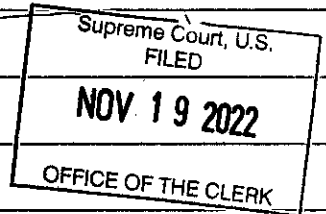


22-6305 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

KALEB LEE BASEY,
Petitioner,



v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERT.

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QUESTION PRESENTED

This petition presents the following question:

Whether a person seeking return of illegally-seized property under Fed. R. Crim. P. Rule 41(g) has an absolute right to reject the Government's offer to return the property where the Government continues to deny liability of constitutional violations?

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(citing Meier v. Keller, 521 F.2d 548, 554 (9th Cir. 1975)).

Here, there is no indication the district court and Ninth Circuit treated Basey's motion like a civil complaint. First, neither court considered any equitable factors. Second, instead of requiring the Government to file a responsive pleading — which would be the normal thing defendants do when facing a civil complaint — the courts condoned the Government's filing of a "Non-Opposition." (Pet. App. 30a-33a). And third, the Government was allowed to deny liability on Basey's claims while asserting its own counterclaim based on a lack of need for Basey's property.

Had the courts treated Basey's Rule 41(g) motion like a complaint they would have realized that Basey was "the master of his claim." Vien-Phuong v. Recontrust Co., 858 F.2d 568, 577 (9th Cir. 2017). Basey, not the Government, was the only one with any say as to what legal theories he could assert. See, e.g., Caterpillar Inc. v. Williams, 482 U.S. 386, 392 & n.7 (1987). Thus, the courts should have disregarded the Government's attempt to inject a lack-of-continuing-need theory into the case to deflect a determination of liability on Basey's claims.

Perhaps more importantly, had the courts treated Basey's motion like a complaint, they would never have allowed the Government to deny liability. At common law, once a lawsuit was filed, "any would-be defendant who tried to deny liability could not effectuate a tender."

Campbell-Ewald, 577 U.S. at 170 (Thomas, J., concurring). But here, the courts below were nonplussed by Busby's objections to the Government's offer despite no admission of liability.

There is unfortunate dicta in the Ninth Circuit's Martinson decision the panel below relied on that says: "when the property in question is no longer needed for evidentiary purposes.... the legality of the search and seizure is no longer an issue...." 809 F.2d at 1369. Is that really true, though? Does a man's right to hold the Government accountable for its Fourth Amendment wrongs rise and fall with the sovereign's whims of whether it will use property as evidence? To the victims of an illegal seizure, the legality of it may remain a very big issue. The damage to one's dignity from an illegal search may dwell for years as he yearns for some semblance of justice. Indeed, as Martinson itself recognizes — with ~~not~~ a little irony — "[i]t is the historic purpose of equity to secure complete justice [.]'" Id. at 1367 (quoting EEOC v. Gen. Tel. Co., 599 F.2d 322, 334 (9th Cir. 1979)). It would be an odd form of "complete justice" to force a man to accept his stolen property from a thief while letting the thief off scott free. Especially when the thief is the Government.

B. Busby had an absolute right to reject the Government's offer to return his property in favor of pursuing his claims.

While some might rest a reversal solely on the lower courts' failure to abide by the law of tenders, see Campbell-Ewald, 577 U.S. at 170 (Thomas,

J., concurring), others might look to contract law. There are fewer concepts more basic in law than knowing a rejected offer is a legal nullity. Id. at 162. Thus, when the Government offered to return Basy's property and he rejected it, the Court was powerless to force Basy to effectively take the offer by ordering him to tell the Government where to send his property. (Pet. App. 4a).

"While the law favors the voluntary settlement of civil suits, it does not sanction efforts by trial judges to effect settlement through coercion." Cabrera v. Esso Std. Oil Co. P.R., 723 F.3d 82, 88 (1st Cir. 2013) (quoting Kothav. Smith, 771 F.2d 667, 669 (2d Cir. 1985)). As Judge Posner put it, "If the parties want to duke it out, that's their privilege." Goss Graphics Sys. v. Dev Indus., 267 F.3d 624, 627-28 (7th Cir. 2001) (Posner, J.). Perhaps Basy was less amenable to settling than he should have been in some abstract sense, but that was his right. Id.

And that right has roots firm in the soil of common law. See Campbell-Ewald, 577 U.S. at 171 (Thomas, J., concurring) (a party may reject an offer "and accordingly go on to trial"). Some have traced it to "the deep-rooted historic tradition that everyone should have his own day in court." Conrad v. Boiron, 860 F.3d 536, 541-42 (7th Cir. 2017) (quoting Taylor v. Sturgell, 557 U.S. 880, 892-93 (2008)). The day-in-court right is part of the procedural due process enshrined by the Fifth Amendment. See, e.g., Grimes v. Pearl Valley Water Supply Dist., 930 F.2d 441, 444 (5th Cir. 1991) ("[B]eing deprived of your day in court, involves the concept of Procedural Due Process.").

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kaleb Lee Basey, respectfully petitions for a writ of certiorari to review the final decree of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The memorandum opinion of the Ninth Circuit affirming the district court's order is unpublished. (Pet. App. 1a-2a). The district court's order is unpublished. (Pet. App. ~~3~~⁴a).

JURISDICTION

The district court had jurisdiction in U.S.v. Basey, No. 4:14-cr-00028-RAB (D. Alaska) over Basey's motion for return of seized property under Fed. R. Crim. P. 41(g) and 28 U.S.C. §1331. The Ninth Circuit had jurisdiction under 28 U.S.C. §1291. The district court's order was issued on August 5, 2021. The Ninth Circuit's memorandum opinion was issued on July 21, 2022. The petition for rehearing or rehearing en banc was denied on October 24, 2022. (Pet. App. ~~3~~⁷a).

This Court has jurisdiction under 28 U.S.C. §1254(1). This petition is filed within the 90-day limit after the denial of Basey's petition for rehearing or rehearing en banc. Sup. Ct. R. 13.1.

RELEVANT STATUTES AND RULES

Federal Rule of Criminal Procedure Rule 41(g) provides:

A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

STATEMENT OF THE CASE

Four years after his federal conviction, Barsey moved for return of property seized by the Government. (Pet. App. 5a-29a). Post-trial Fed. R. Crim. P. Rule 41(g) motions are treated as civil complaints for equitable relief. E.g., *U.S. v. Ibrahim*, 522 F.3d 1003, 1007 (9th Cir. 2008). But his motion was not ^{traced} that way.

Barsey's motion alleged the Government illegally seized his property in violation of the Fourth Amendment. (Pet. App. 23a-28a). To avoid litigating its liability to Barsey's claims, the Government offered to

return Basey's property without admitting liability. (Pet. App. 34-35a). Basey rejected the Government's offer. Id.

The Government then filed a "Non-Opposition" seeking an order from the court requiring Basey to provide contact information for someone designated to receive his property (Basey is in prison). (Pet. App. 30a-33a). Over Basey's objection, the district court granted the Government's request by ordering Basey to supply the information. (Pet. App. 4a). Basey timely appealed and still refuses to supply the information.

The Ninth Circuit affirmed. (Pet. App. 1a-3a). The panel held that the district court was not required to determine Basey's Fourth Amendment claims given the Government's lack of a continuing need for the property. (Pet. App. 2a). Basey's petition for rehearing or rehearing en banc was denied on October 24, 2022 (Pet. App. 36a). This petition is timely filed within the 90-day limit under Sup. Ct. R. 13.1.

The decisions below are wrong because Basey had an absolute right to reject the Government's offer and proceed with his claims. The district court's order effectively attempted to force Basey to take the rejected offer by compelling him to provide information to facilitate the return of his property. This violated basic principles of contract law, due process, and this Court's holding in Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2010).

The Ninth Circuit's ~~affirmance~~ ^{affirmance} on grounds that the Government's lack of a continuing need for Basey's property bars him from having his

Fourth Amendment claims heard is separately flawed. This proposition violates the equitable principles established by this Court as early as *Marbury v. Madison*, where it said civil liberty "consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 1 Cranch 137, 163 (1803).

This Court should grant certiorari or summarily reverse and remand with instructions to conduct further proceeding in accordance with the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

I. The decision below ignores basic principles of contract law and this Court's decision in *Campbell-Ewald*.

A. Post-trial motions for return of seized property must be treated as civil complaints for equitable relief.

It is well settled that a post-trial Rule 41(g) motion must be treated as a civil complaint for equitable relief governed by the Civil Rules. *E.g., Ibrahim*, 522 F.3d at 1007; *U.S. v. Martinson*, 809 F.2d 1364, 1367 (9th Cir. 1987) ("Such motions are treated as civil equitable proceedings even if styled as being pursuant to Fed. R. Crim. P. 41([g]) (my alteration); *Mr. Lucky Messenger Service, Inc. v. U.S.*, 587 F.2d 15, 16-17 (7th Cir. 1978). "In ruling on the motion, the court must take into account all equitable considerations." *Martinson*, 809 F.2d at 1367

Thus, Basey's right to due process was violated by being forced by the district court to effectively accept the rejected settlement offer.

C. Under Campbell-Ewald, the district court could not force Basey to accept the Government's offer by ordering him to provide contact information for where to return the property.

As if violating the law of tenders and contracts and due process weren't enough, the decision below flouts this Court's Campbell-Ewald v. Gomez decision. There, the plaintiff sued under the Telephone Consumer ~~Protection~~ Act ("TCPA"), alleging that he received unsolicited texts from the defendants in violation of the law, 577 U.S. at 157. The defendants offered to settle, but the plaintiff — like Basey — declined. *Id.* at 158. This Court concluded that "[a]n unaccepted settlement offer — like any unaccepted contract offer — is a legal nullity, with no operative effect." *Id.* at 162 (quoting Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66, 81 (2013) (Kagan, J., dissenting)).

Implicit in the district court's order and the Ninth Circuit's affirmance were that Basey's claims were moot in light of the Government's professed lack of need for his property. Campbell-Ewald tells us, not so fast. "[W]ith no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset." *Id.* at 163. To the extent Martinson's unfortunate dicta about the legality of the search and seizure ~~becoming~~ ^{becoming}

a moot point conflicts with Campbell-Ewald's bright-line rule relying on contract law, Martinson should be overruled. Barcy's claims were not rendered moot by the Government's rejected settlement bid. Requiring Barcy to disclose information for where to send his property puts the Government in "the driver's seat" allowing them to steer away from an "adverse decision." Campbell-Ewald, 577 U.S. at 165. That is wrong.

II. The decision below conflicts with this Court's decisions regarding equitable principles.

Since time out of mind, this Court has recognized that "it is the historic purpose of equity to secure complete justice[.]" Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting Brown v. Swann, 10 Pet. 497, 503 (1836)). "[W]here federally protected rights have been invaded, it has been the role from the beginning that courts will be alert to adjust their remedies to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684 (1986). "Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.'" Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (quoting Hecht Co. v. Bowler, 321 U.S. 321, 329 (1944)).

"Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." Porter, 328 U.S. at 398; see FTC v. Commerce Planet, Inc., 815 F.3d 593, 599 (9th Cir. 2016) ("[L]imitations on the Court's equitable jurisdiction are not to be casually inferred."). So long

as "the controversy contains an equitable feature ... the court may go on to ... establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority," U.S. v. Union Pac. R. Co., 160 U.S. 1, 52 (1895) (quoting 1 Pom. Eq. Jur. §181); Camp v. Boyd, 229 U.S. 530, 552 (1913) (equity courts may "determine purely legal rights that would not be within the range of its authority").

Here, the limitations on equity jurisdiction created in the unfortunate dicta in Martinson and relied on by the Ninth Circuit in the memorandum opinion contradict these precedents. 809 F.2d at 1369. The legality of a search and seizure may remain an issue in a post-trial Rule 41(g) proceeding if the movant wants it to be. The court may adjust its remedies to issue a decree declaring the property owner's Fourth Amendment rights to have been violated if that is the case and the claim made. Since Boyd has not yet received his property, there remains an equitable feature in this case and the district court "may go on to ... establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." Union Pac. R. Co., 160 U.S. at 52.

Therefore, this Court should overrule Martinson and summarily reverse the case or grant certiorari to clarify the issue.

CONCLUSION

Because a party cannot be forced to settle against his will, this Court should either 1) summarily reverse with instructions to conduct further proceedings on Basey's claims under the Civil Rule or 2) grant certiorari to flesh the issues out more fully.

Respectfully submitted this 19th day of November, 2022.

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