

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>CIVIL ACTION</b>
	:	<b>NO. 00-929</b>
<b>v.</b>	:	
	:	<b>CRIMINAL ACTION</b>
<b>STANLEY ALBINSON</b>	:	<b>NO. 95-19-01</b>

**Reed, S.J.**

**January 16, 2001**

**M E M O R A N D U M**

Petitioner Stanley Albinson was convicted of the unauthorized sale of property of the United States government. He now seeks the return of other property seized during government searches of his 69 Mine Run Road address. He has filed a motion (Document No. 41) pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure, which provides recourse for an individual whose property was unlawfully seized or whose property was lawfully seized but is unlawfully retained by the government.<sup>1</sup> Because I conclude that there are no remedies available to plaintiff under Rule 41 (e), the motion will be denied.

***Background***

Petitioner's Rule 41 (e) motion has a storied procedural history. The original motion was filed on April 21, 1998. Soon after, he filed a motion for summary judgment on the Rule 41 (e) motion, contending there was no genuine issue of material fact as to his entitlement to the property. After the government failed to respond to the Rule 41 (e) motion for over a year, despite having been ordered to do so by this Court, default judgment was entered in favor of the petitioner, and the government was ordered to return the property to the petitioner forthwith by

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<sup>1</sup> Petitioner also filed a motion for summary judgment on the Rule 41 (e) motion (Document No. 45), which I address today as well.

an order dated May 14, 1999. The government then filed a motion for reconsideration, and the Court agreed to entertain it. The default judgment order was vacated, and the government was ordered to respond to the Rule 41 (e) motion. In the meantime, while his direct appeal from his conviction and sentence was pending, petitioner filed a request for a writ of mandamus with the Court of Appeals for the Third Circuit, seeking an order to compel this Court to act on his Rule 41 (e) motion. The court of appeals denied the request for mandamus, noting the pendency of the motion for reconsideration before this Court. Despite this rather complex procedural history, the simple fact is that the Rule 41 (e) motion and its attendant motion for summary judgment are now fully briefed and ripe for resolution.<sup>2</sup>

***Rule 41 (e) Law***

Rule 41 (e) of the Federal Rules of Criminal Procedure provides, in pertinent part:

A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant . . . .

A district court has jurisdiction to entertain a Rule 41 (e) motion even after the conclusion of criminal proceedings, and the motion is treated as a civil proceeding for equitable relief. See United States v. McGlory, 202 F.3d 664, 670 (3d Cir. 2000). Even if it is alleged that the property at issue is no longer in the government's possession, the district court has jurisdiction to determine whether such property was in the government's possession, and whether the government wrongfully disposed of such property. See United States v. Bein, 214 F.3d 308, 411

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<sup>2</sup> The procedural history, including the entry and vacation of the default judgment order, has no effect on my consideration of the merits of Rule 41 (e) motion, as I have decided to entertain the government's motion for reconsideration.

(3d Cir. 2000) (citing United States v. Chambers, 192 F.3d 374, 378 (3d Cir. 1999)).

Although Rule 41(e) does not set forth the applicable burden of proof, the Court of Appeals for the Third Circuit has held that once criminal proceedings have terminated,

the person from whom the property was seized is presumed to have a right to return, and the government must demonstrate that it has a legitimate reason to retain the property. The government may meet this burden by demonstrating ‘a cognizable claim of ownership or right to possession’ adverse to that of the movant. The government must do more than state, without documentary support, that it no longer possesses the property at issue.

Chambers, 192 F.3d at 377-78 (quoting United States v. VanCauwenberghe, 934 F.2d 1048, 1061 (9<sup>th</sup> Cir. 1991) and citing United States v. Mora, 955 F.2d 156, 159 (2d Cir. 1992)); see also Gov’t of the Virgin Islands v. Edwards, 903 F.2d 267, 274 (3d Cir. 1990); Green v. United States, 90 F. Supp. 2d 229, 230 (E.D.N.Y. 2000) (citing cases). A district court may rely on evidence developed in prior criminal proceedings in determining whether the government has met its burden of proof. See Green, 90 F. Supp. 2d at 230 (citing cases).

### ***Entitlement to the Property***

The government argues that petitioner is not entitled to the property under Rule 41 (e). First, the government argues that petitioner’s guilty plea precludes him from claiming that the property was unlawfully seized, and that, in any event, the property was not unlawfully seized. Assuming the government is correct in so arguing, the argument is not dispositive because Rule 41 (e) requires the return of property “unlawfully seized” *or* property of which the government deprived defendant. This means that even lawfully seized property must be returned to a criminal defendant when the government’s need for that property has expired. See Fed. R. Crim. P. 41 (e), adv. comm. notes. to 1990 amm.; United States v. Moore, Nos. 98-30346, 98-35449, 1999 U.S. App. LEXIS 20350 (9<sup>th</sup> Cir. Aug. 25, 1999) (unreported opinion) (despite lawful

seizure of property, government must return property when it no longer needs it).

The government also argues that plaintiff cannot demand the return of the property, because the property in fact belonged to the United States government. The government contends that because plaintiff pled guilty to the unauthorized sale of property of the United States government, and because the record of his criminal case establishes that it was U.S. government property, plaintiff cannot now assert ownership of or entitlement to the property.<sup>3</sup>

While the government's argument is persuasive, it is directed at the wrong property. The government argues that the property petitioner sold to them was in fact U.S. government property, but the property of which petitioner seeks return is not the property he sold to the government, but the property the government seized during warrant searches of his 69 Mine Run Road address. According to the "Inventory of Items Seized" provided by the government, more than 200 items were seized from plaintiff's 69 Mine Run Road address which plaintiff claims were his personal property and were lawfully acquired during the course of his business of buying and selling military supplies. Plaintiff's guilty plea focused on the items he sold to undercover government agents, and he did not, in the plea agreement or during the colloquy, acknowledge that any other items he possessed were government property. Thus, petitioner's guilty plea is not enough to carry the government's burden of proof as to the ownership of the property in question here.

The government has offered the Court no other persuasive evidence of the United States'

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<sup>3</sup> Rule 41 (e) requires the return of property only "on the ground that such person is entitled to lawful possession of the property." Petitioner acknowledged during his plea colloquy that an element of the statute that he acknowledged violating was the sale of property belonging to the government or its agency. (Transcript of Hearing on Guilty Plea of Stanley A. Albinson, April 24, 1995, at 16-17). Thus, plaintiff acknowledged that he did not own the property he sold to government agents.

“cognizable claim of ownership or right of possession” in the items on the inventory lists adverse to that of the petitioner. At best, the government has suggested that because plaintiff sold some property of the United States to undercover agents, and because the government thought the property it seized was property of the United States, this Court may infer that the seized property was in fact the property of the United States. The paucity of the government’s evidence makes it impossible for the Court to draw such an inference. The property may in fact have been government property, but the government has provided the Court with nothing on which to base such a conclusion. Moreover, in light of the government’s declarations concerning the property, see infra at “Available Remedies,” and for the reasons discussed below, it is highly doubtful that, at this point, the government could produce sufficient evidence to carry its burden of showing a cognizable interest adverse to the petitioner’s.<sup>4</sup>

The government has not met its burden of proof on the petitioner’s Rule 41 (e) motion, and I conclude that on this record, but for the futility of such an order (as discussed below), petitioner’s motion probably would be granted as to the items on the inventory lists.

### ***Available Remedies***

Obviously, the proper remedy on a Rule 41 (e) motion is the return of the property to the petitioner. However, the government has, through its own intentional conduct, foreclosed that remedy in this case. The government has informed the Court by declaration that, while “certain personal property was returned to defendant,” the government would be unable to return to plaintiff the property listed in the inventory of items seized. (Government’s Declaration

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<sup>4</sup> Furthermore, the government has not argued alternative grounds for its not returning the property, such as a continuing need to retain possession of the items or that the items were contraband or the subject of forfeiture proceedings.

Respecting Property, attached to Document No. 53, filed 6/15/99, at ¶ 2). According to the government, the “items have been either acquired by third parties or have been disposed of through the Defense Reutilization Marketing Organization which destroyed most of these items while distributing a few to military agencies.” (Id.) The items distributed to military agencies cannot be traced. (Id.)

The record evidence presented by the government in this case is unacceptable. When the government seizes property pursuant to a search warrant, it does not automatically assume ownership of that property. Rather, it is required by federal law to preserve the property, keep an inventory of the items seized, and return the items unless they are contraband, forfeited, or necessary for investigative or prosecutory purposes. See United States v. Chambers, 192 F.3d 374, 377 (3d Cir. 1999). The government surely was aware of those responsibilities in this case, and it kept a detailed inventory of the items seized. Yet somehow, the more than 200 items listed on the inventory of seized property were handled as if owned by the government. Whether this destruction and loss of personal property was intentional or negligent, the government has failed to show it had any right to allow this to happen to the property. See id. at 378 (court has obligation on Rule 41 (e) motion to ascertain whether government wrongfully disposed of such property).<sup>5</sup>

The government’s conduct creates a serious predicament. Plaintiff may be entitled to a return of the property, yet the property itself cannot be returned, because the government has

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<sup>5</sup> It should be acknowledged that petitioner waited a substantial period of time before filing this motion; however, it likely would have been futile for him to file before his criminal proceedings, including his effort to withdraw his guilty plea, were completed, because the government could have asserted a continuing need for the items in the event a trial was required.

destroyed it or lost it. The government bears the burden of proving that the property should not be returned to the petitioner, and by its own admission, it can neither meet its burden of proof to keep the property, nor can it return the property.<sup>6</sup>

The Court of Appeals for the Third Circuit has confronted this situation before. In United States v. Chambers, 192 F.3d 374 (3d Cir. 1999), a convicted and sentenced petitioner filed a Rule 41 (e) motion seeking the return of property seized by the government when he was arrested, including two automobiles. The government asserted that the motion was moot because it no longer retained the property, but produced no evidence concerning the disposal of the property. See id. at 375. The district court denied the motion for return of the property, and petitioner appealed. The court of appeals reversed the district court on appeal, holding,

If, as in this case, the government asserts that it no longer has the property sought, the District Court must determine, in fact, whether the government retains possession of the property; if it finds that the government no longer possesses the property, the District Court must determine what happened to the property. The District Court must hold an evidentiary hearing on any disputed issue of fact necessary to the resolution of the motion. ... If the District Court concludes that the government's actions in either regard were not proper, it shall determine what remedies are available.

See Chambers, 192 F.3d at 378.

It would appear that Chambers requires this Court to hold an evidentiary hearing on the government's claim that it no longer has the property petitioner seeks and award appropriate remedies if the government's conduct was improper. However, a subsequent court of appeals decision has undermined Chambers' hearing requirement. In United States v. Bein, 214 F.3d 408 (3d Cir. 2000), the court of appeals considered a Rule 41 (e) petition by individuals convicted of

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<sup>6</sup> Moreover, the government's conduct almost certainly defeated the government's claim of ownership of the property, because it prevented the government from being able to produce the property and show the Court that it was in fact the property of the United States government. It may well be that the property indeed belonged to the United States government or to someone else, but the government's conduct has made that determination impossible.

conspiracy and interstate transportation of stolen merchandise. The motion sought not only the return of property but also monetary damages for property the petitioner alleged had been lost or destroyed. See id. at 410.<sup>7</sup> The district court had ordered the return of certain property, and ordered the payment of monetary damages to compensate the petitioners for property the government had destroyed. See id. at 410-11. The court of appeals affirmed the return of the property, but reversed the decision of the district court to award monetary damages on the Rule 41 (e) motion. See id. at 416.

The court of appeals reasoned that the district court had no jurisdiction over the Rule 41 (e) motion insofar as it requested monetary damages, because an award of monetary damages would violate the sovereign immunity of the United States government. See Bein, 214 F.3d at 415. Rule 41 (e) did not constitute a waiver of the United States' immunity from suits for monetary damages, the court held, and "to the extent a court may read Rule 41 (e) as a waiver of sovereign immunity, it must limit the waiver to the express terms of the rule. ... Rule 41 (e) provides for one specific remedy – the return of property." Id. at 415. Therefore, the court of appeals concluded that "the district court erred when it exercised subject matter jurisdiction over the Beins' claims for monetary damages." Id. Under the holding in Bein, a court may not award money damages on a Rule 41 (e) motion.

Chambers and Bein present this Court with a bit of a Catch-22. On the one hand, Chambers demands that this Court engage in an inquiry as to what happened to the lost or

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<sup>7</sup> Petitioner's motion here is slightly different from the motion in Bein in that it does not ask for monetary damages, and thus this petition does not suffer from the same facial flaw as the petition in Bein. However, that minor difference matters little; Bein still precludes an award of money damages under Rule 41 (e), regardless of what is requested in the motion.

missing property and decide on an appropriate remedy. On the other hand, Bein forecloses the only appropriate remedy in a case where the government has lost or destroyed personal property: monetary damages. In other words, Bein makes the inquiry required by Chambers an exercise in futility, because even if the Court were to conclude after a hearing that a Rule 41 (e) petitioner was entitled to the return of property, and that the government improperly disposed of the property, the Court is powerless to award the only available remedy.<sup>8</sup>

### ***Conclusion***

Where does all this leave us? It is somewhat unclear what is required of a court in my position, particularly with respect to an evidentiary hearing. Bein seems, on a practical level, to make the inquiry required in Chambers meaningless.<sup>9</sup> I therefore conclude that in these circumstances, where it is clear that no remedy would be available to the petitioner on a Rule 41 (e) motion, a hearing is not required in light of the futile outcome.

Furthermore, I conclude that despite the harsh consequences<sup>10</sup> of the precedent announced

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<sup>8</sup> Of course, a hearing might spark a government investigation that results in the discovery or recovery of property the government initially thought to be lost or destroyed. A hearing also might result in the government being able to prove that the property was owned by the government as was the property which was the subject of the indictment in this case. Another possibility is that a hearing would provide a public record of the government's mishandling of property that could have the salutary effect of deterring the government from such future mishaps. However, in light of the government's representations, the likelihood of actual recovery of the property at issue here seems very slim, and the public record would be cold comfort to a petitioner sans an effective remedy.

<sup>9</sup> An argument could be made that Bein essentially attempts to overrule Chambers, which it cannot do, and that Bein is therefore not binding on this court under the law of the Third Circuit. See Liang v. INS, 206 F.3d 308 318 (3d Cir. 2000) (“[A] panel of this court cannot overrule a prior panel precedent.”) (quoting O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 354 (3d Cir. 1981) and citing Internal Operating Procedures, United States Court of Appeals for the Third Circuit, Rule 9.1 (“The holding of a panel in a reported opinion is binding on subsequent panels. . . . Court in banc consideration is required [to overrule such a holding].”)). However, I cannot so conclude, because the Bein panel explicitly stated that its holding was not inconsistent with that of Chambers. See Bein, 214 F.3d at 416.

<sup>10</sup> Bein could have consequence of leaving a blameless individual whose property is unlawfully seized and then lost or destroyed by the government without a remedy under Rule 41 (e). Furthermore, it seems unfair to allow the government to escape a limited waiver of sovereign immunity and deny a court jurisdiction by simply losing or

by the Court of Appeals for the Third Circuit in Bein, I am bound by the rule of law it announces. Therefore, though the government has not carried its burden of proving a cognizable claim of ownership of the property petitioner seeks, and though the government has irrevocably lost and destroyed the property, I cannot award petitioner monetary damages, the only relief I believe to be available or appropriate. The court of appeals has provided no alternative remedies for such circumstances, and I can conceive of no other relief to which petitioner is entitled under Rule 41 (e). Therefore, petitioner's motion for return of property will be denied.

An appropriate Order follows.

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destroying property. Nevertheless, sovereign immunity often has harsh consequences. The court of appeals has not had an opportunity to expand on the rule announced in Bein, and it is for the court of appeals, not this Court, to consider exceptions to the rule set forth in Bein.

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<b>v.</b>	:	
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<b>STANLEY ALBINSON</b>	:	<b>NO. 95-19-01</b>

**ORDER**

**AND NOW**, this 16th day of January, 2001, upon consideration of the motion of petitioner Stanley Albinson pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure for return of property seized by the United States government (Document No. 41), and the motion of petitioner for summary judgment on the Rule 41 (e) motion (Document No. 45), and having concluded, for the reasons set forth in the foregoing memorandum, that the government has not carried its burden of proving a cognizable interest in the property adverse to that of the petitioner, that the property cannot be recovered, and that there is no alternative remedy to the return of the property under Rule 41 (e), **IT IS HEREBY ORDERED** that the Rule 41 (e) motion is **DENIED**, the motion for summary judgment is **DENIED**, and final judgment is hereby entered in favor of the United States of America.

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**LOWELL A. REED, JR., S.J.**