No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

BRIAN WRIGHT, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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

APPENDIX

ANGELA H. DOWS
Cory Reade Dows & Shafer
1333 North Buffalo Drive, Suite 210
Las Vegas, NV 89128
Phone: (702) 794-4411
Facsimile: (702) 794-4421

Counsel of record for Petitioner
BRIAN WRIGHT

APPENDIX A

OPINION OF THE
NINTH CIRCUIT COURT OF APPEALS

SEPTEMBER 23, 2022

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. BRIAN WRIGHT, *Defendant-Appellant.*	Nos. 19-10302 21-10036 D.C. No. 2:14-cr-00357-APG-VCF 2:14-cr-00357-APG-VCF-1 OPINION

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Argued and Submitted May 23, 2022
Las Vegas, Nevada

Filed September 23, 2022

Before: M. Margaret McKeown, William A. Fletcher, and Jay S. Bybee, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

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

Affirming the district court's orders with respect to Brian Wright's claim in proceedings under Fed. R. Crim. P. 41(g) for the return of money seized from him in 2014 and 2017, the panel held that neither Wright nor the government has established its right to the money.

Although ample evidence indicated the money was stolen, a 2014 prosecution against Wright, who had a history of robbing Las Vegas businesses, collapsed due to prosecutorial misconduct, and the government apparently never thought to bring a civil forfeiture action for either the 2014 or 2017 seizures. In his Rule 41(g) motions, Wright, who has since been convicted on other charges, argued that he was never convicted of any crime related to the money and hence is presumptively entitled to its return.

The panel held that, as the person who last held the cash before it was seized, Wright was presumptively entitled to its return, but the district court properly found that this presumption was rebutted by the considerable evidence demonstrating that the money was stolen.

The panel also held that the government has not established its ownership of the money, as the government has never invoked the statutory forfeiture scheme and thus has not perfected title in the seized property. The panel declined to permit the government to sidestep the forfeiture

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

statutes, and their accompanying procedural protections, by way of a Rule 41(g) proceeding. The panel therefore rejected the government's claim that it may dispose of the money as it pleases, and offered no view on the government's options downstream.

COUNSEL

Angela H. Dows (argued), Cory Reade Dows & Shafer, Las Vegas, Nevada, for Defendant-Appellant.

William R. Reed (argued), Assistant United States Attorney; Elizabeth O. White, Appellate Chief; Christopher Chiou, Acting United States Attorney; United States Attorney's Office, Reno, Nevada; for Plaintiff-Appellee.

OPINION

McKEOWN, Circuit Judge:

Brian Wright is serving a lengthy prison sentence for armed robbery. Before his incarceration, Wright had a history of robbing Las Vegas businesses at gunpoint, stealing cash and other valuables. In 2014 and 2017, police officers turned the tables on Wright, holding him at gunpoint and seizing tens of thousands of dollars from his home. Although ample evidence indicated the money was stolen, the 2014 prosecution against Wright collapsed due to prosecutorial misconduct, and the government apparently never thought to bring a civil forfeiture action for either seizure. Wright has since been convicted on other charges for which he is currently imprisoned, but the $63,513 seized

from him in 2014 and 2017—and likely stolen from local Las Vegas businesses—has floated in legal limbo for years.

Wright filed motions under Rule 41(g) of the Federal Rules of Criminal Procedure for return of the money, arguing that he was never convicted of any crime related to the money and hence he is presumptively entitled to its return. The government opposed Wright's motions, introduced evidence to show that the money was stolen, and offered to return (some of) the cash to Wright's alleged victims at the conclusion of these proceedings. The district court denied Wright's motions but did not comment on the ultimate fate of the seized currency.

We hold that neither party has established its right to the money. Wright is correct that, as the person who last held the cash before it was seized, he was presumptively entitled to its return. But the district court properly found that this presumption was rebutted by the considerable evidence demonstrating that the money was stolen. We affirm the district court's orders with respect to Wright's claim to the money.

At the same time, we hold that the government has not established its ownership of the money. Congress has enacted a detailed statutory forfeiture scheme through which the government may establish title in seized property. For reasons the government has struggled to articulate, it never invoked this scheme. We decline to permit the government to sidestep the forfeiture statutes, and their accompanying procedural protections, by way of a Rule 41(g) proceeding. Due to its various procedural errors, the government has not perfected title in the money and, unfortunately, Wright's victims must continue to await compensation.

I. BACKGROUND

A. The 2014 Seizure

Wright was arrested in 2014 in connection with the armed robbery of several jewelry stores. During the arrest, police seized $23,513 from Wright's attic pursuant to a warrant. When questioned, Wright denied living in the building where he was arrested and denied that the money was his. Wright was charged with conspiracy, Hobbs Act robbery, brandishing a firearm in furtherance of a crime of violence, and felon in possession of a firearm. Most of these charges were dropped after the district court sanctioned the government for discovery violations, and Wright ultimately pleaded guilty to a single count of felon in possession of a firearm. He then moved for return of the $23,513.

At an evidentiary hearing, the government introduced police reports and coconspirator statements tying Wright to several jewelry store robberies that occurred not long before his 2014 arrest. The government also introduced evidence that Wright had been unemployed since his release from prison in late 2013. Wright was the only person to testify at the hearing. Contradicting his earlier statements, Wright claimed that he lived at the house where he was arrested, and that the money belonged to him. Wright further testified that he came by the money honestly, through gambling and the kindness of friends.

The district court denied Wright's motion, ruling that Wright had failed to show that he was the rightful owner of the money. On appeal, we vacated the district court's ruling because it improperly relieved the government "of its threshold burden of establishing that the cash was contraband or subject to forfeiture."

On remand, the district court reviewed the existing record and held that the government successfully rebutted Wright's claim of ownership by establishing that the money was stolen property and contraband.

B. The 2017 Seizure

Wright was arrested in 2017 on suspicion of sex trafficking. Officers searched Wright's residence pursuant to a warrant and seized $40,000 from inside a mattress. The money was arranged in $10,000 bundles, each wrapped in a distinctive gold band. After he was sentenced to prison for violating the terms of his supervised release, Wright moved for return of the $40,000.

The government opposed Wright's motion, arguing that the money was from a casino robbery committed by one of Wright's associates several weeks earlier. At the evidentiary hearing, a Silverton Casino employee testified that he was robbed of approximately $140,000 in cash by a hooded man with a gun. The employee testified that the money stolen from him was organized in distinctive colored bands. When shown a photo of the $40,000 seized from Wright's residence, the employee positively identified the gold bands in the photo as matching those used by the Silverton Casino. Other Silverton Casino employees testified that the casino is required by law to register any patron who wins over $3,000 and that Wright did not appear in those records. Finally, the government introduced a photograph of a document found in Wright's residence with the name of the suspect in the armed robbery case. Wright testified that the money was his, but he did not meaningfully explain how it came into his possession.

The district court found that the $40,000 was proceeds from the casino robbery and contraband, and denied Wright's motion.

II. ANALYSIS

We review de novo a district court's denial of a motion for return of property under Rule 41(g). *United States v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008). The district court's underlying factual findings are reviewed for clear error. *Id.*

A. Wright's Rule 41(g) Motions Were Properly Denied.

In our constitutional system, "[g]overnment confiscation of private property is disfavored." *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1068 (9th Cir. 1994). Rule 41 ("Search and Seizure") of the Federal Rules of Criminal Procedure permits the government to apply for a judicial warrant authorizing the temporary seizure of property pending investigation and adjudication. 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.

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

The burden of proof on a Rule 41(g) motion "depends on when the defendant files the motion." *United States v. Gladding*, 775 F.3d 1149, 1152 (9th Cir. 2014). When the

government needs the property for evidentiary purposes, either because investigation is ongoing or trial is imminent, "the movant bears the burden of proving both that the [property's] seizure was illegal and that he or she is entitled to lawful possession of the property." *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987). But the burden shifts once criminal proceedings conclude or the government abandons its investigation. *See United States v. Van Cauwenberghe* (*Van Cauwenberghe II*), 934 F.2d 1048, 1061 (9th Cir. 1991); *United States v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993). Because the property here is no longer needed as evidence, Wright, as the person from whom the property was seized, is presumably entitled to lawful possession, and "the government has the burden of demonstrating that it has a legitimate reason to retain the property." *Harrell*, 530 F.3d at 1057; *accord Martinson*, 809 F.2d at 1369 n.4 ("[B]ecause the government no longer has an evidentiary need for the guns, [the movant] no longer bears the burden of demonstrating that he is entitled to lawful possession.").[1]

Our precedent recognizes a limited set of circumstances where the government will have a "legitimate reason" to retain property no longer needed as evidence. First, the government may establish that the property is contraband. *Gladding*, 775 F.3d at 1152. Second, the government may establish that the property is subject to forfeiture. *Id.* Finally, the government may rebut the presumption that the

[1] Because criminal proceedings have concluded, we need not consider Wright's argument that the 2017 search of his residence was unlawful. *See Van Cauwenberghe II*, 934 F.2d at 1060 ("A Rule 41[(g)] motion may be granted after trial 'regardless and independently of the validity or invalidity of the underlying search and seizure.'" (quoting *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976))).

defendant is entitled to lawful possession of the property. *See United States v. Van Cauwenberghe* (*Van Cauwenberghe I*), 827 F.2d 424, 433–34 (9th Cir. 1987); *see also Mills*, 991 F.2d at 612–13. To overcome the presumption, the government must demonstrate a "cognizable claim of ownership or right to possession adverse to that of the [movant]." *Van Cauwenberghe II*, 934 F.2d at 1061 (quoting *United States v. Palmer*, 565 F.2d 1063, 1065 (9th Cir. 1977)).

The district court found that the government adequately demonstrated that the money seized in 2014 and 2017 was stolen, overcoming the presumption that Wright is entitled to lawful possession.[2] The record comfortably supports that conclusion.[3] *See United States v. Dean*, 100 F.3d 19, 20–21 (5th Cir. 1996) (holding that the district court properly denied a motion by a convicted bank robber for return of

[2] Perhaps seeking to comply with our somewhat cryptic instructions on remand, the district court also held that the property is contraband. Although we find no error in the district court's factual findings and ultimate conclusions, we do not agree that stolen money is contraband. "Contraband" means materials that are "illegal to possess" or that "may be lawfully possessed but became unlawful due to their use or intended use." *United States v. Kaczynski*, 551 F.3d 1120, 1129 (9th Cir. 2009). Heroin and bomb-making materials are contraband; currency is not. *See Bennis v. Michigan*, 516 U.S. 442, 459–62 (1996) (Stevens, J., dissenting) (explaining the difference between contraband, derivative contraband, and proceeds).

[3] Wright also seeks return of several rings taken from his fingers in 2017. But Rule 41(g) is not a general waiver of sovereign immunity; it only allows for the recovery of property currently in the government's control. *Ordonez v. United States*, 680 F.3d 1135, 1139–40 (9th Cir. 2012). Because the parties agree that the government does not possess Wright's rings, they are not subject to a Rule 41(g) motion. *Id.* at 1140.

money where the record established that the money was stolen).

As to the money seized in 2014, the government offered considerable evidence tying Wright to a string of jewelry store robberies in the Las Vegas area. The money was seized soon after the robberies, and the location of the cash—hidden in the attic—suggests efforts to conceal it. Wright initially denied living in the residence where he was arrested and refused to acknowledge that the money was his. It was only after the criminal case against him collapsed that Wright reversed course and claimed that the money belonged to him. Given this evidence, and Wright's vague testimony regarding the origins of the money, the district court did not clearly err in concluding that the money was stolen.

Our consideration of the money seized in 2017 is even more straightforward. That money was discovered hidden in a mattress just weeks after the Silverton Casino was robbed, alongside evidence tying Wright to the likely perpetrator of that robbery. The cash was wrapped in distinctive gold money bands used by the Silverton Casino. Wright has never won significant money from that casino. During the relevant period, Wright was unemployed, and he has yet to meaningfully explain how he magically came into possession of the $40,000. As with the 2014 seizure, the district court did not clearly err in concluding that the money seized in 2017 was stolen property.

In sum, the government successfully rebutted the presumption that Wright is entitled to lawful possession of

the money. Wright's Rule 41(g) motions were properly denied.[4]

B. The Government Has Not Perfected Title in the Seized Property.

We now turn to the government's claim that, having defeated Wright's Rule 41(g) motions, it is entitled to dispose of the money "how it sees fit," without further judicial determination. We do not agree. Simply because the government has demonstrated that Wright is not entitled to lawful possession, it does not follow that the government has perfected title in the seized property.

Congress has enacted a comprehensive statutory scheme authorizing the government to forfeit property thought to be connected to criminal activity. In most circumstances, the government may elect to proceed through one of three methods: criminal forfeiture, administrative forfeiture, or civil forfeiture. *See* Stefan D. Cassella, *Asset Forfeiture Law in the United States* 9–17 (2d ed. 2013). The government's procedural obligations vary depending on the method chosen, but none are particularly onerous. And despite forfeiture's close connection to the criminal law, the government must meet a preponderance-of-the-evidence standard and need not prove its case beyond a reasonable doubt. *Id.* As relevant here, Congress has authorized the government to use this regime to forfeit the proceeds of

[4] We reject Wright's claim that the government violated the Eighth Amendment by seizing and retaining the stolen money. Even assuming the Excessive Fines Clause applies to this set of facts, it would not bar the government from seizing $63,513 in proceeds. *Cf. United States v. 22 Santa Barbara Drive*, 264 F.3d 860, 866, 874–75 (9th Cir. 2001) (holding that civil forfeiture of $556,493.28 in proceeds did not violate Excessive Fines Clause).

Hobbs Act robbery and conspiracy. *See* 18 U.S.C. § 981(a)(1)(C) (stating that property is subject to forfeiture if it "constitutes or is derived from proceeds traceable" to "specified unlawful activity," which includes Hobbs Act robbery and conspiracy as "racketeering activity" under 18 U.S.C. § 1961(1)); 28 U.S.C. § 2461(c).

The government never initiated a forfeiture action for the money seized in 2014 and 2017. Instead, the government appears to believe that its victory over Wright's Rule 41(g) motions is sufficient to perfect title to the money. The government did not offer any authority for this position in its brief, although its view finds some support in a Tenth Circuit decision holding that the government may "quiet title" to seized property through a Rule 41(g) proceeding. *See United States v. Clymore*, 245 F.3d 1195, 1200 (10th Cir. 2001); *accord Alli-Balogun v. United States*, 281 F.3d 362, 371 (2d Cir. 2002) (following *Clymore*).

We cannot countenance the Tenth Circuit's approach because we conclude that longstanding principles of equity preclude the government from perfecting title in seized property through a Rule 41(g) proceeding. The issue was not raised in *Clymore*, but it is well established that Rule 41(g) proceedings are equitable in nature and cannot provide relief already available at law. *See United States v. Elias*, 921 F.2d 870, 872–73 (9th Cir. 1990) (explaining that equitable jurisdiction is available where "no legal remedy" is available); *see also United States v. Bacon*, 900 F.3d 1234, 1237–38 (10th Cir. 2018). Here, the government had a remedy in the form of Congress's forfeiture scheme. We have repeatedly held that this statutory scheme offers an adequate remedy at law for criminal defendants, often foreclosing their ability to secure relief through Rule 41(g) proceedings. *See Elias*, 921 F.2d at 873–75; *United States*

v. U.S. Currency, $83,310.78, 851 F.2d 1231, 1233–35 (9th Cir. 1988). That same principle applies equally to the government. We hold that the government may not circumvent the forfeiture statutes by proceeding through Rule 41(g) instead.

Our resolution is particularly fitting given that Congress's statutory forfeiture framework, as relevant here, offers safeguards not available in Rule 41(g) proceedings. The statutory scheme requires the government to provide notice to potential claimants before it may establish its rights, 18 U.S.C. § 983(a), and offers procedural and substantive protections for those who might dispute the government's claim, including statutes of limitation, *see* 19 U.S.C. § 1621, an innocent owner defense, 18 U.S.C. § 983(d), fee-shifting provisions, 28 U.S.C. § 2465(b)(1), and—most important—the right to a jury, *see* Supplemental Admiralty and Maritime Claims Rule G(9); Cassella, *supra*, at 453 (noting that, in most cases, the "claimant in a civil forfeiture case has a constitutional right under the Seventh Amendment to a trial by jury"). Allowing the government to circumvent this congressional scheme through a Rule 41(g) proceeding would necessarily allow the government to side-step many of these protections. *See United States v. One 1985 Mercedes-Benz*, 14 F.3d 465, 468 (9th Cir. 1994) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."); *cf. United States v. Marolf*, 173 F.3d 1213, 1216–17 (9th Cir. 1999) (holding that the government may not use a Rule 41(g) proceeding to elude the statute of limitations governing forfeiture actions).

We hold that the government has not perfected title in the seized property and could not have done so through these Rule 41(g) proceedings. We therefore reject the

government's claim that it may dispose of the money as it pleases. We offer no view on the government's options downstream.

AFFIRMED.

APPENDIX B

ORDER REGARDING SEIZED CASH; REPORT AND RECOMMENDATION AND ORDER; ORDER ACCEPTING REPORT AND RECOMMENDATION IN A CRIMINAL CASE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

AUGUST 26, 2019;
DECEMBER 18, 2020;
JANUARY 22, 2021

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA, Plaintiff, v. BRIAN WRIGHT, Defendant.	Case No. 2:14-cr-357-APG-NJK **ORDER REGARDING SEIZED CASH**

Defendant Brian Wright was arrested in connection with armed robberies of jewelry stores. At the time of his arrest, law enforcement officers seized various items from the house where Wright was arrested including a watch, a cell phone, and $23,513.00 in cash. After sentencing, Wright moved for return of the seized property. Magistrate Judge Ferenbach held an evidentiary hearing (ECF No. 375) and recommended that the Government must return the watch and jewelry, but not the cash. ECF No. 321. Wright did not object, so I adopted Judge Ferenbach's recommendation. ECF No. 339.

The Ninth Circuit vacated part of that decision because Judge Ferenbach and my "conclusion that 'Wright has not shown he is the rightful owner of the money and is not entitled to' its return improperly relieved the Government of its threshold burden of establishing that the cash was 'contraband or subject to forfeiture.'" ECF No. 406 at 6 (citations omitted). The issue was remanded for further proceedings. The parties filed supplemental briefs and agreed that I should rely on the evidence presented at the February 7, 2019 evidentiary hearing rather than conducting another evidentiary hearing.

"A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). "[W]hen the property

in question is no longer needed for evidentiary purposes, either because trial is complete [or] the defendant has pleaded guilty, . . . the burden of proof changes. The person from whom the property is seized is presumed to have a right to its return, and the government has the burden of demonstrating that it has a legitimate reason to retain the property." *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987). "[T]he government must justify its continued possession of the property by demonstrating that it is contraband or subject to forfeiture." *Id.*

Wright's position about ownership of the cash has flip-flopped during this case. When he was arrested, Wright denied living in the house where he was arrested, and denied that the seized items were his. ECF Nos. 310-3 at 13-21, and 375 at 40-43. Now that the case has concluded, Wright contends he was living in the house, the cash was his, and he wants it back. *Id.* at 11-12. The Government has contended all along that Wright was living at the house and the items were his, proving he participated in the robberies. Despite Wright's inconsistencies, the evidence demonstrates that Wright was "[t]he person from whom the property [was] seized" and thus "is presumed to have a right to its return." *Martinson*, 809 F.2d at 1369.

"The government can rebut the presumption that property ought to be returned by proving a 'legitimate reason' for retaining the property that is 'reasonable under all of the circumstances.'" *United States v. Gladding*, 775 F.3d 1149, 1152 (9th Cir. 2014) (citations and alterations omitted). "The simplest way for the government to carry its burden is to prove 'the property . . . is contraband or subject to forfeiture.'" *Id.* (citations omitted).

The Government has proven that the cash is contraband. The timing of the seizure in relation to the robberies and subsequent fencing of some of the goods (ECF No. 375 at 22-24), and the location of the cash—hidden in the attic of the house—strongly indicate the money was proceeds of the robberies. Wright had no lawful employment at the time; he contends his co-

defendant lent him $3,000 but he can't recall when or any details (*Id.* at 16); and he claims someone gave him $600 to buy the seized watch but he can't remember who (*Id.* at 21). He claims "a large chunk" of the seized cash came from "frequent gambling" but could offer no specifics of dates or locations. *Id.* at 11. He admits that he "never won like a chunk, but a few thousand at a time [on] different occasions." *Id.* at 15. Wright's testimony was sketchy at best and his explanations are not reasonable. The Government's explanations are far more reasonable under all the circumstances. Therefore, the Government has proven a legitimate reason for retaining the cash as contraband. *Gladding*, 775 F.3d at 1152.

IT IS THEREFORE ORDERED that Wright's motion for return of property (ECF No. 309) is again DENIED.

Dated this 26th day of August, 2019.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

***

UNITED STATES OF AMERICA, Plaintiff, vs. BRIAN WRIGHT, Defendant.	2:14-cr-00357-APG-VCF **Report and Recommendation** **-and-** **Order** MOTION FOR RETURN OF PROPERTY [ECF No. 424]; MOTION TO CONSOLIDATE OR ADJUDICATE MR. WRIGHT'S PRO SE MOTION TO RETURN PROPERTY [ECF No. 428]

Before the Court is defendant Brian Wright's (1) motion for return of property and (2) motion to consolidate or adjudicate his pro se motion to return property. (ECF Nos. 424 and 428). The Court recommends granting the motion for return of property in part. (ECF No. 424). The Court also grants in part the motion to consolidate or adjudicate. (ECF No. 428).

I. Background and Initial Matters

On February 10, 2017, law enforcement arrested Brian Wright pursuant to a petition to revoke his supervised release: he allegedly resided at 6255 West Arby Avenue, Building 19, #317 in Las Vegas, Nevada ("West Arby Property"). (See Joint-Statement at ECF No. 471 at 2). Wright is currently incarcerated and there are no pending charges against him. Wright filed the instant motion to return

property "pro se" (ECF No. 424) but his attorney Angela H. Dows filed a supplement to his motion (ECF No. 441). Attorney Dows also filed a motion to consolidate Wright's "pro se" motion and the supplement she filed on his behalf. (ECF No. 428). The government filed a response to both motions (ECF No. 444 and 468) and Dows filed a reply on Wright's behalf to both motions (ECF No. 445 and 472). The parties also filed a joint pre-hearing statement outlining the undisputed facts (ECF No. 471) and the Court held an evidentiary hearing on the motion (ECF No. 473).

a. The Motion to Consolidate or Adjudicate

Wright filed his motion pro se and his attorney filed a supplement to his motion. The Court previously denied Wright's motion to dismiss counsel (ECF No. 466). At the evidentiary hearing, the Court checked in with Wright to ensure that he still wanted Dows to argue the motion to return property and he said he did. The Court noted that although the two motions are not procedurally proper, the Court stated that it would consider the arguments both Wright's pro se motion and in the supplement. The Court thus grants Wright's motion to consolidate or adjudicate in part, only to the extent that it considers both the arguments that Wright brought in his "pro se" motion and the arguments Dows presented in the supplement as "one motion" for the purposes of the evidentiary hearing.

b. The Property

Brian Wright alleges that law enforcement must return the following seized property from the West Arby Property to him: (1) $2,152 taken from Wright's front pocket; (2) $40,000 in cash taken from the mattress box spring; (3) the rings that law enforcement took off his fingers that he alleges are worth $30,000; (4) cell phones; and (5) a silver ring with apparent diamond stones inside the kitchen drawer. (ECF Nos. 424 at 2 and 474 at 7). It is undisputed that law enforcement seized $2,152.00 from Wright's person and $40,000 from inside a mattress box spring at the West Arby Property. (*Id.*) It is also undisputed that law enforcement removed rings and other items from Wright's person. (*Id.*)

The government argued at the hearing that it lacked notice regarding the silver ring in the drawer and the cell phones because Wright's initial motion did not ask for the return of these items. Wright admitted that the silver ring was his girlfriend's ring and did not belong to him, thus the Court will not consider any arguments about the silver ring in the drawer. At the hearing, Wright stated that only one of the cell phones belonged to him: A Galaxy 7 Edge. The Court gave the government one week from the hearing to confer with its agents and with Wright to determine whether the Galaxy Edge 7 will be returned to him and to notify the Court regarding the same. To date the government has not notified the Court regarding the status of this cell phone.

The government also argued that it did not seize the rings that law enforcement took off Wright's fingers because law enforcement left the rings at the residence. The government stipulated at the hearing that it had no basis to continue to withhold the cash that is seized from Wright's front pocket. The Court thus recommends that the money from his front pocket be returned to him. At the hearing, the Court noted that Wright's FRCP 41(g) motion failed to make a showing to demonstrate that any of the alleged seizures constitutes an excessive fine pursuant to the Eighth Amendment.[1]

The Court thus considers whether the government must return the $40,000 in cash in the mattress box spring and the rings that the government allegedly took off Wright's fingers pursuant to Federal Rule of Criminal Procedure Rule 41(g).

c. The $40,000 in Cash in the Box Spring and the Rings on Wright's Fingers

Wright argues in his supplement that he was convicted of a single count of felon in possession of a firearm in 2016. (ECF No. 441 at 2). He argues that the FBI seized this property when it arrested him

[1] The Excessive Fines Clause under the Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998).

on a petition for revocation of his supervised release based partly on an allegation that Wright was making money selling the services of prostitutes. (*Id.* at 3). Wright argues that search warrant listed items to be seized related to "pandering." (*Id.*) Wright argues that the government never pursued charges against Wright related to the alleged pandering. (*Id.*) Wright argues that his revocation proceeding is complete so all the property should be returned to him. (*Id.* at 9).

The government argued in response and at the hearing that it is not in possession of the rings that plaintiff alleges law enforcement took off his fingers because law enforcement left the rings at the West Arby Property. (ECF No. 444 at 1). The government also argued at the hearing that the $40,000 in cash hidden in the box spring was stolen from the Silverton Casino Sportsbook about three weeks earlier and presented evidence to show that the cash belongs to the Silverton. The parties do not dispute that the $40,000 hidden in the mattress was bound together with "gold bands."

One of the government's witnesses, Travis Kerr, a supervisor at CG Technology in 2017 at the Silverton Sportsbook, testified that on January 24, 2017 someone robbed him at gunpoint at the Silverton and Kerr put bonded stacks of money in a bag. Kerr testified that stacks of cash at the Silverton are organized with color-coded "bands" and that stacks of $10,000 were organized with "gold bands" that are unique to the Silverton casino. Kerr testified that reviewed the government's exhibit 3, which was a photograph of the $40,000 that the law enforcement seized that was wrapped in "gold bands" and he testified that he was 100% certain that the gold bands were the same ones he used at the Silverton. Kerr also provided a photograph of the bands from the Silverton (government's exhibit 4) and he testified that the bands were a match. The parties do not dispute that $40,000 found at the West Arby residence was wrapped in gold bands each band contained $10,000. (ECF No. 471 at 1).

The government argued in the supplement that the money would have been introduced at the trial of Wright's alleged co-conspirator, Matthew Cannon, who was charged in connection with the Silverton

robberies. (ECF No. 444 at 1). Cannon pled guilty to the conspiracy and has been sentenced.[2] See Wright's exhibit 500; see also *United States v. Matthew John Cannon, Jr.*, 2:19-cr-00025-RFB-VCF (ECF No. 104 at 18).

Another government witness, FBI Special Agent James Mollica testified that he photographed (1) the $40,000 with the gold bands and (2) a document with Wright's alleged co-conspirator Matthew Cannon's name on it at the West Arby Property. Nicholas Cappellari, an executive at CG Technology, testified that there was no record of anyone named Brian Keith Wright receiving any casino winnings above $3,000 dating back to 2016. The government's witness, special agent Colin Congo, testified at the hearing that law enforcement took rings off Wright's fingers, along with other items such as hair ties and a belt, and left them at the West Arby Property.

Wright argues in his reply that the government has the burden, not him, and it must show that it has a legitimate reason to retain the property. (ECF No. 445 at 8). Wright argued at the hearing that a large amount of cash is not contraband and that the $40,0000 is presumed to belong to him and should be returned. The government argued at the hearing that Wright does not have a right to the property if it is stolen property.

II. Analysis and Remaining Issues

a. Legal Standard

A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the return of said property. Fed. R. Crim. P. 41(g). "Rule 41(g) is concerned with

[2] The Court noted at the sentencing that Cannon had access to the West Arby Property and moved into the West Arby Property after Wright's arrest. The Court considered that, "this conspiracy involved a number of people [and after] Brian Wright was arrested on February 10th, 2017, this defendant, Mr. Cannon, basically took over the robbery crew." Wright's exhibit 500; see also *United States v. Matthew John Cannon, Jr.*, 2:19-cr-00025-RFB-VCF (ECF No. 104 at 10).

those whose property or privacy interests are impaired by the seizure." *U.S. v. Comprehensive Drug Testing, Inc*., 621 F.3d 1162, 1173 (9th Cir. 2010) (en banc); see also *Savoy v. United States*, 604 F.3d 929, 932 (6th Cir. 2010) (internal quotes omitted) ("The general rule is that seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated.")

Whenever the property in question is no longer needed for evidentiary purposes, the burden of proof changes. *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987). First, the defendant bringing a motion for return of property pursuant to Rule 41(g) bears the burden of demonstrating that he is "entitled to lawful possession of the property." *Id.* "[W]hen the property in question is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or … the government has abandoned its investigation, the burden of proof changes … and the government has the burden of demonstrating that it has a legitimate reason to retain the property." *Id*. Only a "minimal showing such as testimony from the owner of the [property]…will be required to shift the burden to the government." *Id*., at 1369 n. 4.

For the government to carry its burden under Fed. R. Crim. P. 41(g), it needs to demonstrate that the items are "contraband or subject to forfeiture." *United States v. Gladding*, 775 F.3d 1149, 1152-53 (9th Cir. 2014). The party who carries the burden need do so only by a preponderance of the evidence. *U.S. v. Matlock*, 415 U.S. 164, 177 n.14, 94 S. Ct. 988, 996 n.14, 39 L. Ed. 2d 242 (1974). The government can rebut presumption by showing that a legitimate reason for retaining the property that is reasonable under all the circumstances preponderates. *Gladding*, 775 F.3d at 1152-1154 (9th Cir. 2014) (citing Advisory Committee Note to 2009 Amendment on reasonableness standard applicable to computer files). The government may also overcome this presumption by demonstrating a cognizable claim of ownership or right to possession adverse to that of the defendant. *United States v. Fitzen*, 80 F.3d 387, 388 (9th Cir. 1996); see also *United States v. Palmer*, 565 F.2d 1063, 1064 n.1 (9th Cir. 1977)

("If possession of the things seized is unlawful, the state retains the things no matter how it got them."); see also *Stancil v. United States*, 978 F.2d 716 (9th Cir. 1992), citing to *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1061 (9th Cir.1991)("[A 41(g)] motion should be denied, however, if the movant is not entitled to lawful possession of the property or it is contraband.")

"A federal court has equitable authority, even after a criminal proceeding has ended, to order a law enforcement agency to turn over property it has obtained during the case to the rightful owner or his designee." *Henderson v. U.S.*, 135 S. Ct. 1780, 1784, 191 L. Ed. 2d 874 (2015), citing *U.S. v. Martinez*, 241 F.3d 1329, 1330-1331 (11th Cir. 2001) (collecting cases). The government cannot return property it does not possess, and a motion for the return of property must be denied if the government does not possess the property. *U.S. v. Solis*, 108 F.3d 722 (7th Cir. 1997).

b. The $40,000 in the Box Spring

Since the burden is on the government, now that the property is no longer needed for evidentiary purposes, the Court considers whether the government has overcome the presumption that the $40,000 must be returned to Wright. The Court finds that the government has proved that the cash is contraband. Law enforcement seized the cash less than a month after the January 2017 Silverton Sportsbook armed robbery. The $40,000 was still wrapped in the gold bands from the Silverton Sportsbook. The Silverton has no record of Brian Keith Wright receiving winnings. Wright's alleged co-conspirator Cannon pled guilty to conspiracy, had access to the West Arby Property, and subsequently moved into the West Arby Property.

The Court finds that the timing and the location of the cash (hidden in the box spring) all indicate that the money is proceeds from one of the Silverton robberies. The Court also finds that Kerr's testimony regarding the Silverton gold bands being identical to the bands on the $40,000 is credible and supports a finding that the seized $40,000 came from the Silverton. Since possession of the proceeds

from the robbery is illegal, Wright does not have a right to the property. The Court finds that the government has overcome the presumption and proven by a preponderance of the evidence that the $40,000 belongs to the Silverton Sportsbook and not to Wright. The government represented at the hearing that the $40,000 would be returned to the Silverton's insurance company if the Court determines that Wright is not the owner of the property. The government's evidence that the $40,000 is proceeds from the Silverton robbery is reasonable under all the circumstances and the government has proven a legitimate reason for retaining the $40,000 as contraband. The Court recommends denying Wright's request to return the $40,000 from the box spring to him.

c. The Rings on Wright's Fingers

The Court finds that special agent Congo's testimony, that law enforcement took the rings off Wright's fingers along with other personal items, and left them at the residence, is credible. The sentencing transcript shows that Cannon moved into the West Arby Property after Wright's arrest. If the rings are missing from the West Arby Property, it is likely because other people had access. The fact that other people had access to Wright's residence is of no fault to the government. The Court finds that the government never took the rings into its possession. Since the Court cannot return property to Wright that the government did not take into its possession, the Court recommends denying Wright's request for a return of the rings from his fingers.

ACCORDINGLY,

IT IS RECOMMENDED that defendant Brian Wright's motion (ECF No. 424) be GRANTED IN PART.

IT IS FURTHER RECOMMENDED that the government return the $2,152 taken from Wright's front pocket.

IT IS FURTHER RECOMMENDED that the government should not return the seized $40,000

from the box spring to Wright.

IT IS FURTHER RECOMMENDED that the Court should make a finding that the government cannot return the rings taken off Wright's fingers because law enforcement did not seize the rings.

IT IS ORDERED that the parties must file a joint status report on the docket by December 30, 2020 regarding the status of Wright's Galaxy 7 Edge cell phone and notifying the Court if there are any remaining issues to resolve.

IT IS FURTHER ORDERED that Wright's motion to consolidate or adjudicate (ECF No. 428) is GRANTED IN PART.

IT IS SO ORDERED AND RECOMMENDED.

DATED this 18th day of December 2020.

CAM FERENBACH
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN WRIGHT,

Defendant.

Case No. 2:14-cr-00357-APG-NJK

ORDER ACCEPTING REPORT & RECOMMENDATION REGARDING WRIGHT'S MOTION FOR RETURN OF PROPERTY

[ECF Nos. 424, 478]

Defendant Brian Wright filed a motion for the return of property he claims was seized from him at the time of his arrest. ECF No. 424. Magistrate Judge Ferenbach conducted an evidentiary hearing and recommends that I grant part of the motion. ECF No. 478. Specifically, he recommends that I order the Government to return the $2,152 taken from Wright's front pocket, but that I not order the Government to return the $40,000 cash found in Wright's box spring. *Id.* at 8-9.[1] He also recommends that I find that the government cannot return the rings taken off Wright's fingers because law enforcement did not seize the rings. *Id*. at 9.

Wright objected to Judge Ferenbach's recommendation. I have conducted a de novo review of the papers and evidence as required by Local Rule 3-2(b). Judge Ferenbach's Report and Recommendation sets forth the proper legal analysis and factual bases for the decision. I adopt it as my own.

[1] Wright also sought the return of a silver ring allegedly taken from a drawer and three cell phones. Wright later admitted that the silver ring did not belong to him, so Judge Ferenbach did not consider any arguments about it. *Id*. at 3. Wright also later stated that only one of the cell phones belonged to him, and Judge Ferenbach ordered the parties to confer about what to do with that phone. *Id.* at 9. The parties have resolved that issue. *See* ECF No. 479.

I ORDER that Magistrate Judge Ferenbach's Report and Recommendation **(ECF No. 478) is ACCEPTED** and Wright's motion **(ECF No. 424) is GRANTED IN PART**. By February 22, 2021, the Government shall return to Wright the $2,152 taken from his front pocket and the Galaxy 7 Edge cell phone (if it has not yet been returned). The Government shall not return the seized $40,000.

I FIND that the Government cannot return the rings taken off Wright's fingers because law enforcement did not seize the rings.

Dated this 22nd day of January, 2021.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE