

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

UNITED STATES OF AMERICA)	
)	Criminal Action
v.)	No. 05-cr-00670
)	
KEVIN T. ORTEGA,)	
)	
Defendant)	

* * *

APPEARANCES:

KEVIN T. ORTEGA
Pro Se

JOSEPH F. MINNI
On behalf of the United States of America

* * *

O P I N I O N

JAMES KNOLL GARDNER
United States District Judge

This matter is before the court on the Motion for Return of Property Per Federal Rules of Criminal Procedure Rule 41(g) filed by defendant pro se on October 1, 2014 ("Motion for Return of Property")¹ and the Response of United States of America to Motion for Return of Property, which response was filed March 30, 2016 ("Response").²

For the reasons that follow, I grant in part, deny in part, and dismiss without prejudice in part the Motion for

¹ Document 370.

² Document 390.

Return in Property. Additionally, I reserve decision on the motion in part and direct the government to provide more evidence at the hearing scheduled in the accompanying Order.

PROCEDURAL HISTORY

On November 29, 2005, a sealed indictment³ was filed charging defendant and his co-defendants with sixty-one counts of various offenses related to the distribution of cocaine base ("crack").⁴ Defendant ultimately pled guilty to Count One of the indictment--conspiracy to distribute crack in violation of 21 U.S.C. § 846--and on November 12, 2008, he was sentenced to 292 months of imprisonment followed by five years of supervised release.⁵ He was also ordered to pay a \$1,000.00 fine and a \$100.00 assessment.⁶

By Order dated and filed November 5, 2015,⁷ I granted the parties' joint request to reduce defendant's sentence to 188 months of imprisonment pursuant to 18 U.S.C. § 3582(c)(2)

³ The Indictment was originally sealed, but was unsealed upon request of the United States Attorney's office filed December 8, 2005 (Document 10).

⁴ See Document 1, charging defendant and co-defendants with violations of 21 U.S.C. §§ 846, 841(a)(1), 860(a), 861(a)(1), 848, 853, and 18 U.S.C. § 924(c)(1), 922(g)(1), 2.

⁵ See Judgment in a Criminal Case dated November 12, 2008 and filed February 23, 2009 (Document 296).

⁶ Id.

⁷ Document 383.

based upon Amendment 782 to the United States Sentencing Guidelines.

On October 1, 2014, defendant pro se filed his Motion for Return of Property,⁸ seeking the return of property that the Federal Bureau of Investigation ("FBI") seized from him. By Order dated April 29, 2015 and filed April 30, 2015 (Document 371) the government was given until May 18, 2015 to respond to defendant's motion. On March 30, 2016, the government filed its Response.⁹

STANDARD OF REVIEW

Motion for Return of Property Under Federal Rule of Criminal Procedure 41(g)

Defendant filed his Motion for Return of Property under Federal Rule of Criminal Procedure 41(g). The rule provides:

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

⁸ Document 370.

⁹ Document 390.

A district court has jurisdiction to hear a motion for return of property filed after the termination of criminal proceedings. United States v. Chambers, 192 F.3d 374, 376 (3d Cir. 1999). “[S]uch an action is treated as a civil proceeding for equitable relief.” Id.

Where, as here, a motion under Rule 41(g) is made after the termination of criminal proceedings, the government bears the burden to justify its retention of property, and “the person from whom the property was seized is presumed to have a right to its return”. Id. at 377.

The government’s unsupported allegation that it no longer possesses seized property is insufficient to resolve a motion for return of property. Id. at 377-378. In such situations, the court must receive evidence to determine the location of the property. Id. at 378.

Nonetheless, the relief available is limited. Because of the government’s immunity from suit, this court lacks subject matter jurisdiction over a defendant’s claim for monetary damages. See United States v. Bein, 214 F.3d 408, 411-414 (3d Cir. 2000); see also United States v. Craig, 694 F.3d 509, 512-514 (3d Cir. 2012); Peloro v. United States, 488 F.3d 163, 178 (3d Cir. 2007).

Administrative Forfeiture

The Third Circuit has provided a useful explanation of the administrative forfeiture process, which the government claims to have utilized here:

The civil forfeiture of property that constitutes the proceeds of drug transactions is authorized by 21 U.S.C. § 881(a). When the seized property is \$500,000 or less, the government may use the administrative forfeiture process governed by the customs laws; this process entails no judicial involvement. See 19 U.S.C. § 1607; 21 U.S.C. § 881(d). The government is required to publish notice of its intent to forfeit the property once a week for three weeks and to send written notice to any party known to have an interest in the property. See 19 U.S.C. § 1607(a). . . . If a claimant fails to file the bond to contest the forfeiture, the seizing agency will make a declaration of forfeiture and title will vest in the United States. See 19 U.S.C. § 1609(a).

United States v. McGlory, 202 F.3d 664, 669-670 (3d Cir. 2000).

Typically, a district court lacks jurisdiction to review administrative forfeiture proceedings. Id. at 670. However, courts have equity jurisdiction to review a claimant's challenge to the sufficiency of notice. See id. Typically, a motion to set aside forfeiture is filed pursuant to 18 U.S.C. § 983(e), which provides that such a motion must be filed "not later than 5 years after the date of final publication of notice of seizure of the property." 18 U.S.C. § 983(e)(3). A court may review such a claim although it is styled as a motion under

Federal Rule of Criminal Procedure 41. See McGlory, 202 F.3d at 670.

BACKGROUND

On December 8, 2005, the FBI seized several items of property from defendant, including firearms, ammunition, \$18,707.00 in United States currency, and other miscellaneous items.¹⁰ Defendant submitted three documents, each entitled Receipt for Property Received/Returned/Released/Seized ("Property Receipts"), which list various items of property seized from him or returned to Vivian M. Montalvo.¹¹ Defendant requests the return of all items seized which have not already been returned and do not constitute contraband.

The government alleges that it returned some items of property to defendant or Vivian M. Montalvo. It further alleges that it administratively forfeited nine firearms and \$18,687.00 in United States currency. The remaining property it agrees to return to defendant or to a third party designated by defendant and approved by the court.

¹⁰ See Motion for Return of Property, Exhibit 1.

¹¹ Id.

DISCUSSION

Property the Government Agrees to Return

The government does not oppose the return of several items of property it seized from defendant. These items are the following:

- (1) Citizens Bank ATM card;
- (2) Black & Decker heat sealer;
- (3) 11" bag roll seal-a-meal;
- (4) Blue Smith & Wesson gun case;
- (5) Black file case containing miscellaneous documents;
- (6) One Siemens cellular telephone (serial no. 35348500 4101362);
- (7) One Nextel 1860 cellular telephone (model no. H73XAN6RR4AN); and
- (8) Seven miscellaneous documents.

Accordingly, defendant's motion is granted as unopposed to the extent it seeks the return of those items.

Property Allegedly Returned

The government alleges that several items of seized property were returned either to defendant or to Vivian M. Montalvo. Defendant does not request the return of property which has already been returned, but the parties make inconsistent representations regarding what property has been

returned.¹² The Property Receipts submitted by defendant indicate that the following items were returned to Ms. Montalvo:

- (1) One box with miscellaneous documents;
- (2) Set of keys;
- (3) One black camera bag;
- (4) One gun cleaning kit; and
- (5) Two wooden rifle stocks.

The government claims that it also returned the following property to Ms. Montalvo:

- (1) Pennsylvania identification card in the name of Kevin T. Ortega, 206 S 17th St., Reading, Pennsylvania 191602, Driver's License # 229-45-314;
- (2) Social security card # 199-52-5274 in the name of Kevin Thomas Ortega;
- (3) Deed for 306 South 17th Street, Reading, Pennsylvania, in the name of Kevin T. Ortega and Vivian M. Montalvo;
- (4) Another deed identified as "Item #3";¹³
- (5) Standard agreement for the sale of real estate for 306 S. 17th Street, Reading, Pennsylvania;
- (6) A copy of Sellers Property Disclosure Statement;
- (7) Two copies of First American Pre Insurance Company - Settlement Statement;
- (8) Two Reading Real Estate & School Tax Bills for 2005 for 306 S 17th Street, Reading, Pennsylvania;

¹² Motion for Return of Property, Exhibit 1 at page 3.

¹³ There is no deed listed in the Property Receipts submitted by defendant, which is the property that he requests be returned. Accordingly, it is unclear to what deed the government refers. See Response, Exhibit A.

- (9) 2005 Reading Real Estate Tax Bill stamped "paid";
- (10) Realty Transfer Tax Statement of Value for 306 S 17th Street, Reading, Pennsylvania.

However, the government submitted no evidence to support its claim that this property was returned to Ms. Montalvo. Items two through ten of this list do not specifically appear on the Property Receipts submitted by defendant, but may be encompassed by some of the "miscellaneous documents" listed therein.

I am required to receive evidence regarding the location of property if the government claims it no longer possesses the property but has provided no evidentiary support. See Chambers, 192 F.3d at 377-378. Accordingly, at the hearing scheduled in the accompanying Order, the government shall provide evidence to support its claim that this property was returned to Ms. Montalvo.

Additionally, the government claims that the following items were returned to defendant:

- (1) Compaq laptop computer, serial number CNF5352VBZ2;
- (2) Black briefcase containing bank statements.

The government has also failed to provide evidence supporting its claim that this property was returned to defendant. Accordingly, at the upcoming hearing, the government

shall provide evidence demonstrating that this property was returned to defendant.

Property With Unknown Whereabouts

The government indicates that the following items of property are not in its possession, but does not provide information or evidence regarding its location:

- (1) \$20.00 in United States currency representing the difference between the \$17,410.00 seized from defendant and the \$17,390.00 that was allegedly forfeited;
- (2) Blank checks and miscellaneous documents; and
- (3) Shoebox containing hefty baggies.

Regarding the first item listed, the first page of the Property Receipts indicates that two amounts of currency were seized: \$17,410.00 and \$1,297.00.¹⁴ The combined total of these two sums is \$18,707.00.

The government submitted a copy of the notice it sent to defendant regarding the forfeiture of currency seized from him, which indicates that two amounts of currency were subject to forfeiture: \$17,390.00 and \$1,297.00.¹⁵ The first sum is \$20.00 less than the first sum listed in the Property Receipts.

Additionally, the government submitted a Declaration of Administrative Forfeiture, which indicates that \$18,687.00

¹⁴ See Motion for Return of Property, Exhibit 1 at page 1.

¹⁵ See Response, Exhibit B.

was administratively forfeited, which is \$20.00 less than the combined total of the amounts seized from defendant.¹⁶

Therefore, \$20.00 representing the difference between the amount seized and the amount forfeited is unaccounted for.

Regarding the second item, the Property Receipts list as an item seized: "black brief case containg [sic] bank statements, blank checks & misc. documents".¹⁷ The government claims that it returned to defendant a black briefcase containing bank statements, but not the blank checks and miscellaneous documents.¹⁸ However, it indicates that the blank checks and miscellaneous documents are no longer in FBI custody.¹⁹

Finally, regarding the third item listed, the shoebox containing hefty baggies, the government indicates that this item is not in its possession but has not specified where the property is located.

As noted, I am required to receive evidence regarding the whereabouts of property which the FBI claims is no longer in its possession. Chambers, 192 F.3d at 377-378. Accordingly, at

¹⁶ See Response, Exhibit E.

¹⁷ Motion for Return of Property, Exhibit 1.

¹⁸ Response, Exhibit A.

¹⁹ Id.

the upcoming hearing, the government shall provide evidence regarding the location of those three items of property.

Property Which Defendant is Allegedly Prohibited from Possessing

Ammunition

The Property Receipts submitted by defendant indicate that several items ammunition were seized from him. In its Response the government states that it is willing to return this property to a third party designated by defendant and approved by me. Specifically, the ammunition is:

- (1) Sixteen Remington 12 gauge shotgun shells;
- (2) 457 rounds of 7.62 x 39 millimeter ammunition;
- (3) 900 rounds of 7.62 x 39 millimeter ammunition;
- (4) One box (red) of Black Hills 40 caliber Smith & Wesson ammunition with two casings in the box;
- (5) Six 30-round magazines;
- (6) Two 10-round magazines;
- (7) Twenty 7.62 x 51 millimeter ammunition;
- (8) One magazine with twenty 81-49 FNM ammunition;
- (9) One empty magazine;
- (10) Two boxes of Remington 12-gauge ammunition;
- (11) 100 rounds (two boxes) of Remington 9 millimeter ammunition;
- (12) One box of Remington 40 caliber ammunition;
- (13) One box of Remington nitro-steel 12-gauge ammunition;

- (14) One box of Winchester 50-40 caliber rounds;
- (15) Two boxes Federal 20-gauge shotgun shells (twenty-five in one box, nineteen in the other box);
- (16) One box containing twenty-two Winchester 9 millimeter rounds;
- (17) One box with five rounds of Federal premium 00 buck rounds;
- (18) One box with six rounds of 300 150 GMIN ammunition;
- (19) Seven boxes with 140 rounds of 7.62 x 39 millimeter ammunition;
- (20) One box containing three rounds of 8 millimeter Mauser ammunition;
- (21) Three magazines containing 60 rounds (twenty rounds in each magazine) of FNM 81-35 ammunition;
- (22) Nine rounds of 300 Winchester ammunition with gun;
- (23) Five 8 millimeter rounds of ammunition with gun.²⁰

It is illegal for an individual such as defendant who has been convicted of a crime punishable by imprisonment for more than one year to possess a firearm or ammunition.

18 U.S.C. § 922(g)(1). Defendant is therefore prohibited from possessing the ammunition and magazines.

However, the United States Supreme Court held that a court may order that such property be returned to a third person designated by defendant "if, but only if, that disposition

²⁰ See Motion for Return of Property, Exhibit 1; see also Response, Exhibit A.

prevents the felon from later exercising control over those weapons, so that he could either use them or tell someone else how to do so.” Henderson v. United States, __ U.S. __, 135 S.Ct. 1780, 1786, 191 L.Ed.2d 874, 881 (2015). In other words, if I am satisfied that a third person designated by defendant will not allow him to exercise actual or constructive control over the prohibited items, I may approve the transfer of property to that person.

Defendant has not designated a third person to receive the ammunition and magazines seized from him. Accordingly, his Motion for Return of Property is dismissed without prejudice to the extent it seeks the return of these items. He may renew this request at the upcoming hearing and designate a third person to receive these items, subject to my approval.

Body Armor

One of the items seized from defendant was “Blue American body armor”.²¹ The government contends that defendant is prohibited from possessing this property because he has been convicted of a violent felony. 18 U.S.C. § 931(a).

It is illegal for a person who has been convicted of a “crime of violence” to possess body armor. 18 U.S.C. § 931(a). A crime of violence is defined as:

²¹ See Motion for Return of Property, Exhibit 1 at page 1.

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

Defendant was convicted by this court of conspiracy to distribute crack in violation of 21 U.S.C. § 846. This offense does not contain as an element the use, attempted use, or threatened use of physical force nor does it, by its nature, involve a substantial risk that physical force will be used.

Defendant's criminal history includes not only the instant offense, but also several prior state offenses. However, it is unclear which of defendant's convictions the government contends is a "crime of violence". Because the criminal proceedings in this case have terminated, the government bears the burden of justifying its retention of seized property. Chambers, 192 F.3d at 377. Accordingly, at the upcoming hearing, the government shall submit evidence supporting its claim that defendant has been convicted of a violent felony.

Property Allegedly Administratively Forfeited

The government claims that it administratively forfeited nine firearms and \$18,687.00 seized from defendant.²² The government argues that the only method for challenging an administrative forfeiture is by a motion under 18 U.S.C. § 983(e).²³ It further contends that defendant has failed to bring such a motion and that the statute of limitations for doing so has passed. Section 983(e)(3) provides a five year statute of limitations commencing upon publication of final notice of seizure.

The Third Circuit has held that a challenge to administrative forfeiture can be brought through a motion made under Federal Rule of Criminal Procedure 41. See McGlory, 202 F.3d at 670. Furthermore, documents filed by pro se litigants must be read liberally. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.E.2d 652, 654 (1972). I therefore construe defendant's motion as a proper challenge to the alleged forfeiture of property seized from him. Nonetheless, defendant must comply with the applicable statute of limitations for bringing such claims.

The government claims that final publication of the seizure of the United States currency occurred on February 23,

²² Response, Exhibit A.

²³ 18 U.S.C. § 983 provides general rules for civil forfeiture proceedings.

2006, and final publication of the seized firearms occurred on March 3, 2006. The evidence submitted by the government demonstrates that final publication of seizure did not occur on the dates it alleges. The Declaration of Administrative Forfeiture which the government submitted regarding the currency is dated June 23, 2006, not February 23, 2006.²⁴ The Declaration of Administrative Forfeiture that the government claims pertains to the seized firearms is dated August 26, 2011, not March 3, 2006.²⁵

Nonetheless, defendant's motion would be untimely with respect to the currency whether the final publication occurred on June 23, 2006 or February 23, 2006. However, he may conceivably be able to make an argument for equitable tolling of the statute of limitations based on a lack of notice. Accordingly, at the upcoming hearing, the government shall provide evidence regarding the date of final publication of forfeiture of the \$18,687.00 it claims to have forfeited, such as a Declaration of Administrative Forfeiture with a date matching the date the government claims that final publication occurred.

Furthermore, although the government submitted a copy of the notice it sent defendant and his attorney regarding the

²⁴ See Response, Exhibit E.

²⁵ See Response, Exhibit G.

forfeiture of \$18,687.00,²⁶ it failed to demonstrate that it complied with the requirement to publish notice in the newspaper for three consecutive weeks.

The government submitted a computer screenshot²⁷ that seems to state that it published something in the Wall Street Journal on February 17, 24, and March 3, 2006. However the content of the publication is indecipherable from the evidence submitted.²⁸ To the extent it is legible, it appears to state that the government published notice of its intent to forfeit \$10,980.00, an amount of currency with no clear connection to this case. Accordingly, at the upcoming hearing, the government shall provide evidence that it published notice of seizure of \$18,687.00 in the newspaper for three weeks as required, such as notice of publication from a newspaper of general circulation or an affidavit of the official who arranged the publication, which clearly states the dates and language of the publication. See 18 U.S.C. § 981(d); 19 U.S.C. § 1607(a).

Defendant's motion would not be untimely regarding the firearms if final publication occurred on August 26, 2011. It is not clear that final publication occurred on this date,

²⁶ Response, Exhibits B and C.

²⁷ A screenshot is a printout of the image(s) displayed on a computer screen.

²⁸ Response, Exhibit D.

though, because the Declaration of Administrative Forfeiture submitted by the government does not list the items forfeited and instead refers to an attached list, which was not attached to the document submitted by the government here.²⁹ Accordingly, at the upcoming hearing, the government shall submit evidence regarding the date of final publication of seizure of the firearms it allegedly forfeited.

Furthermore, there are several defects within the evidence submitted by the government regarding its compliance with the administrative forfeiture notice requirements regarding the firearms. First, the government provided no evidence that it published notice of the forfeiture of the nine firearms for three consecutive weeks in a newspaper of general circulation as required. See 18 U.S.C. § 981(d); 19 U.S.C. § 1607(a).³⁰ Second, there are numerous inconsistencies in the evidence regarding the quantity and description of the seized and forfeited firearms.³¹

The government states in the text of its Response that the Bureau of Alcohol, Tobacco, Firearms, and Explosives

²⁹ See Response, Exhibit G.

³⁰ As discussed above, the government submitted a screenshot containing three publication dates in the Wall Street Journal, but the content of the publication is indecipherable. Response, Exhibit D. The document makes no reference to any firearms.

³¹ See Response, Exhibit F.

administratively forfeited nine firearms seized from defendant.³² However, the Property Receipts submitted by defendant list only seven firearms and the spreadsheet attached to the government's Response lists only seven firearms.³³ To further complicate matters, the notice sent to defendant regarding the forfeiture lists eight firearms.³⁴

The firearms listed in the Property Receipts include the following:

- (1) One SA58 .308 caliber CSA Rifle (serial number DS19798);
- (2) One .22 caliber antique rifle (no serial number);
- (3) One Winchester .20 gauge shotgun (serial number L700371);
- (4) One 8 millimeter BCD rifle (serial number 4922);
- (5) One .300 caliber SIG rifle (serial number R03728);
- (6) One Astra Mod A-100 9 millimeter (serial number 3317D); and
- (7) One 40 caliber SIG (serial number SP006917).³⁵

The notice sent to defendant lists eight firearms. Seven of the firearms listed are assigned the same seven serial

³² Response at page 6.

³³ See Motion for Return of Property, Exhibit 1; see also Response, Exhibit A.

³⁴ Response, Exhibit F.

³⁵ Motion for Return of Property, Exhibit 1.

numbers provided in the Property Receipts.³⁶ However, the descriptions of the firearms differ from those in the Property Receipts.³⁷ Some of the descriptions are similar to the descriptions in the Property Receipts, but some are not.³⁸

The Property Receipts list one firearm as an antique rifle with no serial number.³⁹ This is the only firearm listed in the Property Receipts with no serial number. The notice sent to defendant includes a rifle with no serial number as well as a Winchester shotgun with no serial number.⁴⁰ One or both of these firearms listed in the notice are not listed in the Property Receipts. Furthermore, to the extent the government claims it forfeited nine firearms and not seven or eight, there is no evidence regarding what the ninth firearm was.

Accordingly, at the upcoming hearing, the government shall provide evidence that it complied with the notice requirements for administrative forfeiture regarding the seized firearms. It shall also provide evidence regarding that it forfeited the same firearms that it seized from defendant. If the government did not forfeit all of the firearms seized from

³⁶ See Response, Exhibit F.

³⁷ Compare Response, Exhibit F, with Motion for Return of Property, Exhibit 1.

³⁸ Id.

³⁹ Motion for Return of Property, Exhibit 1.

⁴⁰ Response, Exhibit F.

defendant, it shall submit evidence regarding the location of the weapons not forfeited. Finally, the government shall submit evidence regarding the origins, locations and descriptions of the two firearms it claims to have forfeited which are not listed in the Property Receipts.

Contraband

The government contends that the following items should not be returned to defendant because they constitute contraband:

- (1) A license to carry a firearm identification card;
- (2) Two clear baggies of suspected cocaine powder;
- (3) One GE black coffee grinder;
- (4) One Tanita digital scale;
- (5) Two plastic knives;
- (6) One toothbrush;
- (7) Miscellaneous packaging material;
- (8) One razor knife;
- (9) One "20" bag of cocaine (in a Superman baggy).

Item nine constitutes contraband because it is a controlled substance. 18 U.S.C. § 881(f). Item two may be contraband if the suspected powder is, in fact, cocaine. Item four is also contraband because the Third Circuit has found that scales are "drug distribution paraphernalia". United States v. Jenkins, 90 F.3d 814, 818 (3d Cir. 1996).

It is unclear why the remaining items, which each have common every day uses, constitute contraband. The government bears the burden to justify its retention of these items. See Chambers, 192 F.3d at 377. Accordingly, at the hearing, the government shall provide evidence that items one, two, three, and five through eight each constitute drug-related contraband.

Monetary Award

Defendant requests "the return of currency . . . plus interest on the currency" as well as "replacement or reimbursement of any lost or destroyed items, or repairs due to dipriciation [sic] and storage incurred damages."⁴¹ Because of the government's immunity from suit, this court lacks subject matter jurisdiction over defendant's claims for monetary damages. See United States v. Bein, 214 F.3d 408, 411-414 (3d Cir. 2000); see also United States v. Craig, 694 F.3d 509, 512-514 (3d Cir. 2012); Peloro v. United States, 488 F.3d 163, 178 (3d Cir. 2007). Accordingly, the Motion for Return of Property is denied to the extent that it seeks monetary damages.

Conclusion

For the foregoing reasons, defendant's Motion for Return of Property is granted in part as unopposed, dismissed without prejudice in part, and denied in part. Judgment is reserved in part. A hearing is scheduled in the accompanying

⁴¹ Motion for Return of Property at ¶ 8.

Order, at which the government shall submit the items of evidence outlined above. At the hearing, defendant may also renew his request for the return of items he is prohibited from possessing and designate a third person to take possession of the property, subject to my approval.

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

UNITED STATES OF AMERICA)	
)	Criminal Action
v.)	No. 05-cr-00670
)	
KEVIN T. ORTEGA,)	
)	
Defendant)	

O R D E R

NOW, this 27th day of April, 2016, upon consideration of the Motion for Return of Property Per Federal Rules of Criminal Procedure Rule 41(g) filed by defendant pro se on October 1, 2014 together with Exhibits 1 through 3 ("Motion for Return of Property") (Document 370) and the Response of United States of America to Motion for Return of Property, which response was filed March 30, 2016 together with Exhibits A through G ("Response") (Document 390), and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendant's Motion for Return of Property is granted in part, dismissed in part, and denied in part. Judgment is also reserved in part, and a hearing is scheduled to address remaining factual issues.

IT IS FURTHER ORDERED that defendant's Motion for Return of Property is granted as unopposed to the extent it seeks return of the following property:

- (1) Citizens Bank ATM card;

- (2) Black & Decker heat sealer;
- (3) 11" bag roll seal-a-meal;
- (4) Blue Smith & Wesson gun case;
- (5) Black file case containing miscellaneous documents;
- (6) One Siemens cellular telephone (serial no. 35348500 4101362);
- (7) One Nextel 1860 cellular telephone (model no. H73XAN6RR4AN); and
- (8) Seven miscellaneous documents.

IT IS FURTHER ORDERED that a hearing is scheduled for June 21, 2016 at 10:00 o'clock a.m. in Courtroom B, Edward N. Cahn United States Courthouse, 504 West Hamilton Street, Allentown, Pennsylvania, to address the issues outlined in this Order and accompanying Opinion.

IT IS FURTHER ORDERED that continuances will be granted only in extraordinary circumstances. Continuance requests shall be signed by one counsel of record for each party. Continuance requests shall be submitted by June 14, 2016 on a form approved by the undersigned.

IT IS FURTHER ORDERED that at the hearing the government shall provide evidence to support its claim that the following property was returned to defendant through Vivian Montalvo:

- (1) Pennsylvania identification card in the name of Kevin T. Ortega, 206 S 17th St., Reading, Pennsylvania 191602, Driver's License # 229-45-314;
- (2) Social security card # 199-52-5274 in the name of Kevin Thomas Ortega;
- (3) Deed for 306 South 17th Street, Reading, Pennsylvania, in the name of Kevin T. Ortega and Vivian M. Montalvo;
- (4) Another deed identified by the government as "Item #3";
- (5) Standard agreement for the sale of real estate for 306 S. 17th Street, Reading, Pennsylvania;
- (6) A copy of Sellers Property Disclosure Statement;
- (7) Two copies of First American Pre Insurance Company - Settlement Statement;
- (8) Two Reading Real Estate & School Tax Bills for 2005 for 306 S 17th Street, Reading, Pennsylvania;
- (9) 2005 Reading Real Estate Tax Bill stamped "paid";
- (10) Realty Transfer Tax Statement of Value for 306 S 17th Street, Reading, Pennsylvania.

IT IS FURTHER ORDERED that at the hearing the government shall provide evidence to support its claim that it returned the following property to defendant:

- (1) Compaq laptop computer, serial number CNF5352VBZ2;
- (2) Black briefcase containing bank statements.

IT IS FURTHER ORDERED that at the hearing the government shall provide evidence regarding the location of the following items:

- (1) \$20.00 in United States currency representing the difference between the \$17,410.00 seized from defendant and the \$17,390.00 that he was notified was subject to forfeiture;
- (2) Blank checks and miscellaneous documents;
- (3) Shoebox containing hefty baggies.

IT IS FURTHER ORDERED that defendant's Motion for Return of Property is dismissed without prejudice to the extent it seeks return of property that defendant is legally prohibited from possessing, including firearm magazines and ammunition. At the hearing, defendant may renew his request for the return of this property and designate a third person to take possession of the property, subject to my approval. Specifically, the relevant property is:

- (1) Sixteen Remington 12 gauge shotgun shells;
- (2) 457 rounds of 7.62 x 39 millimeter ammunition;
- (3) 900 rounds of 7.62 x 39 millimeter ammunition;
- (4) One box (red) of Black Hills 40 caliber Smith & Wesson ammunition with two casings in the box;
- (5) Six 30-round magazines;
- (6) Two 10-round magazines;
- (7) Twenty 7.62 x 51 millimeter ammunition;
- (8) One magazine with twenty 81-49 FNM ammunition;
- (9) One empty magazine;
- (10) Two boxes of Remington 12-gauge ammunition;

- (11) 100 rounds (two boxes) of Remington 9 millimeter ammunition;
- (12) One box of Remington 40 caliber ammunition;
- (13) One box of Remington nitro-steel 12-gauge ammunition;
- (14) One box of Winchester 50-40 caliber rounds;
- (15) Two boxes Federal 20-gauge shotgun shells (twenty-five in one box, nineteen in the other box);
- (16) One box containing twenty-two Winchester 9 millimeter rounds;
- (17) One box with five rounds of Federal premium 00 buck rounds;
- (18) One box with six rounds of 300 150 GMIN ammunition;
- (19) Seven boxes with 140 rounds of 7.62 x 39 millimeter ammunition;
- (20) One box containing three rounds of 8 millimeter Mauser ammunition;
- (21) Three magazines containing 60 rounds (twenty rounds in each magazine) of FNM 81-35 ammunition;
- (22) Nine rounds of 300 Winchester ammunition with gun;
- (23) Five 8 millimeter rounds of ammunition with gun.

IT IS FURTHER ORDERED that at the hearing the government shall provide evidence that defendant has been convicted of a "crime of violence" which renders it illegal for him to possess the Blue American body armor seized from him.

IT IS FURTHER ORDERED that at the hearing the government shall provide evidence regarding the date of final publication of seizure of the firearms and currency seized from defendant.

IT IS FURTHER ORDERED that at the hearing the government shall provide evidence of the required newspaper publication and notice to interested parties of the firearms and currency seized from defendant that were administratively forfeited.

IT IS FURTHER ORDERED that at the hearing the government shall submit evidence that it administratively forfeited the same firearms which it seized from defendant. If it did not forfeit all of the firearms seized, it shall provide evidence regarding the location of any non-forfeited seized firearms. The government shall also provide evidence regarding the origin, location, and description of the two firearms it claims to have forfeited which are not listed among the firearms seized from defendant.

IT IS FURTHER ORDERED that defendant's Motion for Return of Property is denied to the extent it seeks return of the following items, which constitute drug-related contraband:

- (1) Two clear baggies of suspected cocaine powder;
and
- (2) One "20" bag of cocaine (in a Superman baggy);
and

(3) One Tanita digital scale.

IT IS FURTHER ORDERED that at the hearing the government shall provide evidence that the following items are drug-related contraband:

- (4) A license to carry a firearm identification card;
- (5) One GE black coffee grinder;
- (6) Two plastic knives;
- (7) One toothbrush;
- (8) Miscellaneous packaging material; and
- (9) One razor knife.

IT IS FURTHER ORDERED that defendant's Motion for Return of Property is denied to the extent it seeks interest and reimbursement.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge