UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

DOCKET NO.: 8:07 CR 536-WMC

GOVERNMENT'S RESPONSE TO MOTION FOR RETURN OF SEIZED PROPERTY

NOW COMES the United States, by and through Gretchen C.F. Shappert, United States Attorney for the Western District of North Carolina, and says unto the Court the following in support of denial of the petitioner's motion:

I. PROCEDURAL HISTORY

A. Search Warrant

On May 2, 2007, the Honorable William M. Catoe, United States Magistrate Judge, issued a search warrant for the premises located at 515 Concord Avenue, Anderson, South Carolina. The next day, May 3, 2007, agents of the Federal Bureau of Investigation, Columbia and Charlotte Divisions, executed the search warrant. Among the items which the search warrant authorized to be searched for and seized, and which agents did seize, included taxation training materials, manuals, instructions, data, records and information that may be stored in electronic devices, computers, records which associate as yet unknown co-conspirators to the criminal acts described or related to those in the affidavit, and other items.

When the premises search was completed on the evening of May 3, 2007, agents gave the petitioner a copy of the inventory related to items seized. At the time the search warrant was issued by the court, an Order sealing the affidavit to the search warrants in light of the Governments' on-going investigation was signed as well.

B. Motions

On June 18, 2007, petitioner, *pro se*, filed a motion for the return of the items seized pursuant to the search warrant. In this motion, the movant alleges that the search was related to an unlawful investigation, that the search and seizure was intended to deprive the defendant of his First Amendment rights, that there is no legitimate reason for seizing the items recovered during the search, and finally, that all the materials should be immediately returned pursuant to Fed.R.Crim.P 41(g).

The government submits that the petitioner's motion for this relief should be denied. Here, the government properly seized the items in the usual manner upon a showing of probable cause found by a United States Magistrate Judge. The warrant specified the items to be seized with sufficient particularity. Any alleged deficiencies asserted by the petitioner about the warrant are properly raised and adjudicated after indictment, not pre-indictment because the remedy sought by the petitioner amounts to a pre-indictment suppression of evidence during an on-going grand jury investigation, which is not provided for under Rule 41(g).

II. FACTUAL BACKGROUND

A. Underlying Crimes

As set forth in the application upon which the search warrant was issued, the FBI is investigating numerous violations of federal law to include Title 18, United States Code, Sections 1341, 1343, and 371.

B. Obtaining the Search Warrant

On May 2, 2007, FBI Special Andrew F. Romagnuolo presented an application for a search warrant, supported by sworn affidavit to this Court who reviewed the application and the

affidavit, found probable cause to search for the property listed on Attachment "B" to the warrant, and issued the search warrant.

III. ARGUMENT

A. Rule 41 (g) Does Not Provide For Pre-Indictment Suppression of Evidence

In seeking the return of the evidence seized pursuant to the search warrant, the movant appears to prevent the FBI from seizing evidence which may be used against him in a subsequent prosecution. His contention, that there are is no legitimate purpose for the seizure of the specified items, and thereby his request that the documents be returned to him, constitutes a pre-indictment suppression of all of the evidence that the government obtained through the execution of the search warrant. Such a result would necessarily preclude the government from using information and evidence contained in those documents in its grand jury investigation and any resulting prosecution. However, the pre-indictment suppression of evidence is not provided for by Rule 41(g).

Rule 41(g) of the Federal Rules of Criminal Procedure, which is cited in motion of the petitioner, provides in part that " [A] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." [1]

The central purpose of Rule 41(g) is to afford persons "aggrieved" by the seizure of property the opportunity to secure the return of their property in order to minimize disruption of their lives or businesses. The return of original records is not warranted where the documents are

[1] Effective December 1, 2002, the former Rule 41(e) has been renumbered 41(g), with only stylistic changes. See Rule 41, *Adv. Comm. Notes*, 2002 Amendments. Although the instant motion is brought under Rule 41(g), many of the cases cited herein were brought under the predecessor Rule 41(e), and for purposes of the instant motion the two Rules are used interchangeably.

available for duplication. As stated previously in his motion, the defendant has access to these items because "[A]lmost everything is posted on Clarkson's website..." (Defendant's Motion, pg.2). [2]

A "reasonableness" test is the appropriate legal standard for relief under Rule 41(g). See Government of Virgin Islands v. Edwards, 903 F.2d 267 (3d Cir. 1990) (". . . 'reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property,' a standard comparable to that which we used on 608 Taylor Avenue.") (internal citations omitted); United States v. Premises Known as 608 Taylor Avenue, 584 F.2d 1297, 1302 (3d Cir. 1978) ("a court must weigh the interests of the government in holding the property against the owner's rights to use the property.").

The test applied to the petitioner's claim that the search and seizure was unlawful was "whether 'the alleged unconstitutionality of the search and seizure' was 'absolutely clear on the face of the proceeding' and whether the government had 'obtained a warrant by the usual means based upon at least a colorable allegation of probable cause and the search and was otherwise validly executed.'" In re Search Warrant, 2003 WL 22095662 at *6 (D. Del. Sep. 9, 2003) (quoting Donlon v. United States, 331 F. Supp. 979, 980-81 (D. Del. 1971)). In In re Search Warrant, supra, 2003 WL 22095662 at *6, the district court held that ". . . [Petitioner's] argument [that she was aggrieved by the deprivation of her property] must be balanced against the government's interest in the continued retention of the seized documents, as well as the threat of

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[2] On July 3, 2007, a Permanent Injunction enjoining Clarkson's interference activities as promoted on his website was entered by the Honorable Henry M. Herlong, Jr., United States District Judge, District of South Carolina. (See, 8:05-cv–2734-HMH, entry number 78). Many of the seized materials to which the movant refers were the subject of this injunction.

interference that the Rule 41(g) motion poses to an ongoing investigation." If the government has a need for the property for investigation, retention is generally reasonable. Fed. R. Crim. Proc 41, Advisory Note to 1989 Amendment ("[i]f the United States has a need for the property in an investigation or prosecution, its retention of the property is generally reasonable.")

The movant's motion fails to establish that the "unconstitutionality of the search and seizure' was 'absolutely clear on the face of the proceeding'" as required in 608 Taylor Avenue, supra, 584 F.2d at 1302, for any relief.

The movant is not entitled to pretrial suppression of the documents seized under Rule 41(g) by prohibiting the government's retention of the originals, particularly when he has access to copies of the materials which were seized. In Flores, supra, where petitioner moved pre-indictment under Rule 41(e) to prohibit the government from using seized documents against petitioner in any subsequent proceeding, the Court ruled that Rule 41(e) "does not provide a cause of action for pre-indictment suppression of evidence. Instead, Petitioner may move to suppress should he be indicted." Flores, 2002 WL 31422859 at *6. The court noted that prior to the 1989 amendment, Rule 41(e) "rendered inadmissible at trial property that was seized unlawfully," id. at *5, but explained that under the 1989 amendment,

> Congress deleted the above-quoted language . . . stating evidence shall not be admissible at a hearing or trial if the court grants the motion to return property under Rule 41(e) . . . . The [advisory committee] notes further provide "Rule 41(e) is not intended to deny the United States the use of evidence permitted by the Fourth Amendment and federal statutes, even if the evidence might have been unlawfully seized." Therefore, the exclusionary provision was deleted. "As amended, Rule 41(e) avoids an all or nothing approach whereby the government must either return records and make no copies or keep originals notwithstanding the hardship to their owner. The amended rule recognizes that reasonable accommodations might protect

> both the law enforcement interests of the United States and the property rights of property owners and holders.

Id. (quoting Rule 41, *Adv. Comm. Notes*, 1989 Amendments). See also Wag-Aero, Inc. v. United States, 35 F.3d 569, 1994 WL 485810 at *3 n.5 (7th Cir. Sep. 7, 1994) ("Rule 41 no longer provides for the grant of a pre-indictment suppression order") (unpub. op.).

The Petitioner may move to suppress evidence under Fed. R. Crim. P. 12(a)(1)(C) in the event that there are is an indictment returned in this case. On a Rule 41(g) motion for return of property, however, he is not entitled to litigate what amounts to a pre-indictment suppression order requiring the government to return all original documents.

B. Free Speech Claims

The movant appears to assert that the FBI targeted him because he is a "political dissenter" and that the Government wanted his political organization dismantled. As a remedy, he suggests that the FBI should make copies of the materials and return them to him. This request should be denied for two reasons.

First, the courts, in deciding who bears the responsibility of providing copies, have held that "[W]e know of no equitable principle which would require the Government to pay for copies of records which it has no legal obligation to return, absent some extraordinary pre-indictment delay, once a District Judge had determined that seizure of the items was proper." *Statler Towers v. United States*, 787 F.2d 796, 798 (2nd Cir.1986). The *Statler* court went on to elaborate that following a search and prior to indictment,

> "[T]he Government has a legal right to the evidence.... Moreover, Rule 16 of the Federal Rules of Criminal Procedure suggests that the Government need not pay to retain it. While Rule 16 governs criminal discovery and does not apply to pre-indictment motions such as those brought under Rule 41, it provides a useful analogy for resolving the costs issues. In the discovery context, Rule 16's

> clear import is that the defendant's, at least non-indigent ones, must pay the cost of copying documents legally held by the Government."

Id, see *United States v. Freedman*, 866 F.2d 1364 (11th Cir. 1982). Consequently, the Government contends that there is no reason not to follow the same general rule in the context of a pre-indictment request for records in the possession of the Government which are held pursuant to a warrant issued by the Court.

Secondly, many of the items which the Petitioner requests be returned were related to his Patriot Network and tax protest activities. Thus he claims that the seized items are protected political and educational materials. However, this claim was flatly denied by the District Court in the Opinion and Order filed July 3, 2007. (Opinion and Order, pg. 10). The Court, in so holding, determined that the activities of the Patriot Network involved commercial speech, specifically false commercial speech, and as such, were not protected. (*Id*. Pg. 11). The materials seized, while not related to protected political and educational activities, are relevant to an on-going criminal investigation and as such should be retained by the government.

IV. CONCLUSION

For all the foregoing reasons, the Government respectfully requests that this court deny the petitioner's motion for return of seized items. Additionally, the Government requests that the Affidavit to the Search Warrant remain Under Seal.

Respectfully submitted, this the 9th day of August, 2007.

GRETCHEN C.F. SHAPPERT
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CERTIFICATE OF SERVICE

A copy of this Response was mailed, via deposit with the United States Postal Service, to the Petitioner, Robert Clarkson, at 515 Concord Avenue, Anderson, SC 29621.

S/ *Jill Westmoreland Rose*
Assistant U.S. Attorney