

Appendix A

January 28, 2020 Eleventh Circuit Order Denying Rehearing

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

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January 28, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-12165-GG

Case Style: USA v. Donovan Davis, Jr.

District Court Docket No: 6:14-cr-00043-CEM-DCI-2

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Joseph Caruso, GG/lt  
Phone #: (404) 335-6177

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-12165-GG

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DONOVAN G. DAVIS, JR.,

Defendant - Appellant.

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Appeal from the United States District Court  
for the Middle District of Florida

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BEFORE: WILSON, ROSENBAUM, and HULL, Circuit Judges.

PER CURIAM:

The "Motion for Reconsideration of Panel Decision", construed as a Petition for Panel Rehearing, filed by the Appellant, is DENIED.

ORD-41

Appendix B

September 18, 2019 Opinion of the Eleventh Circuit  
Affirming Judgment

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus DONOVAN G. DAVIS, JR.,  
Defendant-Appellant.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT  
789 Fed. Appx. 105; 2019 U.S. App. LEXIS 27995  
No. 18-12165 Non-Argument Calendar  
September 18, 2019, Decided

**Notice:**

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING  
THE CITATION TO UNPUBLISHED OPINIONS.

**Editorial Information: Prior History**

{2019 U.S. App. LEXIS 1}Appeal from the United States District Court for the Middle District of Florida. United States v. Davis; 2018 U.S. Dist. LEXIS 81203 (M.D. Fla., May 15, 2018)

**Counsel**

For UNITED STATES OF AMERICA, Plaintiff - Appellee: Ellen Meltzer, U.S. Department of Justice, Criminal Division, WASHINGTON, DC; Jeremy Raymond Sanders, U.S. Department of Justice, Criminal Division, Fraud Section, WASHINGTON, DC; U.S. Attorney Service - Middle District of Florida, U.S. Attorney's Office, TAMPA, FL.  
DONOVAN G. DAVIS, JR., Defendant - Appellant, Pro se, COLEMAN, FL.

**Judges:** Before WILSON, ROSENBAUM, and HULL, Circuit Judges.

**Opinion**

{789 Fed. Appx. 106} PER CURIAM:

Donovan Davis, Jr. ("Davis"), proceeding *pro se* on appeal, appeals the district court's denial of his post-conviction motions for return of property under Rule 41(g), Fed. R. Crim. P., and for recusal of the magistrate judge. After careful review, we affirm the denial of both motions.

I.

After a jury trial, Davis was convicted in September 2015 of participating in a scheme to defraud through Capital Blu Management, LLC ("Capital Blu"), a company that traded in the off-exchange foreign currency, or "forex," marketplace. The criminal case followed an earlier civil case against Capital Blu brought by the United States Commodity Futures Trading Commission ("CFTC") in March 2009. In the civil case, the{2019 U.S. App. LEXIS 2} CFTC alleged that Capital Blu, through Davis and two codefendants, violated anti-fraud provisions of the Community Exchange Act. A jury found Davis guilty, and the court ordered restitution, a civil monetary penalty, and injunctive relief in June 2011.

In October 2017, Davis filed a motion seeking the return of property under Rule 41(g) of the Federal Rules of Criminal Procedure. According to the motion, the government notified him in September 2017 that it was in possession of items that he had produced in response to a grand jury subpoena in 2009. 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.

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In response, the government stated that the motion should be denied because Davis failed to establish that he had a possessory interest in items that were seized from Capital Blu. The magistrate judge agreed and denied the motion without prejudice to refiling.

Davis filed a renewed motion more directly asserting a possessory interest in the hard drives. He explained that in June 2009, his personal attorney turned over six hard drives containing Capital Blu records to Lewis Freeman, the court-appointed receiver for Capital Blu in the CFTC{2019 U.S. App. LEXIS 3} case. {789 Fed. Appx. 107} Though the hard drives "had previously been the property of Capital Blu," Davis stated, ownership of Capital Blu's assets passed to its remaining equity members, including Davis, upon its dissolution in September 2009. Davis requested return of the remaining five hard drives. Attached to Davis's motion was a letter he received from the U.S. Secret Service in September 2017 advising that he could arrange for the return of "an external hard drive with power and USB cords" that the Secret Service obtained on March 1, 2010, "pursuant to a Grand Jury subpoena issued in 2009."

In response, the government provided more detail and 86 pages of supporting evidentiary materials. It explained that Davis originally produced six computer hard drives to Freeman. Then, according to an affidavit from one of the receiver's forensic accounts, filed in the CFTC case, "all relevant items that had been gathered, were scanned and put onto external hard drives. . . . Identical copies of those hard drives were produced by me to both the CFTC in September 2009 and the U.S. Attorney['s] Office in August 2009." Freeman eventually resigned and was charged with conspiracy to commit mail fraud. After a new{2019 U.S. App. LEXIS 4} receiver was appointed, she wrote to Davis's lawyer in February 2010, stating that she had "enclosed copies of all of the items that were turned over to me by the previous Receiver" with the exception of the six computer hard drives and an external hard drive that contained images of those drives.

In July 2012, after the CFTC case had concluded, the CFTC provided to the Internal Revenue Service ("IRS") two compact discs containing copies of CFTC's trial exhibits and of the productions made to defense counsel during discovery. A few months later, the CFTC provided an Assistant United States Attorney with "five DVDs containing a complete set of the records located in the CFTC's Concordance database for the Capital Blu matter."

In September 2017, the Secret Service wrote to inform Davis that it was in possession of an external hard drive. A declaration by Brooke Tyus, the agent who drafted the September 2017 letter, explains the background. According to Tyus, in early March 2010, he received one external hard drive from the receiver in response to a grand jury subpoena issued in 2009. That external hard drive was given to the Secret Service's "Orlando Field Office where it was entered into{2019 U.S. App. LEXIS 5} evidence." It was then returned to Davis "after having been wiped." But, Tyus attested, the Secret Service received only one external hard drive and was not in possession of any computer hard drive pertaining to Davis or Capital Blue.

A magistrate judge recommended that Davis's Rule 41(g) motion be denied. Based on Davis's allegations and the evidence presented by the government, the magistrate judge found that Davis's attorney provided the hard drives to a court-appointed receiver, who later provided copies of those drives to the government. While it was unclear what ultimately became of the hard drives, the magistrate judge concluded that the government had adequately shown that the drives "are not in the possession of the government." For that reason, no relief was available under Rule 41(g). Further, according to the magistrate judge, to the extent Davis requested a copy of the information on the hard drives, that was effectively a discovery motion for which no factual or legal showing had been made.

Davis filed objections and moved for reconsideration of the magistrate judge's recommendation. In these filings, Davis maintained that the receiver turned over {789 Fed. Appx. 108} all original materials, including the hard{2019 U.S. App. LEXIS 6} drives, to the prosecutor or the CFTC. Davis wrote that he had originally turned over six hard drives in response to a subpoena sent to the court-appointed receiver by the U.S. Attorney's Office on June 8, 2009. Davis claims that the receiver then turned over the hard drives to the U.S. Attorney's Office, citing a November 17, 2010, decision in the CFTC case which noted that a codefendant had testified that computers from Capital Blu's "Melbourne office . . . were turned over to the United States Attorney's Office." *U.S. Commodity Futures Trading Comm'n v. Capital Blu Mgmt., LLC* ("CFTC Case"), 2010 U.S. Dist. LEXIS 149232, 2010 WL 11508136, \*2 (M.D. Fla. Nov. 17, 2010). But that same decision notes that the computer hard drives Davis turned over came from Capital Blu's Naples office. *Id.* ("[C]ounsel for D. Davis did, in fact, produce six hard drives from the Naples computers to the Receiver."). Davis also asserted that the CFTC took possession of the hard drives upon dissolution of the receivership, citing an August 30, 2010, decision that ordered the receiver to "deliver to [CFTC's] attorney any original Receivership documents she has in her possession," CFTC Case, 2010 U.S. Dist. LEXIS 149174, 2010 WL 11508135, \*1 (M.D. Fla. Aug. 30, 2010). Finally, Davis contended that the receiver, as an "officer of the court," was part of the government.{2019 U.S. App. LEXIS 7}

Meanwhile, Davis moved for recusal of the magistrate judge on the ground that the judge previously had worked for the U.S. Attorney's Office for the Middle District of Florida which, according to the government's response, had recused itself from Davis's criminal prosecution.

The magistrate judge denied the recusal motion, finding no basis to believe that his impartiality might reasonably be questioned. The magistrate judge explained that he had no recollection of Davis's case or of the basis for the recusal decision, and the mere fact that he previously worked for an office that had recused from the case was not enough to warrant recusal. After seeking reconsideration from the magistrate judge, Davis filed objections requesting district-court review.

On May 15, 2018, the district court adopted the magistrate judge's recommendation and denied Davis's Rule 41(g) motion without addressing the recusal motion. The court agreed that the record showed that the property at issue never came into possession of the government.

Davis now appeals, challenging the denial of his Rule 41(g) motion and the implicit denial of his recusal motion. He contends that the district court erred in resolving factual disputes without{2019 U.S. App. LEXIS 8} an evidentiary hearing and that there is record evidence that the hard drives were possessed by some component of the government, whether it was the U.S. Attorney's Office, the CFTC, or the receiver. He further asserts that, if the property was lost or destroyed, the government should be required to pay money damages or replace the property.

## II.

In reviewing the denial of a Rule 41(g) motion, we review legal conclusions *de novo* and factual findings for clear error. *United States v. Howell*, 425 F.3d 971, 973 (11th Cir. 2005).

Rule 41(g) provides that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). "The motion must be filed in the district where the property was seized." *Id.* When a Rule 41(g) motion is filed, "[t]he court must receive evidence on any factual issue necessary to decide the motion." *Id.*

{789 Fed. Appx. 109} The government is not obligated to return property that it never possessed or no longer possesses, but it must provide some evidentiary support for its claim that it does not possess the property at issue. See *United States v. Potes Ramirez*, 260 F.3d 1310, 1314 (11th Cir.

2001) (holding that the district court erred when it relied on the government's representation that the property sought by the defendant had been destroyed because the government did not{2019 U.S. App. LEXIS 9} submit any evidence of the property's destruction). Nevertheless, equitable relief may be available if the property at issue has been lost or destroyed. *Id.* at 1315. Money damages, however, are not available under Rule 41(g). *Id.* at 1315-16 (holding that sovereign immunity protects the government from money damages under Rule 41(g)).

Here, 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 possession of the CFTC, the U.S. Attorney's Office, the IRS, or the Secret Service. The evidence shows that Davis's counsel produced six computer hard drives to the court-appointed receiver in the CFTC Case in June 2009. 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. And there is no other evidence indicating that a government agency received anything other than copies of the data on the original hard drives. Although{2019 U.S. App. LEXIS 10} 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.

Davis's arguments in response are unconvincing. 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. 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 "was seized." Fed. R. Crim. P. 41(g). We cannot reasonably construe Rule 41(g) to apply to property that is not in possession of the executive branch of the government, which the Constitution vests with the powers of prosecution. See *Smith v. Meese*, 821 F.2d 1484, 1491 (11th Cir. 1987) ("The prosecutorial function, and the discretion that accompanies it, is thus committed by the Constitution to the executive . . .").

Here, the receiver was not an agent of the executive-branch agencies involved in the CFTC Case or the criminal prosecution. See *United States v. Koh*, 199 F.3d 632, 640 (2d Cir. 1999) ("as an officer of the court, the receiver was not{2019 U.S. App. LEXIS 11} an agent of the U.S. Attorney's Office"). And Davis cites no authority for the proposition that the executive branch exercised any authority or control over the receiver, such that it would ultimately be responsible for property held by a court-appointed receiver.<sup>1</sup> Accordingly, Davis is not entitled to {789 Fed. Appx. 110} relief under Rule 41(g) based on the receiver's possession of the property.

Second, Davis maintains that the government's possession of the property is shown by the fact that it possessed and returned an external hard drive that belonged to him. However, although Davis often characterizes the external hard drive as one of the six hard drives he originally turned over to the receiver, the evidence shows otherwise. According to the government's evidence and materials from the CFTC Case, including orders Davis cited, Davis produced six *computer* hard drives to the receiver. And it is those drives that are at issue here. What was returned to him was something different-an *external* hard drive that connects to a computer through a USB cable. There is no dispute that the Secret Service took possession of this external hard drive in March 2010, but the agent who obtained the drive attested that the Secret{2019 U.S. App. LEXIS 12} Service did not take possession of the computer hard drives.

For that reason, Davis's motion to take judicial notice of factual findings in a separate case is

misguided, in addition to being improper. Davis requests that we take judicial notice of a decision by the U.S. District Court for the District of Columbia in a separate civil case Davis filed against the Federal Bureau of Investigation and others. The motion is due to be denied because we may not take judicial notice of the factual findings of another court. *Grayson v. Warden, Comm'r, Ala. DOC*, 869 F.3d 1204, 1225 (11th Cir. 2017). In any event, contrary to Davis's belief, the findings of the D.C. Court are consistent with the court's findings here. The D.C. Court referenced a hard drive belonging to Davis that the Secret Service wiped, which is the same external hard drive that was returned to him. So that reference does not contradict the government's evidence that the six computer hard drives never came into possession of the Secret Service or another government agency.

Third, Davis points to other evidence that, in his view, establishes the government's possession of the property at issue. But none of the evidence he cites contradicts the district court's findings. As we have explained, the receiver's{2019 U.S. App. LEXIS 13} possession of the property is not enough, and the government's possession of an external hard drive does not equate with possession of the property. Nor does the CFTC decision he cites support his position. While the November 17, 2010, order reflects that computers from Capital Blu's *Melbourne* office were turned over to the U.S. Attorney's Office, it also notes that the property at issue here came from the Naples office and was produced "to the Receiver." CFTC Case, 2010 U.S. Dist. LEXIS 149232, 2010 WL 11508136, \*2. Other evidence indicates that the receiver then provided copies of the drives, but not the originals, to the U.S. Attorney's Office, among other agencies.

Finally, Davis suggests that the district court abused its discretion by failing to hold an evidentiary hearing. See *Aron v. United States*, 291 F.3d 708, 714 n.5 (11th Cir. 2002) ("[A] district court's denial of an evidentiary hearing is reviewed for abuse of discretion."). We disagree. Rule 41(g) requires the court to "receive evidence on any factual issue necessary to decide the motion." Fed. R. Crim. P. 41(g). The movant is presumed to have a right to an item's return, so the government must demonstrate it has a legitimate reason to retain the property. See *Potes Ramirez*, 260 F.3d at 1314. The district court has discretion to determine whether the government has made the necessary showing. *Id.* ("We{2019 U.S. App. LEXIS 14} leave it to the district court's discretion on remand to determine how the government should {789 Fed. Appx. 111} present evidence of the property's destruction.").

Here, the government presented substantial evidence regarding whether it ever possessed the property at issue, which was a factual issue necessary to decide the motion. Davis disagrees with the district court's interpretation of that evidence, but he does not dispute the evidence itself. Nor does he identify with any specificity what additional evidence could be presented at an evidentiary hearing. Instead, he broadly asserts that government personnel should be submitted for examination, and he claims that the government is withholding relevant information regarding the disposition of his property. But evidentiary hearings generally are not required based on mere speculation that they could produce helpful information. See *United States v. Arias-Izquierdo*, 449 F.3d 1168, 1189 (11th Cir. 2006); *United States v. Champion*, 813 F.2d 1154, 1171 n.25 (11th Cir. 1987). Because Davis offers little more than speculation that an evidentiary hearing could provide helpful information, the court did not abuse its discretion by refusing to hold an evidentiary hearing.

For the foregoing reasons, the district court did not clearly err in finding that the government agencies involved in the CFTC{2019 U.S. App. LEXIS 15} Case and his criminal prosecution never possessed the property at issue.<sup>2</sup> We cannot order the government to return something that it does not possess, and there is no evidence that the government lost or destroyed the property, so we affirm the denial of Davis's Rule 41(g) motion without considering the issue of remedies.

### III.

Finally, we address Davis's argument that the magistrate judge should have recused because he was employed by the U.S. Attorney's Office for the Middle District of Florida at the time that office recused itself from Davis's criminal case. We review a judge's decision not to recuse for an abuse of discretion. *United States v. Berger*, 375 F.3d 1223, 1227 (11th Cir. 2004).

Under 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The purpose of this provision is to promote confidence in the judiciary by avoiding even the appearance of impropriety. *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003). To that end, "the standard of review for a § 455(a) motion is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality, and any doubts must be resolved in favor of recusal." *Id.* (citations and quotation{2019 U.S. App. LEXIS 16} marks omitted).

Here, Davis has presented no grounds that, viewed objectively, would cause a neutral lay observer to entertain a significant doubt about the magistrate judge's impartiality. Although the magistrate judge previously worked for a prosecutor's office that recused itself from Davis's criminal prosecution, we do not know the basis for the recusal decision, and neither, it appears, does the magistrate judge. The magistrate judge explained that he had no recollection of any personal involvement in Davis's case or knowledge of the basis for the recusal.{789 Fed. Appx. 112} decision. Davis offers no argument or evidence tending to show these statements are inaccurate or the district-wide recusal decision was in any way related to the magistrate judge or would affect his impartiality in this case. Standing alone, these facts are insufficient to demonstrate that the magistrate judge abused his discretion by declining to recuse. See *Berger*, 375 F.3d at 1227. We therefore affirm the denial of the recusal motion.

### IV.

In sum, the district court's order denying Davis's motions for the return of property under Rule 41(g) and for recusal of the magistrate judge is **AFFIRMED**. Davis's "Motion to Supplement the Record Through Judicial notice" is{2019 U.S. App. LEXIS 17} **DENIED** for the reasons discussed above.

#### Footnotes

1

Davis asserts that the receiver reported to the Attorney General, but the statute he cites, 7 U.S.C. § 13a-1, does not support that claim.

2

In his briefing on appeal, Davis also demands the return of other property, including a laptop and DVDs. But this other property is not properly before us because his renewed Rule 41(g) motion sought return of the six hard drives only. And he has since filed a new Rule 41(g) motion for return of the laptop.

Appendix C  
District Court Order Denying 41(g)

UNITED STATES OF AMERICA v. DONOVAN G. DAVIS, JR.  
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO  
DIVISION  
2018 U.S. Dist. LEXIS 81203  
Case No: 6:14-cr-43-Orl-41DCI  
May 15, 2018, Decided  
May 15, 2018, Filed

**Editorial Information: Subsequent History**

Affirmed by, Motion denied by United States v. Davis, 2019 U.S. App. LEXIS 27995 (11th Cir., Sept. 18, 2019)

**Editorial Information: Prior History**

United States v. Davis, 2018 U.S. Dist. LEXIS 81550 (M.D. Fla., Mar. 12, 2018)

**Counsel** {2018 U.S. Dist. LEXIS 1}For USA, Plaintiff: Ephraim Wernick, LEAD ATTORNEY, US Department of Justice - Criminal Division, Washington, DC; Thomas Anthony Quinn, LEAD ATTORNEY, Thomas P. Swanton, US Attorney's Office - DC, Washington, DC; David Michael Fuhr, US Department of Justice - Criminal Division, Washington, DC.

**Judges:** CARLOS E. MENDOZA, UNITED STATES DISTRICT JUDGE.

**Opinion**

**Opinion by:** CARLOS E. MENDOZA

**Opinion**

**ORDER**

THIS CAUSE is before the Court on Defendant Donovan Davis, Jr.'s Motion for Return of Property Under Federal Rule of Criminal Procedure 41(g) ("Motion," Doc. 346). United States Magistrate Judge Daniel C. Irick issued a Report and Recommendation ("R&R," Doc. 359), recommending that the Court deny the Motion. Magistrate Judge Irick, upon review of the record, concludes that the six hard drives sought by Defendant are not in the possession of the United States.

Defendant filed an Objection to the R&R (Doc. 367), arguing that "the magistrate's report is riddled with error, which makes his failure to recognize his earlier recusal more disturbing. Essentially, this Court should scrap the report and start over." (*Id.* at 4). Defendant further asserts that "no principled observer would believe this proceeding is fair and unbiased. The magistrate recklessly speculates that the government{2018 U.S. Dist. LEXIS 2} did not ever obtain possession of the hard drives (or their content). When - on this record - there is no doubt the 'government' received the computers." (*Id.*).

Judge Irick correctly points out that "Defendant fails entirely to explain how the six hard drives came into the possession of the government. Based upon the government's explanation, and the exhibits attached to its response, the simple explanation for that failure is that the six hard drives never came

into the possession of the government." (Doc. 359 at 4). Defendant responds by accusing the United States of being untruthful and criticizing Magistrate Judge Irick for failing to join in his accusation.

After a *de novo* review of the record, the Court agrees entirely with the analysis in the R&R.

Therefore, it is **ORDERED** and **ADJUDGED** as follows:

1. The Report and Recommendation (Doc. 359) is **ADOPTED** and **CONFIRMED** and made a part of this Order.
2. The Motion for Return of Property Under Federal Rule of Criminal Procedure 41(g) (Doc. 346) is **DENIED**.

**DONE** and **ORDERED** in Orlando, Florida on May 15, 2018.

/s/ Carlos E. Mendoza

CARLOS E. MENDOZA

UNITED STATES DISTRICT JUDGE

Appendix D  
Magistrate's Report & Recommendation

UNITED STATES OF AMERICA, Plaintiff, v. DONOVAN G. DAVIS, JR., Defendant.  
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO  
DIVISION  
2018 U.S. Dist. LEXIS 81550  
Case No: 6:14-cr-43-Orl-41DCI  
March 12, 2018, Decided  
March 12, 2018, Filed

**Editorial Information: Subsequent History**

Adopted by, Motion denied by United States v. Davis, 2018 U.S. Dist. LEXIS 81203 (M.D. Fla., May 15, 2018)

**Editorial Information: Prior History**

United States v. Davis, 2017 U.S. Dist. LEXIS 127065 (M.D. Fla., May 11, 2017)

**Counsel** {2018 U.S. Dist. LEXIS 1}For USA, Plaintiff: Ephraim Wernick, LEAD ATTORNEY, David Michael Fuhr, US Department of Justice - Criminal Division, Washington, DC; Thomas Anthony Quinn, LEAD ATTORNEY, Thomas P. Swanton, US Attorney's Office - DC, Washington, DC.

**Judges:** DANIEL C. IRICK, UNITED STATES MAGISTRATE JUDGE.

**Opinion**

**Opinion by:** DANIEL C. IRICK

**Opinion**

**Report and Recommendation**

On October 23, 2017, Defendant Donovan G. Davis, Jr. filed a "Motion to Return Property Under Rule 41(g)." Doc. 330. In that motion, the Defendant stated that a computer hard drive that the government obtained via a 2009 subpoena was returned to him in October 2017, but that "the government only returned one of six hard drives that [the Defendant] produced in accordance with the 2009 subpoena." *Id.* In seeking relief under Federal Rule of Criminal Procedure 41(g), the Defendant simply stated that: "Mr. Davis requests that the government return to him the remaining hard drives and other property that it obtained through its investigation." *Id.*

In response, the government stated that the remaining hard drives and computer media at issue were seized from the business entity Capital Blu Management LLC, a defunct limited liability company, and not the Defendant. Doc. 336. The government asserted that the Defendant failed to {2018 U.S. Dist. LEXIS 2} allege, let alone establish, that the property should be returned to him, or that he even had standing to seek return of the property at issue. *Id.* Thus, the government requested that the Court deny the motion without prejudice to the Defendant re-filing the motion. *Id.* Thus, the Court denied that motion without prejudice, and allowed the Defendant to re-file the motion within a prescribed time period. Doc. 337.

On January 8, 2018, the Defendant timely filed the "Motion for Return of Property Under Federal

Rule of Criminal Procedure 41(g)" that is now before the Court. Doc. 346 (the Motion). In the Motion, the Defendant asserts that he has a possessory interest in the six hard drives at issue sufficient to establish standing under Rule 41(g). Doc. 346 at 1. At the outset of the Motion, the Defendant explained that, "In June 2009, [the Defendant]'s personal attorney, A. Brian Phillips, delivered six hard drives to Lewis Freeman." *Id.* At that time, Mr. Freeman was the receiver of Capital Blu. Referencing the same exchange, the Defendant later explained that, "it was his agent Attorney Phillips, not Capital Blu's attorney that delivered the hard drives to the government." *Id.* Indeed, the Defendant referenced the "government's" possession{2018 U.S. Dist. LEXIS 3} of the hard drives throughout the Motion:

Here it is undisputed (undisputable for the matter) that [the Defendant] had possession of the hard drives and complied with a grand jury directive to transfer temporary possession of the items to the government. Presumably, this is why the Secret Service contacted [the Defendant] when it came time to return the hard drives. ("Exhibit 1" )(Secret Service Letter).

The government has not, however, returned the other five hard drives, nor the information contained on any of the six hard drives.

Federal Rule of Criminal Procedure 41(g) provides for return of seized property. Generally, the rule involves the recovery of unlawfully seized property, but the rule also encompasses recovery of the property that a person has been deprived of. See Fed. R. Crim. P. 41(g) (2012) ("A person aggrieved...by deprivation of property may move for the property's return.")

The government received from Donovan Davis's attorney six hard drives that contained electronic copies of the books and records of Capital Blu. The government has had nine years to copy the information in the hard drives, further deprivation of the drives (computers) should no longer be required and is objectively unreasonable. This court should direct the government{2018 U.S. Dist. LEXIS 4} to return the hard drives and the data within 30 days.

Wherefore, Mr. Davis respectfully requests this court order the government to return the property. Doc. 346 at 2. In the attached letter from the United States Secret Service, an agent wrote that: "On 03/01/10, the U.S. Secret Service, Orlando Field Office, obtained an external hard drive with power and USB cords pursuant to a Grand Jury subpoena issued in 2009." Doc. 346-1.

In response, the government states that the six hard drives at issue in the Motion are not in the possession of the government. Doc. 358.1 In sum, the government explains that, prior to the commencement of this criminal case, the six hard drives at issue were surrendered by Capital Blu to Mr. Freeman, who was the court-appointed receiver in a civil action brought by the Commodity Futures Trading Commission. *Id.* (citing *United States Commodity Futures Trading Commission v. Capital Blue Management, LLC, et al.*, No.6:09-CV-508, at Doc. 8 (M.D. Fla. April 9, 2009) (the CFTC Case)). A log from the receiver, and within the civil case docket, memorialized the transfer of the six hard drives from Mr. Phillips to Mr. Freeman. CFTC Case, Doc. 66 at 2, n. 1 ("Item 30 (BATES{2018 U.S. Dist. LEXIS 5} 05918 to 05937, produced by A. Brian Phillips, P.A. (D. Davis) - Response to Information Request (includes CD, two DVDs, & 6 hard drives) - Rcvd 6/10/09."). An affidavit from one of the receiver's forensic accountants, filed in the CFTC Case, explains that "all relevant items that had been gathered, were scanned and put onto external hard drives. . . . Identical copies of those hard drives were produced by me to both the CFTC in September 2009 and the U.S. Attorney[']s Office in August 2009." CFTC Case Doc. 111-1 at ¶¶ 3-5. Mr. Freeman eventually resigned as the receiver and was charged with Conspiracy to Commit Mail Fraud, in violation of 18 U.S.C. § 1349. See *United States v. Lewis B. Freeman*, No. 1:10-cr-20095 (S.D. Fla. (Miami)). There is no further indication in the government's response as to what actually happened to the six.

physical hard drives that are at issue in the Motion. Separately, the government explains that, on March 1, 2010, "the U.S. Secret Service, Orlando Field Office, obtained an external hard drive with power and USB cords pursuant to a Grand Jury subpoena issued in 2009." Docs. 346-1; 358-1. Finally, the government then represents to the Court that neither the CFTC, nor the{2018 U.S. Dist. LEXIS 6} investigating law enforcement agencies currently have possession of the six hard drives. Doc. 358 at 4.

Rule 41(g) provides as follows:

A person aggrieved by an unlawful search and seizure of property or by 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. Civ. P. 41(g). Implicit to seeking relief pursuant to the Rule is the prerequisite that the government seized the property at issue or deprived a person of that property.

In the Motion, the Defendant alleges that his personal attorney (Mr. Phillips) "delivered six hard drives to" the receiver. Doc. 346 at 1. And the government agrees. Doc. 358. But the Defendant then repeatedly alleges, in a conclusory manner, that the "government" has possession of the six hard drives, which were delivered pursuant to a "grand jury directive," and which the "government" has not returned. Doc. 346 at 1-2. Yet the Defendant fails{2018 U.S. Dist. LEXIS 7} entirely to explain how the six hard drives came into the possession of the government. Based upon the government's explanation, and the exhibits attached to its response, the simple explanation for that failure is that the six hard drives never came into the possession of the government. While the Defendant attaches a letter from the United States Secret Service as purported support for his claim that the government obtained the six hard drives via grand jury subpoena, that letter references a single hard drive obtained from the Defendant and later returned to the Defendant - not the six hard drives at issue here. Thus, the letter from the United States Secret Service provides no support to the Defendant's claim. What the evidence before the Court establishes is that Defendant's attorney provided the hard drives to a court-appointed receiver, who later provided copies of those hard drives to the government. While the Court cannot determine the final location of the six hard drives at issue, the record supports the government's position that they are not in the possession of the government. Finally, to the extent that the Motion could be construed as a request for copies of the six{2018 U.S. Dist. LEXIS 8} hard drives, it would essentially be a discovery motion, and the Defendant has failed entirely to establish any legal or factual basis to seek such discovery.<sup>2</sup>

Accordingly, it is respectfully **RECOMMENDED** that the Defendant's "Motion for Return of Property Under Federal Rule of Criminal Procedure 41(g)" (Doc. 346) be **DENIED**.

#### **NOTICE TO PARTIES**

A party has fourteen days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. See 11th Cir. R. 3-1.

Recommended in Orlando, Florida on March 12, 2018.

/s/ Daniel C. Irick

DANIEL C. IRICK

UNITED STATES MAGISTRATE JUDGE

### Footnotes

1

The government also apologized for not pointing out this issue sooner, but explained that current government counsel was not involved in the investigation of this case. *Id.*

2

Because the undersigned believes that this issue is dispositive of the Motion, the Defendant's standing to bring the Motion is not further addressed in this Report.

Appendix E

Omnibus Order Granting Parties 150 days to Petition for Certiorari

ORDER  
SUPREME COURT OF THE UNITED STATES  
2020 U.S. LEXIS 1643  
No. 589.  
March 19, 2020, Decided

**Editorial Information: Subsequent History**

Later proceeding at In re Order, 2020 U.S. LEXIS 2196 (U.S., Apr. 15, 2020)

**Judges:** {2020 U.S. LEXIS 1}Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

**Opinion**

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari: IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3. IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection. IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted{2020 U.S. LEXIS 2} by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection. IT IS FURTHER ORDERED that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument. These modifications will remain in effect until further order of the Court.