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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 21 2022

FOR THE NINTH CIRCUIT

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

UNITED STATES OF AMERICA,

No. 21-30196

Plaintiff-Appellee,

D.C. No. 4:14-cr-00028-RRB-1

v.

KALEB L. BASEY,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Submitted July 12, 2022**

Before: SCHROEDER, R. NELSON, and VANDYKE, Circuit Judges.

Kaleb L. Basey appeals pro se from the district court's orders granting his motion for return of property under Federal Rule of Criminal Procedure 41(g) and denying reconsideration. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, Basey's request for oral argument is denied.

As an initial matter, we reject Basey's assertions that the district court's order granting relief was an injunction or "coerced settlement." The record reflects that the district court properly granted Basey's motion for return of property after the government filed a notice of non-opposition conceding that it had no legitimate reason to retain the property at issue. *See United States v. Martinson*, 809 F.2d 1364, 1369-70 (9th Cir. 1987) ("A district court has both the jurisdiction and the duty to return the contested property once the government's need for it has ended." (internal quotation marks omitted)). Moreover, the court did not abuse its discretion in denying Basey's motions for reconsideration after ordering the government to return Basey's items and delete copies in its possession. *See United States v. Tapia-Marquez*, 361 F.3d 535, 537 (9th Cir. 2004) (stating standard of review). Contrary to Basey's contentions, the district court was not required to treat the government's notice of non-opposition as a motion to dismiss, and neither the district court nor this court need reach Basey's claim that the property at issue was illegally seized. *See Martinson*, 809 F.2d at 1369 ("[W]hen the property in question is no longer needed for evidentiary purposes . . . the legality of the search and seizure is no longer an issue."). Finally, no hearing on the motion was required. *See Fed. R. Crim. P. 41(g)*.

In light of this disposition, we do not reach the government's remaining arguments.

We do not consider matters not specifically and distinctly raised and **argued** in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Basey's motion for reassignment to a different district judge is denied as moot.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KALEB LEE BASEY,

Defendant.

Case No. 4:14-cr-00028-RRB

ORDER

Defendant's Motion for Return of Seized Property at Docket 369 is hereby GRANTED consistent with the Government's Non-Opposition at Docket 387, and according to the terms set forth by the Government.

IT IS SO ORDERED this 5th day of August, 2021, at Anchorage, Alaska.

/s/ Ralph R. Beistline

RALPH R. BEISTLINE
Senior United States District Judge

Kaleb Lee Basey
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Federal Medical Center Lexington
P.O. Box 14500
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Defendant in Pro Se

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)	No. 4:14-cr-00028-RRB
Plaintiff,)	
)	
vs.)	SECOND MOTION FOR
)	RETURN OF SEIZED
KALEB LEE BASEY,)	PROPERTY
)	(Fed. R. Crim. P. 41(g))
<u>Defendant.</u>)	

Defendant in pro se, Kaleb Basey, moves once again for an order directing the United States ("Government") and State of Alaska ("State") to return certain physical property seized from Basey and destroy any derivative information obtained from this property.

I. Facts.

The Investigation

¶1. In January 2014, the Alaska State Troopers (AST) and the Army Criminal Investigation Division (CID) began an investigation into the posting of an advertisement on the Fairbanks, Alaska Craigslist website

which investigators believed to be a solicitation of a minor for sex.¹

Using IP address information obtained from the Craigslist and a DHCP log provided by a local internet provider, the investigators concluded that the initial ad was posted by Kaleb Basey, a soldier stationed at Ft. Wainwright, Alaska.²

¶2. On January 17, 2014 CID agent Sean Shanahan was granted a military search warrant to search Basey's barracks room for child pornography despite a complete lack of probable cause for that offense.³ Shanahan's warrant was later found to be invalid.⁴ Around midnight on January 18, 2014 the CID and AST raided Basey's barracks room seizing the following items as Basey was made to stand directly outside his room in his long underwear:⁵

¹ Dkt. 160 at 7-8 (Magistrate's Final R&R).

² Dkt. 172 at 12.

³ Dkt. 160 at 10-15; Dkt. 45-1 (Military Warrant & Aff.).

⁴ Dkt. 110 at 36 ("The officer could not have harbored an objectively reasonable belief in the existence of probable cause to search Basey's room...").

⁵ Dkt. 160 at 16-17.

1. One black and silver iPhone model A1387 encased in a grey and green Otterbox;
2. One silver and with Apple Mac Pro desktop computer;
3. Two compact discs;
4. One Pro Tools M-Powered dongle;
5. Two 16 GB SanDisk Extreme SD cards;
6. One 16 GB Transcend SD card;
7. One 4 GB flash drive; and
8. One Patriot SD card.⁶

They also seized Basey's penis rings⁷ and viewed boudoir photos of Basey's girlfriend (now fiancée) on Basey's camera.⁸ Basey wasn't given a copy of the warrant or affidavit.⁹

¶3. Basey was then taken to CID headquarters in handcuffs where agent Shanahan proceeded to extract statements from Basey that the computer contained child pornography by using the illegal search against Basey.¹⁰ These statements were later suppressed by the District Court as fruits of the poisonous tree.¹¹ The following day, the AST took

⁶ Dkt. 278 at 2; Dkt. 278-1 (CID Property Custody Document); Dkt. 278-2 (FBI Property Custody Document).

⁷ Dkt. 80 at 80-81; 129, LL 6-11 (Evid. Hrg. Tr.).

⁸ *Id.* at 129, LL 13-20; Exh. A at 5 ¶11.

⁹ *Id.* at 119, LL 15-19.

¹⁰ Dkt. 160 at 20-23.

¹¹ *Id.* at 30-39.

custody of Basey's property.¹² The AST illegally searched Basey's property over the months that followed by subjecting the property to a digital forensic examination (DFE).¹³ As explained by agent Shanahan, "[T]he way [they] were able to *move forward* was what [they] found on the digital evidence."¹⁴

¶4. It was only after the illegal searches of Basey's property that the AST and CID contacted the FBI as shown by agent Shanahan's testimony at the July 2015 evidentiary hearing:

Q: So it was after the evidence had been discovered [on Basey's devices] that discussion of bringing the FBI into the loop occurred?

A: That's correct, ma'am.

Q: And approximately when was the FBI looped in?

A: It was either the end of June or July time frame.¹⁵

¹² *Id.* at 25-26; Dkt. 80 at 102, LL 1-6 (Evid. Hrg. Tr.).

¹³ Dkt. 160 at 25-26; Dkt. 80 at 102-05.

¹⁴ Dkt. 80 at 102, LL 11-17 (emphasis added).

¹⁵ *Id.* at 104, LL 18-22.

¶5. At meetings held on July 25 and 30, 2014, AST and CID briefed the FBI “on everything [they] had at the time”¹⁶ and even gave the FBI a copy of the illegally-created DFE discs:

Q: Prior to November 4th, 2014 did the FBI have... possession or custody of [Basey’s devices]?

A: [FBI] Agent Lambert had copies. After our meeting I told him I’d get him copies of the DFE report produced by the Alaska State Troopers....¹⁷

¶6. The FBI were not given information regarding the original Craigslist ad that triggered the investigation until later in August 2014.¹⁸ As of August 26, 2014, the FBI had searched the illegally-obtained DFE discs provided by the AST and CID and “identified all the child porn images, [and] other content and briefed the U.S. attorney.”¹⁹ The FBI then sent the DFE disc to the National Center for Missing and Exploited Children (NCMEC) to be searched.²⁰ The FBI

¹⁶ *Id.* at 105, LL 6-12; Dkt. 296-7 (Bates 1897-98).

¹⁷ *Id.* at 107, LL 1-3, Dkt. 278-1 (The CID custody document shows that agent Lambert received the discs on August 12, 2014.).

¹⁸ Dkt. 261 at 39, LL 6-10 (Trial Day 2 Tr.).

¹⁹ Dkt. 296-7 (Bates 1900).

²⁰ Dkt. 296-8 (Bates 222-24).

served Craigslist a subpoena on October 24, 2014 for additional postings linked to Basey's email and IP address.²¹ FBI agent Jolene Goeden applied for a warrant for Basey's computer and iPhone on November 3, 2014.²²

¶7. Goeden committed perjury in the application by saying: "A search of the SUBJECT DEVICES was performed by CID personnel: however, the United States *has not relied on any information from that search in this affidavit*. No other attempts to acquire the sought-after information have been made."²³ Goeden had relied on the earlier searches of Basey's devices because the description of the devices was unknown prior to the AST and CID's involvement. Also, the government had not only acquired the sought-after information, it had searched it by way of the DFE discs CID agent Shanahan had given the FBI in August.

¶8. The warrant was issued, but Basey never received a copy of the warrant or affidavit.²⁴ The warrant return indicates that the FBI did

²¹ Dkt. 45-4 at 32-34, par. 43 (Search Warrant Application for Basey's Devices); Dkt. 296-9 (additional Craigslist information).

²² Dkt. 45-4.

²³ *Id.* at 55, par. 70 (emphasis added).

²⁴ Dkt. 110 at 62.

not search and seize Basey's devices, but instead searched and seized the DFE discs already in their possession.²⁵

¶9. Basey was originally indicted on December 16, 2014 with six counts related to his seized property.²⁶ All of these counts would ultimately be dismissed by trial.

¶10. On April 21 and 28, 2015 Basey filed motions to suppress evidence and statements.²⁷ On March 17, 2016 a Superseding Indictment was filed charging Basey with 4 Counts related to his seized property and 2 Counts related to his emails (not located on his seized property).²⁸ On May 3, 2016 the District Court adopted the magistrate's final recommendations denying Basey's suppression motions.²⁹

¶11. The magistrate made the following conclusions:

²⁵ Dkt. 285-1 at 1, par. 2 (Basey Decl.); Dkt. 285-2 (Device Warrant Return).

²⁶ Dkt. 160 at 1 n.1.

²⁷ Dkts. 44; 49.

²⁸ Dkt. 101 (Superseding Indictment).

²⁹ Dkt. 115 (District Court's Adoption); Dkt. 110 (4/1/16) (Magistrate's Final R&R).

- The military search warrant used to initially seize and search Basey's devices lacked probable cause.³⁰
- The FBI's decision to seek the warrant for Basey's devices and the magistrate's decision to issue the warrant were not tainted by prior illegality.³¹
- That the subsequent searches of Basey's devices made their 9-month seizure under an invalid warrant reasonable.³²
- And failure to serve Basey a copy of the warrant was not a fundamental constitutional violation.³³

¶12. On October 4, 2016 Basey filed a motion for reconsideration of the District Court's earlier order denying suppression of his statements at CID headquarters.³⁴ This was ultimately granted in part on May 9,

³⁰ Dkt. 110 at 36.

³¹ Dkt. 110 at 47 ("The federal warrant was not based on information derived from or related to the military search authorization."); *Id.* at 49 ("This court further finds that the FBI agents would have sought a warrant even if they had not been provided information from the illegal search....").

³² *Id.* at 46 (stating Basey's tainted statements allowed the government to retain the property); *id.* at 64 (finding the 9-month seizure under the invalid warrant to be reasonable because the illegal searches occurred "in a reasonable time.").

³³ *Id.* at 62.

³⁴ Dkt. 130.

2017, by the magistrate.³⁵ But the magistrate found that even after removing Basey's tainted statements, the affidavit still contained sufficient probable cause.³⁶

¶13. Trial began on December 11, 2017 with the dismissal of 4 of the 6 Counts of Basey's Superseding Indictment.³⁷ This was likely done so the government could avoid an unfavorable review of its search and seizure of Basey's property. The government used two emails obtained from Basey's Yahoo account to convict on the remaining two charges of transportation and distribution of child pornography.³⁸ Basey's seized devices were not used at trial, again, likely because the government did not want to jeopardize their case on appeal.

¶14. In fact, the prosecutor carefully avoided any hint of the circumstances surrounding the illegal search and seizure of Basey's property. For example, the prosecutor asked FBI agent Goeden, "So

³⁵ Dkt. 160 at 30-39.

³⁶ *Id.* at 39-43.

³⁷ Dkt. 252.

³⁸ Dkt. 261 at 88 (Trial Tr.) (evidence regarding distribution); *id.* at 98-100 (evidence regarding transportation).

without telling us what anybody said, can you describe generally the purpose of that meeting that you had in July 2014 with [AST] Investigator Hansen and CID?"³⁹ Goeden discussed the meeting without mentioning anything about the searches of Basey's devices. Notably, Goeden said it was only after this meeting took place in July 2014 that she received information regarding the initial Craigslist posting:

Q: Now, at some point in time, did you receive any reports or documentation from either Investigator Hansen or CID relating to Exhibit 1 [a copy of the January 2014 Craigslist posting]?

A: I did. And *that was later* in August 2014.⁴⁰

¶15. Thus, it was the July meetings that triggered the FBI's involvement, not the later-obtained information about the initial Craigslist ad.

¶16. The jury did not make a special verdict regarding the criminal forfeiture allegations in the Superseding Indictment. Nor did the District Court enter a preliminary forfeiture order as required by

³⁹ Dkt. 261 at 38, LL 19-21.

⁴⁰ *Id.* at 39, LL 6-10 (emphasis added).

Federal Rule of Criminal Procedure 32.2.⁴¹ Nor did the District Court include forfeiture in Basey's judgment.⁴² The government never pursued administrative forfeiture of Basey's property contrary to their statements at sentencing.⁴³ Nor did the government live up to its statements that it would return Basey's property if they failed to pursue forfeiture.⁴⁴

Criminal Appeal and First Rule 41(g) Motion

¶17. Basey's appeal to the Ninth Circuit was denied on August 14, 2019.⁴⁵ Basey's petition for rehearing en banc was denied on September

⁴¹ Fed R. Crim. P. Rule 32.2(b)(2)(A) ("If the court finds that property is subject to forfeiture, it *must* promptly enter a preliminary order of forfeiture...") (emphasis added).

⁴² Dkt. 257 at 1 (Judgment); Dkt. 262 at 8, LL 9-11 (Sentencing Tr.) (District Court told the government to "follow the proper procedures" if it wanted to forfeit Basey's property).

⁴³ Dkt. 262 at 6-7.

⁴⁴ *Id.*

⁴⁵ *United States v. Basey*, 2019 U.S. App. LEXIS 24208 (9th Cir. Aug. 14, 2019).

23, 2019.⁴⁶ Basey's petition for writ of certiorari was denied on December 9, 2019.⁴⁷

¶18. Basey filed his first Rule 41(g) motion on October 7, 2019.⁴⁸ Basey alleged that the property related to dismissed charges⁴⁹ and that it was illegally searched and seized.⁵⁰ The government submitted an unsworn opposition claiming it could not return Basey's property because (1) the property could be used to reindict Basey on previously-dismissed charges if he overturns his conviction,⁵¹ and (2) the property is or contains contraband.⁵² The government also submitted an affidavit that

⁴⁶ *United States v. Basey*, 2019 U.S. App. LEXIS 28734 (9th Cir. Sept. 23, 2019) (denial of rehearing en banc).

⁴⁷ Dkt. 285 (Denial of Cert.); *Basey v. United States*, 2019 U.S. LEXIS 7266 (Dec. 5, 2019).

⁴⁸ Dkt. 278 (Rule 41(g) Motion).

⁴⁹ *Id.* at 6-7 ("Here, all charges related to Basey's devices were dismissed by the government.").

⁵⁰ *Id.* at 1-3.

⁵¹ Dkt. 281 at 11.

⁵² *Id.* at 12.

was not part of Basey's Rule 41(g) motion.⁵³ Three days later—and without giving Basey a chance to receive the Government's opposition—the district court dismissed Basey's Rule (41)g motion without prejudice based on the government's unsworn arguments and the extrinsic affidavit.⁵⁴

¶19. Basey filed a motion seeking leave of court to file a reply to the Government's opposition arguing he did not receive the Government's opposition until December 3, 2019, and by then the Court had already ruled.⁵⁵ Basey also said he needed to develop his Fourth Amendment claims since the Government surprised him with the fact it wanted to retain Basey's property to potentially reindict him if he overturned his conviction.⁵⁶ Despite the fact the Government's opposition was untimely served on Basey and despite the fact the Court ruled within three days, the Court refused Basey an opportunity to file a full reply to the Government's opposition—which was essentially a motion for summary

⁵³ Dkt. 281-2 (Goeden Decl.).

⁵⁴ Dkt. 283.

⁵⁵ Dkt. 283 at 1 (Mot. for leave of court).

⁵⁶ Dkt. 283 at 2.

judgment.⁵⁷ Instead, the Court said Basey could file a motion for reconsideration within a week.⁵⁸ Thus, Basey was limited to 5 pages instead of 35 pages;⁵⁹ he was limited to discussing “manifest error[s] of the law or fact “as opposed to fleshing out his legal claims.⁶⁰

¶20. Basey filed a motion for reconsideration on December 19, 2019 arguing:

- the court should construe his Rule 41(g) motion as a civil complaint;⁶¹
- he should be allowed to file a full opposition to the government’s summary judgment motion;⁶²
- the court should not have relied on unsworn arguments and the extrinsic affidavit.⁶³

⁵⁷ Dkt. 284 (Order denying Mot. for leave).

⁵⁸ *Id.*

⁵⁹ Compare D. Ak. L. Civ. R. 7.3(h)(2) with D. Ak. L. Civ. R. 7.4 (a)(1).

⁶⁰ D. Ak. L. Civ. R. 7.3(h)(1).

⁶¹ Dkt. 286 at 3.

⁶² *Id.*

⁶³ *Id.*

Basey then proffered 3 main points he wished to address in his opposition.⁶⁴ Basey also called into question agent Goeden's credibility and the veracity of her affidavit as well as AUSA Reardon's binding statements regarding the return of his property.⁶⁵ These went unchallenged in the government's response.⁶⁶

¶21. On January 14, 2020 the District Court denied Basey's reconsideration motion stating:

While procedural status of this matter may be unclear, the bottom line is that the Defendant seeks return of property taken by the Government... *which was utilized at trial.*⁶⁷

Basey filed a timely notice of appeal on January 22, 2020.⁶⁸

Appeal of First Rule 41(g) Motion

¶22. Basey's Opening Brief on appeal argued four main things:⁶⁹

⁶⁴ *Id.* at 3-4.

⁶⁵ Dkt. 286-1 (Basey Decl.).

⁶⁶ Dkt. 289 (Gov's Opp. to First Rule 41(g) Mot.).

⁶⁷ Dkt. 290 (emphasis added).

⁶⁸ Dkt. 291.

⁶⁹ Appellant's Opening Brief at 2-3, *United States v. Basey*, No. 20-30014, ECF No. 6 (Statement of issues).

- The district court should have allowed Basey to file a full response to the Government's opposition.
- The appellate court should entertain the merits of Basey's claims for return of his seized property.
- The Government cannot indefinitely retain Basey's property without indicting him.
- And the seizure of Basey's property was initially and has always been unlawful for several reasons.

¶23. Basey's Reply added a promissory estoppel claim as another ground for his property's return.⁷⁰

¶24. The Ninth Circuit memorandum decision "assum[ed] the district court should have treated the government's opposition to Basey's motion as a motion for summary judgment."⁷¹ It then affirmed the dismissal on grounds that "[t]he government demonstrated a reasonable need to retain the property in light of Basey's pending collateral attack on his 2017 convictions."⁷² But the panel refused to entertain Basey's constitutional claims regarding the unlawful seizure and retention of

⁷⁰ Appellant's Reply Brief at 24-28, *United States v. Basey*, No. 20-30014 (9th Cir. Sept. 29, 2020) ECF No. 21.

⁷¹ Memorandum Decision at 2, *United States v. Basey*, No. 20-30014 (9th Cir. Feb. 24, 2021) ECF No. 26-1.

⁷² *Id.*

his property and his promissory estoppel claim.⁷³ There was however, no question “that criminal proceedings are over for purposes of a Rule 41(g) motion once the defendant is convicted.”⁷⁴

The State’s Continuing Retention of Derivative Information

¶25. Subsequent to the filing of Basey’s first Rule 41(g) motion, he discovered the State is still in possession of information derived from its illegal searches of Basey’s property under the deficient military warrant.⁷⁵ To wit, this derivative information is “contained on eight disks (CDs/DVDs) and one thumb drive” and “forensic paperwork from Mr. Basey’s computer [that] has been printed out.”⁷⁶ It appears this information was recently searched.⁷⁷

⁷³ *Id.* at 2-3.

⁷⁴ *Id.* at 2.

⁷⁵ Dkt. 343-1 at 3-4 (Notice, Basey v. State, No. 4FA-16-02509CI (Ak. Super. Ct. Aug. 31, 2020). This Court may take judicial notice of this filing under Fed. R. Evid. 201. *Headwaters Inc., v. U.S. Forest Service*, 399 F.3d 1047, 1051 n. 3 (9th Cir. 2005).

⁷⁶ *Id.* (my alteration).

⁷⁷ *Id.* at 4 (stating the paperwork contains, *inter alia*, a description of a “photograph of defendant (frontal-naked).”).

II. Jurisdiction.

Since this motion arises from a criminal case, “a claim under Rule 41(g) may be brought after the defendant’s conviction...as an ancillary proceeding to the criminal case.”⁷⁸ Rule 41(g) can also be used to recover seized property from a state where there was a “search[] conducted by state law enforcement...with direct federal authorization.”⁷⁹ Thus, where as here, the state searches under the color of a federal (or military) warrant, this Court has jurisdiction to order return of seized property in the State’s possession.⁸⁰

III. Claims for Relief.

There are two, mutually-exclusive paths that Rule 41(g) movants may use to get their property back: show “*either* the search [or seizure]

⁷⁸ *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2002) (opinion by Posner, J.); *United States v. Martinson*, 809 F.2d 1364, 1370 (9th Cir. 1986) (“The motion was sufficiently related to the 1977 criminal case as to be considered an ‘ancillary’ proceeding.”).

⁷⁹ *United States v. Huffhines*, 986 F.2d 306, 308 (9th Cir. 1993).

⁸⁰ *United States v. Wright*, 610 F.2d 930, 939 (D.C. Cir. 1979) (property in possession of District of Columbia that was seized by D.C. Police under a federal warrant was subject to the federal court’s jurisdiction).

was illegal *or* the government's need for the property has ended."⁸¹ In this proceeding Basey will use the first path; showing the search *or* seizure of his property was (and remains) unlawful. In contesting the illegality of the search or seizure of the property, "[v]irtually all challenges to the government's basis for seeking forfeiture that could be raised in judicial forfeiture proceedings may be raised in proceedings under Rule 41(g).⁸² This includes using the exclusionary rule and the fruits-of-the-poisonous-tree doctrine.⁸³

With that said, Basey incorporates, as if set forth fully herein, every allegation in the paragraphs above into the following claims.

⁸¹ *United States v. Cauwenberghe*, 827 F.2d 424, 433 (9th Cir. 1987) (emphasis and alteration added); *United States v. Crow*, 651 Fed. Appx. 686, 688-89 (9th Cir. 2016) (same); *United States v. Ferreira*, 354 F. Supp. 2d 406, 409 (S.D.N.Y. 2005) (same); see *United States v. Ganas*, 824 F.3d 199, 219 (2d Cir. 2016) (en banc) ("Rule 41(g) permits a defendant or any 'person aggrieved' by *either* an unlawful or lawful deprivation of property...to move for its return.") (first emphasis added).

⁸² *Omid v. United States*, 851 F.3d 859, 863 (9th Cir. 2017).

⁸³ See, e.g., *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965) (exclusionary rule applies in forfeiture proceedings); *United States v. \$167,070.00*, 112 F. Supp. 3d 1108, 1116 (D. Nev. 2015) (poisonous-fruits doctrine applies in forfeiture proceedings).

A. Claim one: Fourth and Fifth Amendment violation—unreasonably-long retention of property without an indictment being issued related to the property.

1. At some point, the government's delay in indicting on the basis of seized property becomes unreasonable.⁸⁴ The government is not required to seek immediate indictment once property is seized, "[b]ut if no charges are filed for nearly one and one-half years after the property was seized...constitutional violations emerge...mandat[ing] the property be returned."⁸⁵

2. The Government and State's possession of Basey's property in either physical or derivative (e.g., digital) form is meaningfully interfering with his possessory interests; including his right to exclude others, which amounts to both a seizure under the Fourth Amendment and a taking under the Fifth Amendment.⁸⁶

3. Since Basey's property was seized in 2014 and no current indictment

⁸⁴ *Black Hills inst. Of Geological Research v. U.S. DOJ*, 967 F.2d 1237, 1240 (8th Cir. 1992).

⁸⁵ *Mr. Lucky Messenger Service, INC. v. United States*, 587 F.2d 15, 17 (7th Cir. 1978).

⁸⁶ *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in the owner's bundle of rights.").

exists relating to the property, this unreasonable delay renders the continuing seizure of Basey's property (and derivatives) unlawful.

B. Claim two: Fourth Amendment violation—the FBI's decision to seek a warrant for Basey's property and the magistrate's decision to issue the warrant were both tainted by the prior illegal searches and seizure of Basey's property.

1. The AST, CID, and FBI all illegally searched Basey's devices in some form or fashion—be it physically or digitally (as in the DFE discs)—prior to the FBI's decision to get a warrant for Basey's property.

2. The FBI was unaware of the initial Craigslist postings that triggered the investigation until after the illegalities occurred.

3. But for these prior illegalities, the FBI's help would not have been sought and the additional postings subpoenaed from Craigslist (one tainted fruit) or the Federal device warrant (another tainted fruit) would not have been obtained.

4. Because the FBI lacked description information for Basey's devices prior to the illegal searches, including this unlawfully obtained information influenced the magistrate's decision to issue the warrant because without the description information the affidavit and warrant would have lacked particularity and probable cause.

C. Claim three: Fourth Amendment violation—the FBI agent's perjury in the search warrant affidavit for Basey's devices was unlawful under *Franks v. Delaware*.⁸⁷

1. When a search warrant affiant lies about material facts, those lies must be redacted under *Franks v. Delaware*, and if the resulting affidavit lacks probable cause or particularity, then the search or seizure under the warrant was a Fourth Amendment violation.

2. FBI Agent Goeden made a false, material statement in the affidavit for Basey's devices that she had not relied on any prior search of Basey's devices in preparing the affidavit. In fact she did: the device description information resulted from an illegal search of Basey's devices.

3. Once the device description information is removed from the affidavit, it loses its particularity and probable cause.

D. Claim four: Fourth Amendment violation—the 9-month, effectively-warrantless seizure of Basey's property under an invalid military warrant was unreasonable.

1. A warrant that is deficient of probable cause or particularity is not a warrant at all; any search under color of such a "warrant" is effectively warrantless.⁸⁸

2. And "even a seizure based on probable cause is unconstitutional if

⁸⁷ 438 U.S. 154 (1978).

⁸⁸ See *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (search under a warrant lacking particularity was warrantless).

the police act with unreasonable delay in securing a warrant.’ ”⁸⁹

3. Because Basey’s property was seized and searched under an invalid military warrant, that was warrantless and unreasonable conduct; and even assuming there was valid grounds for an initial, warrantless seizure, the police acted with unreasonable delay in securing another warrant eight months later.

E. Claim five: Fourth Amendment violation—lack of service of the search warrants and affidavits.

1. There is a Fourth Amendment right to be served a search warrant, the police’s failure to serve the warrant renders the search and seizure unreasonable.⁹⁰

2. There is a separate Fourth Amendment “ ‘right of access under the

⁸⁹ *United States v. Mitchell*, 565 F.3d 1347, 1350 (11th Cir. 2009) (quoting *United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998)).

⁹⁰ *United States v. McGrew*, 122 F.3d 847, 850 (9th Cir. 1997) (“It is the government’s duty to serve the search warrant on the suspect....”); see *Groh*, 540 U.S. at 557 (“The presence of a search warrant serves a high function....”); *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1027 (9th Cir. 2002) (“To stand a real chance of policing the officers conduct, individual’s must be able to read and point to the language of a proper warrant.”).

Fourth Amendment to the affidavit in support of the search warrant' during the preindictment stage, which vest in the individual...whose property is seized.' ”⁹¹

3. Basey was not given a copy of the military warrant and affidavit for his devices nor given a copy of the later FBI warrant and affidavit.

F. Claim six: Fourth Amendment violation—the multiple police illegalities taken in aggregate are a separate violation.

1. Assuming the FBI's later warrant was valid, when “the severity of the police misconduct” before an otherwise valid warrant is egregious, the entire search and seizure may be unreasonable despite the valid warrant.⁹²

2. Because the Government's and State's actions or omissions prior to the FBI's warrant were unreasonable in aggregate, Basey's Fourth Amendment rights were violated under the *Madrid* exception to the independent source of doctrine.

⁹¹ 2016 U.S. Dist. LEXIS 104375, *3 (E.D. Cal. Aug. 8, 2016) (quoting *In re Searches and Seizures*, 2008 U.S. Dist. LEXIS 107087, *10 (E.D. Cal. Dec. 19, 2008)); *United States v. Oliver*, 208 F.3d 211, 2000 WL 263954, *2 (4th Cir. 2000).

⁹² *United States v. Madrid*, 152 F.3d 1034, 1036 (8th Cir. 1998); *see also Franklin v. Foxworth*, 31 F.3d 873, 875 (9th Cir. 1994) (a search or seizure may become “invalid if carried out in an *unreasonable fashion*”); *United States v. Jobe*, 933 F.3d 1074, 1078 (9th Cir. 2019) (there is a “category of cases [where] police misconduct effectively bears no ‘fruit,’ ” but still warrants exclusion of evidence) (my alteration).

G. Claim seven: promissory estoppel.

1. “Contract law principles apply in the context of promises made to defendants by prosecutors.”⁹³

2. Promises are enforceable where there was (1) a promise (2) reasonable and (3) foreseeable reliance by the promisee, and (4) injury to the promisee.⁹⁴

3. The Government promised to return Basey’s property (less any per se contraband) if it didn’t pursue forfeiture (which it didn’t).

4. Basey reasonably and foreseeably relied on the Government’s promise—made at sentencing and mediated by the judge.

5. Basey suffers injury to his possessory interests from the Government and State’s possession of his property (and/or derivatives of it) as well as the threat of potential prosecution on the basis of this property made by the Government.⁹⁵

⁹³ *United States v. Moore*, 2016 U.S. Dist. LEXIS 130799, *2-3 (E.D. Cal. Sept. 27, 2016).

⁹⁴ *E.g., Graham-Sult v. Clainos*, 756 F.3d 724, 749 (9th Cir. 2014).

⁹⁵ *E.g.*, Dkt. 281 at 11; Dkt. 330 at 4.

IV. Prayer.

- A. A hearing to establish any contested issue of facts.
- B. A hearing under *Franks v. Delaware*.⁹⁶
- C. Return of Basey's property (less any per se contraband) by the Government.
- D. To the extent per se contraband cannot be removed to allow return the Government should destroy Basey's property.⁹⁷
- E. Destruction of all derivative information in the Government and State's possession.⁹⁸
- F. All other relief that is just and proper.

Dated: April 28, 2021

Kaleb Basey

Kaleb Basey

⁹⁶ *United States v. Martinez-Garcia*, 397 F.3d 1205, 1215 (9th Cir. 2005) ("A defendant is entitled to a hearing to determine the sufficiency of the affidavit supporting a search warrant if he or she makes a 'substantial preliminary showing that (1) the affidavit contains intentionally or recklessly false statements or misleading omissions and (2) the affidavit cannot support a finding of probable cause without the allegedly false information.' ") (quoting *United States v. Reeves*, 210 F.3d 1041, 1044 (9th Cir. 2000)).

⁹⁷ *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1002 (9th Cir. 2009) (en banc) ("[D]istrict judges may order the return of the originals, as well as any copies, of seized evidence: 'In some circumstances, however, equitable considerations might justify an order requiring the government to return or destroy all copies of records that it has seized.' ") (quoting Fed. R. Crim. P. advisory committee notes (1989 amendments)).

⁹⁸ *Id.*

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)	No. 4:14-cr-00028-RRB
)	
Plaintiff,)	
)	
vs.)	
)	
KALEB LEE BASEY,)	
)	
Defendant.)	
_____)	

**NON-OPPOSITION TO MOTION FOR RETURN OF SEIZED PROPERTY
[DKT 369]**

Comes now the United States, by and through the undersigned Assistant U.S. Attorney, and files this non-opposition to Defendant's Motion for Seized Property (Dkt 369). The Government does not concede defendant's factual and legal claims. However, after consultation with the Federal Bureau of Investigations (FBI) the Government agrees that it follows policy to return the requested property after it has been

deleted in a manner which ensures no contraband remains. This renders much of defendant's motion moot.

The search of defendant's room has been thoroughly litigated in this case, with multiple motions and evidentiary hearings. Some of defendant's statements were suppressed but none of the seized items were suppressed. Dkts 160, 165. Defendant's Second Motion for Return of Seized Property appears primarily focused on relitigating these previously litigated issues. Such rehashing is unnecessary as the Government is prepared to return the property as requested.

Rule 41(g) is broader than the exclusionary rule, permitting the return of even lawfully seized evidence. Fed.R.Crim.P. 41(g). It serves a fundamentally different purpose and goal from the exclusionary rule. *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1173 (9th Cir. 2010) (overruled on other grounds). District Court's have broad discretion in applying the rules of equity when returning seized property and ordering potential deletion of copies. *Id.* at 1174 ("What circumstances merit this remedy is left to the discretion of the district court . . ."). Return of property does not require deletion of copies, and deletion is not required even where it is found that property was seized illegally. *Ramsden v. U.S.*, 2 F.3d 322, 326-37 (9th Cir 1993) (Holding "that the district court erred by precluding the Government from reviewing or copying the illegally seized documents.")

The government does not concede that the items at issue would qualify as

“illegally seized” nor that deletion is required even if they were.¹ However, it is FBI policy to delete copies of seized digital evidence upon return of the property and completion of any appeal in the case. The defendant’s primary appeal is concluded, and while he still has a pending motion for certificate of appeal on his §2255 motion it appears compliant with policy to delete the relevant copies upon return of these items.

The Government agrees to return defendant’s property once they have been cleared of contraband and destroy copies made of the returned property. This satisfies defendant’s prayers for relief C, D, and E; and renders moot prayers for relief A, B, and F.

Derivative Information

Defendant asks for an order to destroy “all derivative information in the Government and State’s possession.” This phrase in isolation is vague and potentially overbroad. It could arguably include reports about the information, court filings which discuss the evidence, and records from the evidentiary hearings which reference or summarize the information.

Defendant’s Second Motion for Return of Property includes a subsection at paragraph 25 which directly addresses “Derivative Information.” Dkt 369 p.17. This section specifies that the derivative information is “contained on eight disks (CDs/DVDs) and one thumb drive” and “forensic paperwork from Mr. Basey’s computer [that] has

¹ Previous rulings of the Court find that the initial search seizing the items was improper but that the subsequent warrant was sufficiently curative such that suppression was not required. Dkt. 160, 165.

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been printed out.” From this context it appears that “Derivative Information” is meant to include all copies of the seized evidence, and not other materials which simply reference that evidence. The Government agrees to delete copies made from the seized evidence which is being returned. While this is beyond legal requirements it follows policy.

Return of Property

Defendant must provide the name of an individual who he authorizes to receive his returned property and their contact information. When this is done the FBI will contact them and let them know where and when they can receive the property. Once that is complete copies of the returned property will be deleted. The Government has no opposition to the entry of such an order.

RESPECTFULLY SUBMITTED July 30, 2021, in Anchorage, Alaska.

E. BRYAN WILSON
Acting United States Attorney

s/ G. Michael Ebell
G. MICHAEL EBELL
Assistant U.S. Attorney
United States of America

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2021,
a true and correct copy of the foregoing
was served via United States Mail on the following:

Kaleb Lee Basey
1775-006 Cardinal Unit
Federal Medical Center Lexington
PO Box 14500
Lexington, KY 40512-4500

s/ G. Michael Ebell
Office of the U.S. Attorney
U.S. v. Basey
4:14-cr-00028-RRB

Kaleb Lee Basey
17753-006 Cardinal Unit
Federal Medical Center Lexington
P.O. Box 14500
Lexington, Ky 40512-4500
Defendant in Pro Se

RECEIVED

SEP 03 2021

CLERK, U.S. DISTRICT COURT

ANCHORAGE, AK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,) No. 4:14-cr-00028 - RRB

Plaintiff,)

v.)

KALEB LEE BASEY,)

Defendant.)

VERIFIED NOTICE OF
REJECTION OF GOVERNMENT'S
SETTLEMENT OFFER

I, Kaleb Basey, declare as follows:

1. I received the Government's letter (Dkt. 382-1), offering to settle this Rule 41(g) proceeding by returning some of my property, sometime after July 8, 2021.
2. Shortly thereafter (within about a week), I sent Government counsel a hand-written letter that rejected their settlement offer and said I was going to litigate the case in court instead.
3. I didn't make a copy of this letter because I thought it would be irrelevant to the case given that Fed. R. Evid. 408 bars use of rejections of settlement offer in proving or disproving claims.

I declare under penalty of perjury the foregoing is true and to the best of my knowledge.

Executed on: August 30, 2021, in Lexington, KY.

Kaleb Boney

Kaleb Boney

Defendant in Pro Se

Certificate of Service

I certify I caused to be mailed a copy of the foregoing to the following:

G. Michael Ebell

222 W. 7th Ave., #4, Room 253

Anchorage, AK 99513-7567

Dated: Aug. 30, 2021.

Kaleb Boney

Kaleb Boney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 24 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KALEB L. BASEY,

Defendant-Appellant.

No. 21-30196

D.C. No. 4:14-cr-00028-RRB-1

District of Alaska,

Fairbanks

ORDER

Before: SCHROEDER, R. NELSON, and VANDYKE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See Fed. R. App. P. 35.*

Basey's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 25) are denied.

No further filings will be entertained in this closed case.