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

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[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.