

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – MISDEMEANOR BRANCH**

UNITED STATES OF AMERICA

v.

ANDREW JOHNSON,

Defendant.

Case No.: 2021 CMD 000191

Judge: Hon. Judith Smith

Status: November 5, 2021

**GOVERNMENT’S OPPOSITION TO
DEFENDANT’S MOTION FOR RETURN OF PROPERTY**

The United States, by and through Channing D. Phillips, the acting United States Attorney for the District of Columbia, respectfully files this Opposition to Defendant’s Motion for Return of Property. For the reasons that follow, the government respectfully requests that this Court deny Defendant’s Motion.

BACKGROUND

As detailed in the Gerstein affidavit, Defendant was arrested on January 6, 2021, for his refusal to leave U.S. Capitol Grounds despite the imposition of a curfew and numerous audio-broadcasted and verbal warnings to disperse from the United States Capitol Police and Metropolitan Police Department, respectively. In connection with Defendant’s arrest, the Metropolitan Police Department seized as evidence a cellular telephone that was in his possession. On January 7, 2021, the government filed the instant case, charging Defendant, among others, with Unlawful Entry on Public Property in violation of D.C. Code § 22-3302(b).

The government then obtained a search warrant for the contents of Defendant’s phone. The contents were disclosed to counsel for Defendant on March 25, 2021, and the warrant on May 18, 2021. On September 16, 2021, counsel for Defendant emailed the government to inquire if it would consent to the return of Defendant’s phone. That same day, the government responded,

explaining that only a partial extraction has been completed on Defendant's phone, but that it would release the phone, pursuant to a stipulation, if Defendant were to "provide the passcode to the device so as to allow [the government] to fully execute the warrant." Counsel for Defendant did not reply, but instead on September 20, 2021 filed the instant Motion for Return of Property. The government now timely files its Opposition.

ARGUMENT

I. DEFENDANT HAS NOT MET HIS BURDEN FOR THE RETURN OF HIS PHONE

Pursuant to D.C. Superior Court Criminal Rule 41(g), 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 court must receive evidence on any factual issue necessary to decide the motion." When a motion for return of property is made while a defendant's criminal investigation is still pending, "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. Gladding*, 775 F.3d 1149, 1152 (9th Cir. 2014) (discussing Fed. R. Crim. P. 41(g), which is identical to D.C. Super. Ct. Crim. R. 41(g)); *see also Patterson v. Sharek*, 924 A.2d 1005, 1009–10 (D.C. 2007) (holding that where a local court rule is "nearly identical to the functional equivalent of a federal procedural rule," the District of Columbia Court of Appeals "look[s] to cases interpreting the federal rule for guidance on how to interpret our own"). Because Defendant's criminal case is still pending, he bears the burden of proving that his property was illegally seized and that he is entitled its return under Rule 41(g).

Here, Defendant does not make any allegation that his phone was unlawfully seized and further does not make any compelling argument of why he deserves his phone returned. Instead, he argues that (1) "on information and belief, [the government] has no ability to conduct further

forensic analysis” of his phone, and therefore (2) the police have no further need to retain [Defendant’s] cell phone since it “has no evidentiary purpose. Defendant is incorrect on both points.

First, although the government has, to date, only been able to complete a partial extraction of Defendant’s phone, that does not mean that the government will never be able to fully execute the search warrant. Encryption and decryption technology is a constantly evolving field, and capabilities can change at any point. Defendant does not cite any authority that would suggest that the government cannot take advantage of future advances in decryption technology that allow it to fully extract the data in Defendant’s phone pursuant to the lawfully issued warrant that the government has already obtained.

Second, Defendant is incorrect when he states that his cell phone “has no evidentiary purpose.” Separate and apart from the government’s need to complete the execution of the search warrant, the phone itself has evidentiary value as part of the chain of custody of any information extracted therefrom. While it is true that the government has returned cell phones to several co-defendants, it has only done so pursuant to a stipulation regarding the authenticity and admissibility of the digital media extracted from the device and only after the extraction is complete.

Finally, Defendant states that he has “a privilege under the Fifth Amendment to the United States Constitution not to provide information to the government that the government will use to prosecute him” as an explanation for his decision not to provide his passcode. He is certainly entitled to make that choice. The government gave Defendant the option of voluntarily providing his passcode so that the government could more quickly complete the execution of the search warrant on his phone and return the device. Defendant refused to do so. The government, which

lawfully obtained a valid warrant to search the device, therefore intends to hold the device until it finishes executing the search warrant.

CONCLUSION

For the above-stated reasons, the government respectfully request that the Court deny Defendant's Motion for Return of Property.

Dated: October 4, 2021

Respectfully submitted,

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