No. 21-7319

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ABRAHAM A. AUGUSTIN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Abraham A. Augustin
(Your Name)

P.O. Box 1032
(Address)

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

(Phone Number)

QUESTION(S) PRESENTED

I. WHETHER THE UNITED STATES INDICTMENT OF A DEFENDANT WHO'S PROPERTY WAS SEIZED BY THE STATE AND FBI DURING THE CRIMINAL INVESTIGATION OF A CASE PROSECUTED IN FEDERAL COURT CREATED ANCILLARY JURISDICTION OVER THE PROPERTY BY THE UNITED STATES AND U.S. DISTRICT COURT?

II. WHETHER A DISTRICT COURT ADJUDICATING A RULE 41(g) PROCEEDING FILED AT THE CONCLUSION OF THE CRIMINAL PROCEEDINGS, CONSIDERED TO BE A CIVIL ACTION IN EQUITY, HAS PANOPLY POWER TO GRANT RELIEF, INCLUDING ALLOWING THE CLAIMANT TO ASSERT ALTERNATIVE CLAIMS?

III. WHETHER A DISTRICT COURT'S FOUR-YEAR DELAY AND THE CIRCUIT'S SEVEN-YEAR DELAY IN ADJUDICATING A MOTION FOR THE RETURN OF PROPERTY CAUSED OR CONTRIBUTED TO THE PROPERTY'S DESTRUCTION?

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:

RELATED CASES

TABLE OF CONTENTS

INDEX TO APPENDICES

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

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

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

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[X] is unpublished.

The opinion of the United States district court appears at Appendix B 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[X] is unpublished.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[ ] is unpublished.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

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

The date on which the United States Court of Appeals decided my case was February 11, 2022.

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals 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. § 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).

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

United States Supreme Court:

Federal Court of Appeals:

State Cases:

State Statutes:

Federal Statutes:

Federal Rules:

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. FIFTH AMENDMENT, UNITED STATES CONSTITUTION, provides:
No person shall ... be deprived of life, liberty, or property, without due process of law ...

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ABRAHAM A. AUGUSTIN — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

PROOF OF SERVICE

I, Abraham A. Augustin, do swear or declare that on this date, March 1, 2022, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States
Department of Justice, Room 5614
950 Pennsylvania Ave., Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 1, 2022

(Signature)

INTRODUCTION

This Court has never granted a writ of certiorari to a Fed. R. Crim. P. 41 proceeding, i.e., a proceeding for the return of property seized by law enforcement during a criminal investigation. That is because of the timing such a motion is usually filed. If filed during the criminal proceeding, the motion for return of property is addressed as part of the criminal proceedings and ruled under the rules of criminal procedures.

If, however, the request is made at the conclusion of the criminal proceedings, it is considered a civil action in equity requiring the rules of civil procedures. For all intents and purposes, this case was and still is a civil action in equity.

Due to this Court's lack of guidance in such an action in equity, the Sixth Circuit has taken a position contrary to law and majority of the circuits. The United States and District Court obtained jurisdiction over Augustin's cash ($15,640) and vehicle--initially seized by the State of Tennessee during his arrest for state kidnapping--when the United States obtained federal jurisdiction over the kidnapping that the property was seized during and used as evidence for. Moreover, the federal case agent seized a U-Haul rental truck consisting of Augustin's personal property during the federal arrest.

The FBI agent completed the U-Haul towing slip to have it transported to the local sheriff's impound lot to be held under federal orders with specific instructions to hold the vehicle and its contents until the FBI ordered its release. The U-Haul was eventually returned to the company, but the contents were never returned to Augustin. When Augustin filed the motion for return of property and the district court ordered a response, the case agent accused Augustin in an affidavit of having requested the release of the U-Haul's contents to a woman the case agent identified as

Crystal Alford. Augustin immediately filed a declaration in court categorically and emphatically denying of ever having made this request. When Augustin sought the documentary evidence of this request, none was provided.

Furthermore, Ms. Alford (the alleged property recipient) was even contacted by a third party to inquire whether she ever truly received any property from the FBI or the local sheriff's office. Ms. Alford was adamant that she never received any property and was willing to testify to such facts in any court. Augustin informed the district court.

In the face of such facts and denial by the property recipient, the district court refused to grant Augustin's request for an evidentiary hearing to determine the property's final outcome, the lower court and Sixth Circuit ruled Augustin requested the release of his property to Ms. Alford, denied the United States had constructive possession of the property, and refused to grant any relief.

STATEMENT OF MATERIAL FACTS

On December 3, 2009, the Bradley County Sheriff's Office (BCSO) arrested Augustin for aggravated robbery and aggravated kidnapping. Although the BCSO made the arrest, due to Augustin being apprehended in the county, Hamilton County (Chattanooga, Tennessee) issued the arrest warrants. During this arrest, the BCSO seized $847 cash from Augustin's wallet, $4,943 cash from a sports bag, and his BMW 745 LI vehicle. Augustin had no pending criminal charges in Bradley County and was immediately turned over to Hamilton County detectives who transported him to Hamilton County.

On December 4, 2009, Augustin was given bond, which he posted on December 5, 2009.

On December 8, 2009, the U.S. District Court issued an arrest warrant for Augustin--as a result of a complaint filed in federal court--for the very kidnapping offense he had been arrested for on December 3 and posted bond for.

On December 9, 2009, Federal Bureau of Investigation Special Agent Wayne Jackson (SA Jackson)--the author of the complaint--arrested Augustin on the federal arrest warrant for federal kidnapping. During this arrest, Augustin's cash ($9,850) and U-Haul rental truck with its contents inside were seized by SA JAckson. The cash was turned over to the BCSO. The U-Haul rental truck with contents was also given to the BCSO with SA Jackson's intructions

to the BCSO (on all documents in the record) to "Hold for FBI SA Jackson 423-265-3601." See Appendices E to J attached to this writ.

On December 11, 2009, Hamilton County, the only entity to have charged Augustin with criminal charges, dismissed all charges against him. Hamilton County never made any seizures. All seizures were made solely by the BCSO in connection to the kidnapping offense that originated in Hamilton County.

Seizure notices of the cash and vehicle seized on December 3 and 9, 2009, were included in the federal discovery. Augustin received no forfeiture documents from the BCSO, before nor after the seizures, even though he was being housed in its jail.

Augustin was formally indicted by the United States for kidnapping on December 22, 2009, and superseded on March 23, 2010, for drug conspiracy (the very drug offense leading to the kidnapping). However, Augustin was found not guilty of the drug conspiracy (the only offense in the indictment authorizing forfeiture) on October 20, 2010, at trial. His property was never returned.

Augustin appealed his criminal conviction. This Court denied the appeal in June 2014. And Augustin filed his writ of certiorari to this Court, which was denied on October 6, 2014.

PROCEDURAL HISTORY

Augustin was sentenced in federal court on March 10, 2011. Within months of sentencing, on December 30, 2011, Augustin filed a Freedom of Information (FOI) to the BCSO to inquire the whereabouts of his seized property. The FOI was explainably returned two months later. A copy of the envelope with the enclosed rejected FOI was provided as Appendix A in the initial Appellant brief on appeal. See Appendix C attached to this writ.

Then on January 17, 2012, during to his appeal in the Sixth Circuit, Augustin begged the Sixth Circuit Court of Appeals in a "Letter requesting that the Federal Courts help him get the answers to what happened to all of his confiscated property; and questions regarding his state charges." See Doc. 41 in Court of Appeals Docket No. 11-5257; see Case No. 1:09-cr-00187-CLC-SKL, Doc. 156-1, Page ID 1488. See Attached Appendix D.

None of these filings brought any response. Thus, years later, a second request for information was mailed to the Cleveland City Hall on November 25, 2015, at 190 Church St. NE/P.O. Box 1519/Cleveland, TN 37311. See Certified Mail No. 7015 1730 0002 3580 3096. That request was also ignored. The following year, a third request was mailed to the Cleveland City Hall (Certified Mail No. 7014 2120 0004 1702 5794) and the BCSO at 2290 Blythe Ave. NE/Cleveland, TN 37311 (Certified Mail No. 7014 2120 0004 1702 5787) on July 5, 2016. The return receipt signature card was signed by "J. Hicks" at the sheriff's office on July 11, 2016. But no response was ever provided.

Eight months after filing his writ to this Court, on June 29, 2015, Augustin filed his first motion for return of property. (Motion R. 139; Page ID 1296). The District Court never ruled on this motion.

Therefore, on September 15, 2015, Augustin filed a Fed. R. Crim. P. 41(g) motion for the return of his property. Doc. 143. The government responded

on November 12, 2015. Doc. 152. The government's response was evasive, ambiguous, and blamed the BCSO for the illegal forfeiture of Augustin's property. Attached to this response was an affidavit from SA Jackson accusing Augustin of having requested the release of his property to Crystal Alford.

On December 8, 2015, Augustin sought discovery and submitted a declaration opposing SA Jackson's affidavit. On February 3, 2016, Doc. 168, Augustin filed a motion to the district court to compel evidence. The Court ignored the motion. A year later, wanting to utilize the Fed. R. Civ. P., Augustin re-submitted the motion for discovery on February 7, 2017, Docs. 185, 186, 187, 188, and 189. The district court ignored those motions also.

On October 24, 2018, Augustin filed for summary judgment. That motion was also ignored. The next month, on November 30, 2018, Augustin filed a fourth FOI request to the BCSO. See Certified Mail No. 7017 0530 0001 1315 2738. Due to the district court's history in ignoring all motions filed, Augustin filed a writ of mandamus to the Sixth Circuit on December 11, 2018. See No. 18-6290.

On February 23, 2019, Augustin finally received an answer from the BCSO's attorney: Four pieces of documents in the BCSO's records showing SA Jackson instructing the BCSO to seize and "Hold" the U-Haul rental truck with its contents. One document shows Jackson completing the U-haul's Vehicle Tow Slip to have it towed from the arrest scene to the BCSO impound lot. SA Jackson signed his name above the stipulation "THE UNDERSIGNED ACCEPTS RESPONSIBILITY FOR THE ABOVE DESCRIBED VEHICLE AND ITS CONTENTS." See Exhibit E of Doc. 252--Rule 60(b). See attached Appendix H.

On April 5, 2019, the District Court was "INVITED to respond to the mandamus petition ..." Also on the same day, the District Court ORDERED the government to "file a response to the motion within ten days from the date of this order." Doc. 228. On April 15, 2019, AUSAs Christoper Poole and Gretchen Mohr filed two separate responses to the writ. And on April 19, 2019, the District Court, without a hearing, ruled: (1) The properties seized from Petitioner were not included in the superseding indictment in the case; (2) there is no evidence of record showing that the properties in question were ever in the possession of the federal government; (3) because the United States was not in possession of the properties at the time petitioner filed this motion, and because the government has never been in possession of the properties, it is not the appropriate party from which to seek the properties' return. The District Court DISMISSED the petition.

Augustin appealed the decision. On January 19, 2020, the Sixth Circuit affirmed the lower court's decision. A Petition for Rehearing to the Sixth Circuit and a writ of certiorari to this Court were filed and denied. On January 31, 2010, Augustin filed the Fed. R. Civ. P. 60(b), Doc. 252, and introduced the newly discovered evidence received from the BCSO's attorney. On June 17, 2020, the District Court denied the Rule 60(b). Doc. 274. On June 26, 2020, Augustin timely filed his appeal. And on February 11, 2022, the Sixth Circuit affirmed the district court's decision.

SUMMARY OF ARGUMENT

I. The Sixth Circuit erroneously denied the United States was in

constructive possession of the cash and vehicle--that were evidence of and seized during the investigation of a case prosecuted in federal court--and the U-Haul rental truck (with its contents) it personally seized and instructed the BCSO to hold. Unlike cases where criminal charges are split between the government and the state, and it is hard to determine the entity responsible for the seized property, the State never prosecuted nor convicted Augustin of any criminal offense. The criminal investigation--during which property was seized--was acquiesced to the United States for prosecution. The State turned over all evidence seized during its criminal investigation of the kidnapping (including, but not limited to, firearms, ammunition, witness statements, reports, etc.) except the cash and vehicle similarly seized by the BCSO and on the same day as the firearms. The United States was in constructive possession of all said property even though the BCSO held the property. And the district court had ancillary jurisdiction over the seized property.

II. The Sixth Circuit erroneously denied relief simply because the government was no longer in possession of the property. Majority of the circuits have commented and opposed this position as it created the incentives for the seizing agency to seize property and quickly (and illegally) dispose of the property since the lack of possession of such property alone will defeat the Rule 41.

III. The Sixth Circuit erroneously denied the district court's four-year delay to adjudicate the Rule 41 caused prejudice and contributed to the property's unknown whereabouts or destruction. And considering the first request made regarding the property was made to the Sixth Circuit in early 2012, the motion's denial in 2019 is actually a seven-year delay. Had this matter been adjudicated in 2012 as initially sought, then it is more than likely the property could have been returned.

ARGUMENT

I. PROPERTY SEIZED DURING A CRIMINAL INVESTIGATION THAT IS ACQUIESCED TO THE UNITED STATES AND ALSO USED AS EVIDENCE TO CONVICT IN FEDERAL COURT IS WITHIN THE CONSTRUCTIVE POSSESSION OF THE UNITED STATES, EVEN WHEN THE UNITED STATES AGENT HOLD THE PROPERTY. AND PROPERTY THAT THE UNITED STATES INSTRUCTS THE STATE TO SEIZE AND HOLD IN STATE CUSTODY IS SIMILARLY WITHIN THE CONSTRUCTIVE POSSESSION OF THE UNITED STATES, EVEN WHEN THE UNITED STATES AGENT HOLD THE PROPERTY. WHERE AUGUSTIN SOUGHT THE RETURN OF THE PROPERTY, THE SIXTH CIRCUIT ABUSED ITS DISCRETION IN DENYING THE UNITED STATES WAS IN CONSTRUCTIVE POSSESSION OF THE PROPERTY.

1. Standards of review.

Undoubtedly, the cash and vehicle were seized by the State during its criminal investigation of the state-originated-kidnapping offense that was acquiesced to the United States.

A) Ancillary jurisdiction over property through federal indictment.

The Sixth Circuit erred when it refused to find the district court had ancillary jurisdiction over the seized property based on the facts. The Tenth, D.C., and Third Circuits have defined ancillary jurisdiction as:

> District Courts have jurisdiction to enter orders ancillary to a criminal proceeding concerning disposition of materials seized in connection with the criminal investigation of a case. United States v. Wingfield, 822 F.2d 1466, 1470 (10th Cir. 1987). Ancillary jurisdiction derives from the notion that a federal court acquires jurisdiction of a case or controversy in its entirety. Jenkins v. Weinshienk, 670 F.2d 915, 918 (10th Cir. 1982).

The Tenth Circuit has ruled that in such circumstances "the district court does have jurisdiction to enter an order concerning the disposition of seized property in its control." Wingfield, 822 F.2d at 1470. Other courts have held that in such circumstances a district court "has both the jurisdiction and the duty to ensure the return of such property." United States v. Wright, 197 U.S. App. D.C. 411, 610 F.2d 930 (D.C. Cir. 1979), citing United States v. Wilson, 176 U.S. App. D.C. 321, 540 F.2d 1100 (D.C. 1976); United States v. Premises known as 608 Taylor Avenue, 584 F.2d 1297 (3d Cir. 1978); United States v. La Fatch, 565 F.2d 81, 83 (6th Cir. 1977), cert denied, 435 U.S. 971, 98 S. Ct. 1611, 56 L. Ed. 2d 62 (1978).

Additionally, the seized property was included as evidence in the federal-

kidnapping discovery submitted by the United States. According to Fed. R. Crim. P. 16, the inclusion of the photograph of the vehicle, seizure notices of the cash seizures, and property inventory receipt documentation of the U-Haul rental truck in Augustin's discovery is the requirement of "books, papers, documents, photographs, tangible objects, building or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were 'obtained from' or 'belong to' the defendant." Fed. R. Crim. P. 16(a)(1)(C).

Furthermore, at trial, the BMW vehicle's search warrant affiant, BCSO Detective David Shoemaker, testified that approximately four days after Augustin's arrest and vehicle seizure:

> Chattanooga P.D. came back to me and asked that if I could write a search warrant for the BMW, since it was still parked at our forensics bay. And I did that.

Trial Tr. P. 399 L. 17-20; Case 1:09-cr-00187, Doc. 122 Page ID 1009.

The search warrant for the BMW vehicle was issued on December 7, 2009, at 2:23 PM by a Bradley County judge. A copy of this search warrant and photograph of the vehicle (and DNA evidence obtained during the search) were included in the federal discovery.

And during his closing argument at trial, AUSA Poole stated:

> Does a simple drug user spend $4,000 on drugs, get caught and arrested by the police the next day with another, combined between the two of them, almost $20,000; then make bond of $140,000, and get caught with $18,000 two days later?

Trial Tr. P. 548 L. 4-8; Doc. 123, Page ID 1158.

B) FBI's instructions to BCSO to seize property created federal possession.

In early 2019, the BCSO attroney provided additional evidence that confirmed the government had exercised authority and control over the seized property. Take for example, the Rule 60(b) (Doc. 252), Exhibit E, in which SA Jackson

personally completed and signed the U-Haul vehicle tow slip the day of the federal arrest of Augustin to have the vehicle towed to the BCSO impound lot to be searched by the FBI. This Court is asked to notice SA Jackson's signature above the following words:

> THE UNDERSIGNED ACCEPTS RESPONSIBILITY FOR THE ABOVE DESCRIBED VEHICLE & ITS CONTENTS.

See attached Appendix H.

Also notice in the Rule 60(b) appendices, Doc. 252, Appendix G, SA Jackson's instructions to the BCSO that the "REASON IMPOUNDED: to be searched by the FBI--Do not release w/o (sic) calling S/A Jackson." See Appendix J.

And notice in the same Rule 60(b) appendices, Doc. 252, Appendix F, the BCSO's compliance with SA Jackson's instructions quoted above when it confirmed: "U-HAUL TRAILER WILL BE RETURNED UPON APPROVAL OF W. JACKSON, FBI, 423-265-3601." This Court is further directed to look directly below that last statement in the appendix at the fact the identity of the person the property was "RELEASED TO" is blank. See Appendix I.

In the face of such overwhelming evidence, the United States submitted an affidavit by SA Jackson accusing Augustin of having requested the release of his property and provided no evidence to support. Augustin immediately opposed this perjured affidavit with a declaration naming two attorneys--his attorney and codefendant's attorney--who both witnessed Augustin denied SA Jackson's request to be given possession of the property around the exact time the affaint alleged Augustin made this request. The affiant never even identified what channel Augustin was to have used to make this request. Considering Augustin was incarcerated in Cleveland, Tennessee--approximately 30 miles from the closest FBI's office and federal court located in Chattanooga--any such request would have to be made through his then-attorney (Public Defender Anthony Martinez) or some form of written and mailed correspondence, a record of that would exist.

The district court refused to conduct and evidentiary hearing to inquire from counsel or request SA Jackson provide evidence of this alleged request. Additionally, the property form--required by all county jails before the release of an inmate's property--that Augustin would have had to sign to authorize the release of his property and identify the property recipient did not exist. The property form that the property recipient would have had to sign to document the receipt of the property also did not exist.

Furthermore, through a third party, Augustin was informed that the property recipient, identified by the affiant as Crystal Alford, stated she never received any property from the FBI nor BCSO (nor was she ever contacted regarding this matter) and would testify in any court to such facts. Augustin notified the district court of this fact and sought an evidentiary hearing. The district court denied the request, ignored Augustin's declaration and chose the government's perjured affidavit as truth, and ruled Augustin had indeed requested the release of his property.

Several circuits have provided guidance how a district court in Augustin's case--where the government is alleging the release of property without any documentary evidence to support--should proceed. The First Circuit, uniting with the Second, Third, and Seventh Circuits, has ruled:

> Denial of a Fed. R. Crim. P. 41(g) motion for return of property based on the Government's bare assertion that it no longer retains possession of the property is error. The U.S. Court of Appeals for the Seventh Circuit has noted that arguments in a government filing are not evidence. The U.S. Court of Appeals for the Third Circuit has held that a federal district court must determine what happened to property requested under Rule 41(g) but not returned. If it concludes that the government's actions were not proper, it must determine what remedies are available. The U.S. Court Appeals for the Second Circuit has noted that the Drug Enforcement Administration (DEA) is presumed to keep records of the properties it seizes and stores under the Dept. of Justice regulations found at 41 C.F.R. Sec. 128-50.101. With these records at hand, it should be a simple matter for the Government to establish on remand what property was seized and how that property was disposed of. According to the Second Circuit, an assertion that the DEA has returned the property to a defendant's designee is inadequate to support a district court's denial of a Rule 41(g) motion.

United States v. Cardona-Sandoval, 518 F.3d 13, 16-17 (1st Cir. 2008).

The Sixth Circuit's position that the property was released solely because the government said it was is dangerous and pernicious. This position encourages federal law enforcement to seize property and claim it was released--even though the records contradict this, then the courts will deny relief because of the government's allegations.

The Third Circuit recognized this danger and required the district court to conduct an evidentiary hearing.

> We provided more specific guidance on the scope of this evidentiary hearing inquiry in United States v. Chambers, 192 F.3d 374 (3d Cir. 1999). In that case, petitioner Chambers filed a Rule 41(g) motion for return of property seized by the government during his arrest. Id. at 375. The government argued Chambers' motion was moot because it no longer retained possession of the seized property. Id. The district court agreed, and denied Chambers' motion based on representations by the government that the property at issue had been forfeited, repossessed, returned or destroyed, and therefore could not be returned. Id. We reversed on appeal, concluding that the "government can not defeat a properly filed motion for return of property merely by stating that it has destroyed the property or given the property to third parties." Id. at 377. Rather, "the government must do more than state, without documentary support, that it no longer possesses the property at issue." Id. at 377-78.

United States v. Albinson, 356 F.3d 278, 281 (3d Cir. 2003).

> Allowing the government to defeat a Rule 41(g) motion simply by asserting that it no longer retains possession of the property would frustrate the purpose of the Fed. R. Crim. P. 41(g) evidentiary inquiry set forth in Chambers.

Id. at 283.

The Fourth Circuit instructs a district court facing the dilemma of an agent alleging he gave away to a third party a defendant's property in his constructive possession, especially when the defendant has exposed the agent's perjury:

> If a disputed issue of fact exists "relating to the status of the property or what happened to it," then the court should hold an evidentiary hearing to determine the chain of custody.

United States v. Roca, 676 Fed. Appx. 194, 195 (4th Cir. 2017) (citing Albinson, 356 F.3d at 284).

In a case very similar to Augustin's, the Seventh Circuit, uniting with

the Third Circuit, stated:

> 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 & Poust, 290 F.3d 843, 853 (7th Cir. 2002) ("It is universally known that statements of attorneys are not evidence."); see also United States v. Albinson, 356 F.3d 278, 281 (3d Cir. 2004) ("The 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 (3d Cir. 1999)). As such, the district court failed to receive evidence to support its factual determinations as required by Rule 41(g).

United States v. Stevens, 500 F.3d 625, 628-29 (7th Cir. 2007).

The Tenth Circuit has also addressed the issues in this case and found constructive possession:

> Apart from principles of equity, however, there are some limited circumstances under which Rule 41(e) can be used as a vehicle to petition for the return of property seized by state authorities. Those circumstances include actual federal possession of the property forfeited by the state, constructive federal possession where the property was considered evidence in the federal prosecution, or instances where the property was seized by state officials acting at the direction of federal authorities in an agency capacity. Clymore v. United States, 164 F.3d 569, 571 (10th Cir. 1999). Property seized and held by state-law-enforcement officers is not in the constructive possession of the United States for Fed. R. Crim. P. 41(g) purposes unless it is being held for potential use as evidence in a federal prosecution. Absent such potential use, the United States has no interest in the property. Id.

Undoubtedly, the United States was in constructive possession of the property. And Augustin's Fifth Amendment of the U.S. Constitution was violated. The property was used as evidence and seized at the FBI's behest.

> For the district court to grant the motion, however, the federal government must have itself possessed the property at some point.

United States v. Price, 841 F.3d 703, 707 (6th Cir. 2016).

This Court should grant certiorari due to the Sixth Circuit Court of Appeals having entered a decision in conflict with the decision of other United States court of appeals (namely, the First, Second, Third, Fourth, D.C., Seventh, and Tenth Circuits) on the same important matter; and has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a decision by a lower court, as to call for an exercise this

Court's supervisory power. Rule 10(a) of the Rules of the Supreme Court of the United States.

II. A RULE 41 MOTION FILED AT THE CONCLUSION OF THE CRIMINAL PROCEEDING IS A CIVIL ACTION IN EQUITY, THEREBY, GIVING A DISTRICT COURT PANOPLY POWER TO GRANT RELIEF. WHERE THE UNITED STATES AND/OR ITS AGENT ILLEGALLY FORFEITED AND DISPOSED OF PROPERTY IN ITS POSSESSION, THE SIXTH CIRCUIT ABUSED ITS DISCRETION IN RULING NO RELIEF COULD BE GRANTED SIMPLY BECAUSE THE PROPERTY WAS NO LONGER IN POSSESSION, WHEN IT FAILED TO ORDER THE UNITED STATES AGENT TO RETURN THE PROPERTY, AND/OR ALLOW AUGUSTIN TO AMEND HIS PETITION FOR ALTERNATIVE CLAIMS.

1. Standards of review.

Since the government was in constructive possession of the property, the Sixth Circuit was to grant some form of relief. However,, the Circuit insisted since the government no longer possessed the property (contradicted by the documentary evidence of the United States agent the BCSO, showing the U-Haul contents were never released), no relief could be granted. That is erroneous. If the government's agent possess the property, the government possess the property.

Coupled with the fact the Rule 41(g) proceeding is a civil action in equity, the court had planery power to grant relief.

> A Rule 41(g) motion is treated as a civil action in equity when the owner of the property invokes the rule after the conclusion of the criminal proceedings against him.

United States v. Savage, 99 Fed. Appx. 583, 584 (6th Cir. 2009).

A) The Rule 41(g) motion should be construed for alternative claims.

The Second Circuit, uniting with the Ninth Circuit, has held:

> Noting that Rule 41(e) proceedings are equitable in nature, some circuits have concluded (or at least strongly suggested) that federal courts may award money damages, pursuant to their inherent power to afford adequate relief, when the moving party is entitled to the return of property the government has lost, destroyed, or transferred. See Soviero v. United States, 967 F.2d 791, 792-93 (2d Cir. 1992); Mora v. United States, 955 F.2d 156, 161 (2d Cir. 1992); United States v. Martinsan, 809 F.2d 1364, 1368 (9th Cir. 1987).

The Third Circuit has emphasized the importance of the evidentiary hearing by noting that, "depending on what is adduced through the evidentiary inquiry,

amendment may be particularly appropriate on the facts of th(e) case."

Albinson, 356 F.3d at 289 n.9.

> The allegations of a pro se litigant are generally held to a "less stringent standard" than formal pleadings prepared by a lawyer. Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003) (citing Haines v. Kerner, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)). Fed. R. Crim. P. 41(g) motions are civil in nature, and should be treated as a "civil complaint." United States v. McGlory, 202 F.3d 664, 670 (3d Cir. 2000). Therefore, a pro se Rule 41(g) motion should be liberally construed to allow the assertions of alternative claims. "Affirming the denial (of a pro se Rule 41(e) motion) without leave to amend would have the same effect as a Rule 12(b)(6) dismissal of a pro se complaint," which are generally disfavored. Pena v. United States, 157 F.3d 984, 987 (5th Cir. 1998) (reversing dismissal of pro se petitioner's Rule 41(g) motion without leave to amend to state a Bivens action).

The Fifth Circuit also takes the same position:

> A defendant's "claim--that the government wrongfully deprived him of his property and destroyed it--alleges facts that could support a Bivens claim, see Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

Pena v. United States, 157 F.3d 984, 987 (5th Cir. 1998).

> Like Pena, Bacon, a pro se litigant, did not have the opportunity to amend his pleading under Rule 15(a). In such a situation, it is appropriate to treat pro se petition as one seeking the appropriate remedy. Clymore v. United States, 217 F.3d 370, 373 (5th Cir. 2000). Therefore, we treat Bacon's claim as one seeking damages under a Bivens claim for the alleged due process violation with regard to his destroyed property.

United States v. Bacon, 546 Fed. Appx. 496, 499-500 (5th Cir. 2013).

The Seventh Circuit, in turn, proposed a relevant question and answer:

> But what if relief under Rule 41(g) is sought against individual officers rather than against the United States, because the government has disposed of the property to them (or maybe they never turned it over to the government)? Then the issue of sovereign immunity falls away and the question becomes whether Bivens offers the exclusive route to a suit against the officers or whether the Rule 41(g) is available since the relief sought is in the nature of restitution. Although Bivens is constitutionally described as providing a damages remedy ... what it really does is create a right of action against individual federal officers for violation of constitutional rights; it does not truncate the remedies available. It would be odd to be able to proceed by way of Bivens if one sought damages yet be remitted to Rule 41(g) if one sought restitution.

Okoro v. Callaghan, 324 F.3d 488, 491 (7th Cir. 2003).

> Since in the usual case the only relief sought by Rule 41(g) motion is return of property by the government, the fact that the government doesn't have it is ordinarily a conclusive ground for denial of the motion. But

> an action for the return of property is necessarily directed against the custodian. If the federal government's agents have secreted or sold the property that they unlawfully seized while exercising investigative powers with which the government had clothed them, the owner of the property is entitled to seek the return of the property or its proceed from them. Otherwise the government could defeat a motion under a Rule 41(g) simply by transferring the property to one of its agents. It is no answer that if they hold it as the agents of the government and the government is ordered to return it, they must return it. Of course, they must.

Id. at 491-92.

The Seventh Circuit has consistently ruled that when a district court conducting a Fed. R. Crim. P. 41(g) proceeding learns that the government no longer possesses the property that is subject of motion to return, the court should grant movant (particularly movant proceeding pro se) opportunity to assert alternative claim for money damages; pro se Rule 41(g) motion should be liberally construed to allow assertion of alternative claims. United States v. Norwood, 602 F.3d 380 (7th Cir. 2010). In Norwood, although the district judge denied defendant's motion for restitution against the government for value of property taken from him that was not returned (property had no relation to any crime or conviction) because Rule 41(g) did not authorize monetary relief, case was remanded to the district court for purpose of deeming motion as civil complaint and determining if defendant were to assert either Bivens claim against federal officers and/or 42 U.S.C. Sec. 1983 claim against state officers, whether claims would relate back, and whether claims would have been otherwise barred. Id.

The Eighth Circuit also supports this position:

> We conclude, however, that as to items which were not forfeited but were no longer in the government's possession, the district court should have afforded Reed an opportunity to assert an alternative claim for damages. See United States v. Hall, 269 F.3d 940, 943 (8th Cir. 2001) (addressing Rule 41(g) predecessor, Rule 41(e); sovereign immunity bars money damages for destroyed property under Rule 41(e) but proceeding is not moot; "when a district court in a Rule 41(e) proceeding learns that the government no longer possesses property that is the subject of the motion to return, the court should grant movant ... an opportunity to assert an alternative claim for money damages" such as under the Tucker Act or Federal Tort Claims Act).

United States v. Reed, 782 Fed. Appx. 522, 523 (8th Cir. 2019).

In regards to the Tucker Act, 28 U.S.C. Sec. 1491, the Little Tucker Act, 28 U.S.C. Sec. 1346(a)(2), and the Federal Tort Claims Act, 28 U.S.C. Secs. 2671 to 2681, the Eighth Circuit stated:

> A cause of action may accrue under one or more of these statutes when the government discloses that it has lost, damaged, or transferred property that would otherwise be subject to a Rule 41(e) order to return. If such a cause of action has accrued, the government's sovereign immunity from an award of money damages may well be waived. See United States v. Mitchell, 463 U.S. 296, 77 L. Ed. 2d 580, 103 S. Ct. 2961 (1983).

United States v. Hall, 269 F.3d 940, 943 (8th Cir. 2001).

The Sixth Circuit has refused to allow Augustin to amend, even claiming it would have been futile since the one-year statute of limitations (for a Sec. 1983 or Bivens claim) would have expired. That's erroneous. The record of this case show upon seizing his property, the State never served Augustin any forfeiture documents and thus forfeited his property without due process. Even more relevant to this point is that Augustin never had any knowledge the cash and vehicle had been forfeited without due process since he was never served any forfeiture warrants nor forfeiture orders.

Augustin filed numerous FOIs to the State that were all ignored. The State suppressed all documentary evidence of the property's whereabouts. And the contents of the U-Haul that SA Jackson instructed the BCSO to hold, the record in this case support, is still in the custody of the BCSO or it disposed of the contents in a manner that no records can account. The first evidence Augustin received about the property was from the U.S. Attorney's Office during its response to the Rule 41(g). Any statute of limitations should begin on November 2015 when Augustin received notice of his injury.

For a Bivens or Sec. 1983 claim, the governing statute of limitations is provided by the law of the state in which the suit is brought. Roberson v. Tennessee, 399 F.3d 792, 794 (6th Cir. 2005); see also Wilson v. Garcia, 471 U.S. 261, 275-76, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985). Tennessee law provides a one-year statute of limitations for civil actions brought

under federal rights statutes. Tennessee Code Annotated Section 28-3-104(a)(3); Roberson, 399 F.3d at 794. However, for a Bivens or Sec. 1983 claim, the date on which the statute of limitations begins to run is a question of federal law. Kuhnle Bros., Inc. v. County of Geauga, 103 F.3d 516, 520 (6th Cir. 1997). Under federal law, the statute of limitations accrues when the plaintiff knows or has reason to know of the injury that forms the basis of his action. Id.

Additionally, wrongful concealment by authorities also tolls the statute of limitations. Wrongful concealment can be determined by analogy to cases in the Sixth Circuit dealing with fraudulent concealment, the presence of which bars a defendant from asserting the statute of limitations as a defense. Under Tennessee law, the tort of fraudulent concealment, also known as constructive fraud, occurs when

> a party who has a duty to disclose a known fact or condition fails to do so, and another party reasonable relies upon the resulting misrepresentation, thereby suffering injury.

Roopchan v. ADT Sec. Inc., 781 Supp.2d 636, 650 (E.D. Tenn 2011) (quoting Chrisman v. Hill Home Dev., Inc., 978 S.W.2d 535, 538-39 (Tenn. 1998)).

Under the discovery rule, a Sec. 1983 or Bivens claim accrues when the plaintiff "knew or should have known of the injury which is the basis of his Bivens claim." Friedman v. Estate of Presser, 929 F.2d 1151, 1159 (6th Cir. 1991). Once the plaintiff knows "he has been hurt and who has inflicted the injury," the claim accrues. United States v. Kubrick, 444 U.S. 111, 122, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979).

The date the claim began was on November 12, 2015, two months after filing his Rule 41(g) motion. Therefore, any alternative claim would have been timely.

B) The property could have been substituted.

Regarding the substitute property issue, the Sixth Circuit and others

have held that money damages are not available via Rule 41(g) motion when the property has been destroyed. The District of Columbia Circuit, however, held that depositing the actual seized cash into the Court's bank account did not preclude return of the seized cash. Wilson, 540 F.2d 1100 (D.C. Cir. 1976). That Circuit held that "whoever holds the money holds it subject to the order of the federal court and is subject to its judgment and the execution thereof." Wilson, supra, at 1104.

In the instant case, Augustin itemized the property to be returned by attaching the very documents the government used to document the seizure. Cash items included $9,850.00, $7,829.00, $840.00 in United States Currency. Motion, R. 139, Page ID 1303. These cash items are fungible and there is no reason that a payment cannot be made by whichever agency converted those funds to their own use. The BMW was listed as a black 2003 BMW 745 LI. Id. If this vehicle was sold at auction, then the amount of cash it brought in to the police agency would be substitute property. Payment to Augustin of the amount it was sold for (net) would not result in the payment of money damages but would simply be a substitute for the property. If, for example, the BMW was worth $90,000 but sold for $30,000.00 at auction, paying the $30,000.00 would not be damages. It would simply be a substitute for the vehicle. Ordering the government to pay the difference would be damages. The same would hold true for all the items listed by Augustin.

C) The district court could have ordered the BCSO to return the property.

And if somehow, the court was to have differentiated between the United States and its agent, then the court could have ordered the BCSO to return the cash, U-Haul contents still in its possession, and pay the auction value of the BMW.

III. AUGUSTIN FILED HIS FIRST FILING REGARDING HIS PROPERTY IN A LETTER TO THE SIXTH CIRCUIT DURING HIS DIRECT APPEAL IN 2012, WHICH WAS IGNORED. HE FILED HIS FIRST PETITION FOR THE RETURN OF PROPERTY JUST EIGHT MONTHS AFTER HIS WRIT TO THE U.S. SUPREME COURT WAS DENIED. THE DISTRICT COURT IGNORED THE MOTION. WHERE AUGUSTIN FILED A SECOND MOTION THREE MONTHS LATER AND THE DISTRICT COURT WAITED NEARLY FOUR YEARS TO ADDRESS ITS CLAIMS, THE SIXTH CIRCUIT ABUSED ITS DISCRETION FOR THE UNREASONABLE DELAY THAT CAUSED OR CONTRIBUTED TO THE DESTRUCTION OR UNKNOWN WHEREABOUTS OF THE PROPERTY.

1. Standards of review.

Just ten months after his sentencing and filing of notice appeal, believing his case to now be in the court of appeals, on January 17, 2012, Augustin filed a letter to the Sixth Circuit that was docketed as:

> CORRESPONDENCE: Letter requesting that the Federal Courts help him get the answers to what happened to all of his confiscated property; and questions regarding his state charges.

Doc. 41 in Sixth Circuit Court of Appeals Docket No. 11-5357; see Case 1:09-cr-00187-CLC-SKL, Doc. 156-1, Page ID 1488. See attached Appendix D.

Even though Augustin was represented by counsel, less than a year from sentencing, this record shows Augustin was actively pursuing the return of his property even in the midst of having no information as to what had happened to his property and state charges. The month before filing this letter to the court of appeals, Augustin had filed a FOI to the BCSO---to obtain the answers he was seeking from federal court--that was unexplainably returned by the sheriff with no information provided for the reason of the rejection. The postmark date on the envelope from the BCSO Sheriff T. Hammons was February 3, 2012, as the FOI was enclosed and returned in an official envelope from the sheriff. A copy of this evidence was attached to the Appellant Brief. This evidence is reattached to this writ as Appendix C.

After renewing this FOI multiple times throughout the coming years, finally seven years after the first request, the BCSO provided some information on February 23, 2019, that made up the newly discovered evidence introduced in the Rule 60(b). See attached Appendix E to this writ.

Augustin never received any documents from the State nor sheriff's office

regarding his criminal charges (he had been out on bond for when arrested by the United States), plus he was never taken to his state-court arraignment where he would discover years later all his state criminal charges had suddenly and unexplainably been dismissed during his absence. And he received no forfeiture warrant nor forfeiture order from the State regarding the forfeiture proceedings of all his property. The only thing Augustin knew for sure back then was that all the documents he possessed regarding his confiscated property were provided in the federal discovery used to prosecute and convict him in federal court. All his confiscated property--which are the subject of the Rule 41(g)---was used as evidence at his trial.

Needless to say, this CORRESPONDENCE on January 17, 2012 was ignored by Augustin's counsel, the district court, and brought no response from the court of appeals. Could this correspondence been construed as a plea for the return of property? And if so, how might addressing the return of property back in 2012 might have impacted this case?

Following Augustin's direct appeal denial in June 2014, he sought a writ to this Court that was denied on October 6, 2014. Just eight months later, on June 29, 2015, Augustin filed his motion for return of property. When the district court docketed but ignored the motion, Augustin refiled the motion on September 15, 2015. Then the district court refused to rule on the motion, after the government's response and Augustin's reply were filed seeking discovery, until Augustin was forced to file a writ of mandamus. Once the court of appeals ordered the district court to make a ruling, only then did the district court finally acted.

From the record, one can assume if the writ of mandamus was never filed, Augustin's Rule 41(g) would still be pending in the district court. Nevertheless, after delaying the ruling for four years, the district court ruled against Augustin stating since the government no longer possess the

property, no relief could be granted.

In delaying its ruling for four years, instead of a speedy adjudication that could've given Augustin other options to seek relief, the district court strung Augustin along in hope of relief while the statute of limitations for seeking relief from the State for civil rights violations (Tucker Act, Bivens Claim, Sec. 1983, or Federal Tort Claim) have expired, leaving Augustin today with no other available remedy but for the district court to allow his pro se Rule 41(g) motion--being civil in nature--to be treated as a "civil complaint." McGlory, 202 F.3d at 670.

Since it is now known that the government fabricated the account of Augustin having requested the release of his property, especially to Crystal Alford, since the record of the government agent holding the property revealed the property was never released to anyone, the district court's delay prejudiced Augustin from discovering the property's final outcome. The longer the court waited, the more the chances increased of officers forgetting the outcome of the property, paperwork getting lost, etc., or whatever other excuses the government and its agent can conjure to escape liability.

Finding a petitioner's lack of available remedy, except a Rule 41(g) motion, the Tenth Circuit ruled that in spite of the government's contention that former Rule 41(e) claimant failed to pursue 4 available remedies at law, claimant had no adequate remedy at law which would have required dismissal of his motion under former Rule 41(e). Floyd v. United States, 860 F.2d 999 (10th Cir. 1988).

CONCLUSION

Augustin asserts the United States was in constructive possession of the property, the Sixth Circuit failed to substitute the property and grant other available relief, and the four-year delay tremendously prejudiced Augustin. It is time for this Court to resolve and establish the proper procedures the

lower courts in the nation are to follow in adjudicating a petitioner's motion for return of property. The lack of this Court's guidance has caused inter-circuit split on the proper procedures and remedy.

The Sixth Circuit's decision in this case will become controlling precedent in the circuit to incentivize federal law enforcement to seize property or order the state to seize property, dispose of the property in some undocumented way without the claimant's consent, then accuse the claimant of having requested the release of his property, and the court will deny an evidentiary inquiry and relief based on the government's version of events and allegations that it no longer possess the property. The district court should have at least granted an evidentiary hearing to determine the still-unknown disposition of the U-Haul contents.

RELIEF REQUESTED

WHEREFORE, Augustin respectfully requests this Supreme Court to grant certiorari to resolve the issues in this case and establish unity in the circuits as the proper remedy for a Rule 41(g) proceeding, filed at the conclusion of the criminal proceedings, and thus a civil action in equity.

Dated this 1st day of March 2022.

Respectfully Submitted,