiction finding necessarily requires that the electronically-stored property was vicariously forfeited. Because if the untainted electronically-stored property was not forfeited, then the entire appellate opinion runs contrary to this Court's decisions and the governing rules. **Griggs,** 459 U.S. at 58.

The property Mr. Cabezas sought to recover included personal pictures and proprietary computer application data. (Appx. A at 1). It is undisputed that these items were not involved in the alleged crime. (Appx. B at 1). Equally unchallengeable, the items were not listed in the indictment, information, plea agreement, or the forfeiture order. (Appx. E at 6-7).

Which reduces the circumstances to only one possibility, that the forfeiture of the storage device (in this case, the iPhone) constitutes a forfeiture of the device's (the container's) content regardless of the factual nexus between the content and the alleged crime. A rule that conflicts with this Court's decisions and the principles infused in the rules of civil and criminal procedures. See, e.g., **Fed. R. Crim. P. 41(e)(2)(B); Advisory Committee Notes: 2009 Amendments to 41(g)** (This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant); **Fed. R. Civ. P. 34(b)** and **(c)** (describing the means for discovering electronically-stored information apart from its storage device); **Fed. R. Civ. P. 37(e).**

There are two takeaways from these rules and their advisory notes: (1) Congress considered the storage medium (storage device) separate property from the electronically-stored information, the same as any container-contents inquiry; and (2) Congress does not consider all electronically-stored property to be the same or fungible. Put differently, these rules make obvious the distinction between electronically-stored property and the device in which the property is stored. Moreover, the rules recognize that electronically-stored property is diverse: some of it may be forfeitable or discoverable, some may not. Like any container, the government was required to limit its search and seizure, not to mention its forfeiture, to properties with a nexus to the alleged crime. In Mr. Cabezas's case, none was, and particularly none Mr. Cabezas sought to recover.

Further, the only item Mr. Cabezas agreed to forfeit was the storage device (iPhone) and that was the only item identified in the forfeiture order. The

result, no matter what the outcome of the appeal, Mr. Cabezas was entitled to his electronically-stored property. The district court had 41(g) jurisdiction over that property and the Eleventh Circuit had appellate jurisdiction, it should have reached the merits.

The immediate consequence of which is that a forfeiture motion must specifically identify that the content is meant for forfeiture, and then the government must prove a factual nexus between the specific item and the crime.

CONCLUSION

The advent of electronic information poses new questions for American courts. In order to avoid some of those questions, the Eleventh Circuit re-asserted its established precedent of a notice-of-appeal's jurisdictional effect in a manner that placed in conflict the Circuits in the Court of Appeals.

Furthermore, the Eleventh Circuit's opinion illuminates ubiquitous confusion on the relation between a storage medium and its electronically-stored content. This Court should grant the writ, resolve the circuit split, and provide guidance to lower courts by answering the question concerning the legal nature of electronic property.

Prepared with the assistance of Frank L. Amodeo and respectfully submitted by Andres F. Cabezas on this 17th day of April, 2020.

Andres F. Cabezas
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VERIFICATION

Under penalty of perjury as authorized in 28 U.S.C. § 1746, I declare that the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.

Andres Cabezas