

19-8918  
No.

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

Donovan Davis, Jr.,

Petitioner,

v.

FILED  
JUN 25 2020

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

United States of America,  
Respondent.

On Petition for Writ of Certiorari to the  
Eleventh Circuit Court of Appeals

**PETITION FOR WRIT OF CERTIORARI**

Donovan Davis, Jr.  
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## QUESTIONS PRESENTED

### QUESTION 1

Federal Rules of Criminal Procedure 41(g) provides for the return of a person's property once it no longer serves a government purpose in the prosecution of a criminal case. The Eleventh Circuit held the rule applies only to the executive branch, thus property in the possession of the judicial branch need not be returned to the owner. Is the Eleventh Circuit's atextual construction of Rule 41(g) correct?

### QUESTION 2

The Eleventh Circuit Court of Appeals inserted the word government into the text of Federal Rule of Criminal Procedure 41(g). The appellate court, then defined "government" to mean an executive branch agency. Should the court of appeals have inserted the specially-defined non-existent word?

**LIST OF PARTIES**

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

**RELATED CASES**

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## **PETITION FOR WRIT OF CERTIORARI**

The Eleventh Circuit Court of Appeals elected to construe a Federal Rule of Criminal Procedure, Rule 41(g), using something other than the traditional canons of construction. The Eleventh Circuit departed from the ordinary course of judicial proceedings when it chose this course of action. This court should exercise its supervisory authority in order to realign the Eleventh Circuit with its sibling courts of appeal and this Court's governing authority.

### **OPINIONS BELOW**

The opinion of the United States court of appeals at Appendix A and B to the petition and is unpublished. The opinion of the United States district court appears at Appendix C and D to the petition.

### **JURISDICTION**

The date on which the United States Court of Appeals decided my case was September 18, 2019. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 28, 2020, and a copy of the order denying rehearing appears at Appendix A. An extension of time to file the petition for a writ of certiorari was granted to and including June 29, 2020 on March 19, 2020. (App. E). This Court's jurisdiction—to the extent is other than anomalous—arises under 28 U.S.C. § 1254.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

#### **Federal Rules of Criminal Procedure Rule 41(g)**

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

In September 2015, a jury convicted Donovan Davis, Jr. of participating in a scheme to defraud through the Capital Blu Management, LLC ("Capital Blu"), a company that traded in the off-exchange foreign currency, or "forex," marketplace. (App. B at 1). The criminal case followed a March 2009 civil case against Capital Blu brought by the United States Commodity Futures Trading Commission ("CFTC"). (*Id.*). In 2009, in response to a grand jury subpoena to Capital Blu's court-appointed receiver, Mr. Davis turned over six computer hard drives containing Capital Blu's records and emails. (*Id.*). In September 2017, the government notified Mr. Davis that it was in possession of items that he had produced in response to the 2009 grand jury subpoena. (*Id.*). Davis retrieved the items, but the government returned only one of the six hard drives he had turned over and failed to return other computer-storage devices. (*Id.*). In October 2017, Davis filed a motion seeking the return of property under Rule 41(g) of the Federal Rules of Criminal Procedure. (*Id.* at 1).

Mr. Davis appealed the district court's refusal to order the return of property and refusal to craft an equitable remedy. (*Id.* at 3). The appellate court found the district court did not err in denying Davis's motion under Rule 41(g). The record evidence amply supports the court's finding that the property at issue never came into the possession of the CFTC, the U.S. Attorney's Office, the IRS, or the Secret Service. (*Id.* at 4). The evidence shows that Davis's counsel produced six computer hard drives to the court-appointed receiver in the CFTC Case in June 2009. (*Id.*). The receiver scanned the drives and provided copies to the CFTC, the IRS, and the U.S. Attorney's Office. As of February 2010, the receiver remained in possession of the original hard drives and an external hard drive. The Secret Service obtained an external hard drive from the

receiver in early March 2010, but it did not take possession of the original hard drives. (*Id.*). And there is no other evidence indicating that a government agency received anything other than copies of the data on the original hard drives. (*Id.* at 4). Although the evidence fails to show what became of the original hard drives, the court did not clearly err in finding that the "government"—that is, the investigating and prosecuting government agencies never possessed the property at issue. (*Id.* at 4).

The appeals court explicated. "First, Davis contends that the court-appointed receiver is 'essentially the United States' for purposes of his motion because a receiver is an officer of the court, which in turn is part of the government. (*Id.* at 4). But this interpretation would expand Rule 41(g) well beyond its terms. Rule 41 is a rule of criminal procedure that addresses searches and seizures by law enforcement, and subsection (g) provides for the return of property that is not in possession of the executive branch of the government, which the Constitution vests with the powers of prosecution". (*Id* at 4).

The appellate court ultimately concluded that the executive branch agencies could not be ordered to return properties, they did not receive. (*Id.* at 5). And that 41(g) does not apply to judicial receivers (*Id.* at 6).

This petition follows, and Mr. Davis requests the Court realign Mr. Davis with this Court's precedent and the rules of its sibling circuits.

## REASONS FOR GRANTING THE WRIT

The Eleventh Circuit asserts that Mr. Davis's textually pure reading of Federal Rule 41(g) is unduly expansive. (App. B at 4)(Davis's "interpretation would expand Rule 41(g) beyond its terms"). The appellate court then supports its conclusion by using only one of the Rule's disjunctive prerequisites. The court says, "Rule 41 ... addresses searches and seizures" and "provides for return of property that 'was seized'...."(Id at 4). Therein, overlooking, the alternative means for relief: "or by the deprivation of property" without regard to how obtained. **Fed. R. Crim. Rule 41(g).**

Mr. Davis reads 41(g) to provide that a federal court may order the return of a citizen's property when in the context of a criminal investigation "a person aggrieved ... by deprivation of property may move for the property's return." **Fed. R. Crim P. 41(g).** The Eleventh Circuit, tortures the text by inserting words that do not exist: government, executive branch, and then by defining the inserted words other than the word's ordinary meaning. (App. at 4).

The crucial Eleventh Circuit holding is that "Rule 41(g) is a rule of criminal procedure that addresses searches and seizures by law enforcement...." (App. at 5). This premise ignores the statute's plain text which is disjunctive, one part involves seizures and the other does not (involves deprivations). The literal text reads:

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.

**Fed. R. Crim. P. 41(g) (2019).**

The Rule's language provides two grounds for relief, one where the property was unlawfully seized, and one where the property owner is deprived of the property. The latter ground encompasses scenarios where a lawful search and seizure happened or no seizure at all occurred. The Eleventh Circuit chose not to apply the traditional canons of statutory construction, which produced a different result, from precedent requires, that is, leaving one provision superfluous and the rule, as limited, readily manipulable by law enforcement.

**1. This Court's precedent provides that a federal court should interpret rules in order to give every word substantive purpose.**

Federal Rules of Criminal Procedure Rule 41(g) provides: if during a criminal investigation a person is deprived of property by whatever means and for whatever reason (a crime scene barrier that prevents entry to an apartment is a deprivation) then that person may move under 41(g) to have property returned—by whoever has it: landlord, state agency, caregiver, etcetera.

The Eleventh Circuit reads the deprivation provision out of existence, the appellate court states: "subsection (a) provides for return of property that 'was seized'" (App. at 4). The appellate court is wrong. Subsection (a) provides for the return of property obtained in relation to a criminal case regardless of how or why the government or any entity obtained the property as long as that entity's continued retention of the property deprives the movant of the property's enjoyment or use.

This Court has long held that federal "courts should, to the extent possible, read statutes so that no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); see *Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Text*, 174 (2012) ("every word and every provision is to be given effect

[and should not] needlessly be given an interpretation that causes it to duplicate another"); see also **Kungys v. United States**, 485 U.S. 759, 778 (1988)(Scalia, J.)(the "cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant").

The Eleventh Circuit's construction of Rule 41(g) as only including executive branch search and seizure effectively nullifies the deprivation portions of Rule 41(g). By adding the phantom word "government" and narrowly defining the words as executive branch the Eleventh Circuit wipes out the importance of the non-seizure deprivation portion of the rule.

## **2. Eleventh Circuit's Rule Produces Absurd Result**

For example, in our hypothetical apartment, where, at law enforcement's request, a landlord secures an apartment and prevents a guest from entering the apartment and obtaining possession of the guest's iPhone charger. The iPhone's owner may bring a 41(g) action to recover the iPhone charger from the landlord. The "in rem"-like, quasi-equitable 41(g) action is meant to ensure that a person does not suffer extended loss of property as part of "assisting" the government in a criminal prosecution. The Eleventh Circuit's rule would prohibit the iPhone owner, a third-party, from bringing an action for recovering the iPhone. The sounder interpretation (Mr. Davis's proposition), 41(g) permits any property owner deprived of property, during a criminal investigation, to recover the property (i.e., end the deprivation) as long as the prosecutor no longer needs it. Hence, 41(g) should be interpreted broadly to ensure justice and afford streamlined due process since the iPhone is not in the possession of an executive branch agency. **United States v. Resendiz-Ponce**, 549 U.S. 102, 110 (2007)(The Federal Rules of Criminal Procedure "were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure.").

Furthermore, the Eleventh Circuit's interpretation encourages gamesmanship on the part of law enforcement. That is, law enforcement could avoid returning property (that was either unlawfully seized or of speculative value) simply by transferring the property to a third party such as the clerk of court, a federal agency, or non-federal law enforcement entity. A gaming practice this Court disfavors as fundamentally unfair. In the context of vagueness, Justice Scalia sums up the constructive canon and philosophical principle, "Our cases establish that the Government violates ... [Due Process] by taking away someone's life, liberty, or property under a criminal law<sup>1</sup> so vague ... or standard less that it invites arbitrary enforcement." **Johnson v. United States**, 135 S. Ct. 2551 (2015)(citing **Kalender v. Lawson**, 461 U.S. 352, 357-58 (1983)).

Moreover, the Eleventh Circuit's insertion of its own specially defined word generates an ambiguity that the rule did not previously contain.

That is, prior to the Eleventh Circuit's fiddling with the rule's text, 41(g) meant that when a person's property was taken or held as a result of criminal investigation, then a court could order any entity in possession of the property to return it to its rightful owner; so long as the government did not have a need for the property and the property itself was not criminal contraband. After the Eleventh Circuit's tweak, a party must determine the contextual meaning of the phantom word government in order to determine if the entity holding the property is not only the government but also an executive-branch agency. The appellate court construction convolutes 41(g).

On the other hand, Mr. Davis's rule makes good sense and honors the statutory language. If in conjunction with a criminal investigation, any person deprives another of property, then the deprived person may motion the criminal court for the property's return. The criminal court will order whatever party

has the property to return it, unless the government provides a reasonable justification for the property to remain detained.

## **CONCLUSION**

The Eleventh Circuit did not like the plain meaning of 41(g), which would have required the district court to either return the hard drive to Mr. Davis, or to craft an equitable remedy. The Eleventh Circuit avoided the question by inserting words into 41(g) and then defining those words to forego granting the 41(g) motion or its equitable alter ego.

The appellate court's linguistic alchemy conflicts with this Court's decisions and this Court should grant the writ to reconstrue 41(g) using traditional canon of construction, vacating the Eleventh Circuit's opinion, and return the court of appeals to the ordinary course of judicial proceedings.

The petition for a writ of certiorari should be granted.

Respectfully submitted by Donovan Davis, Jr. on June 22, 2020:

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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.

  
\_\_\_\_\_  
Donovan Davis, Jr.