UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

DECISION AND ORDER

ROBERT C. MORGAN,

1:18-CR-00108 EAW

Defendant.

I. INTRODUCTION

Defendant Robert Morgan (hereinafter "Robert Morgan" or "Defendant") stands accused, by way of a Superseding Indictment returned on May 21, 2019, with conspiracy to commit wire fraud and bank fraud in violation of 18 U.S.C. § 1349 (count 1), wire fraud in violation of 18 U.S.C. § 1343 (counts 6-10, 14, 29, 38-39, 46-47, 56-65, 68-70, 80-82), bank fraud in violation of 18 U.S.C. §§ 1344 and 2 (counts 83-90, 92-97), conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 (count 98), wire fraud in violation of 18 U.S.C. § 1343 (counts 100, 111), and money laundering conspiracy in violation of 18 U.S.C. § 1956(h) (count 114). (Dkt. 42).

On January 2, 2020, Defendant filed a Motion for Return of Property Under Federal Rule of Criminal Procedure 41(g). (Dkt. 175). The property at issue is Defendant's iPhone, which was seized by the government on May 14, 2018, and remains in the government's possession. (*See* Dkt. 176). The government filed papers in opposition to Defendant's motion on January 17, 2020 (Dkt. 189), and Defendant filed papers in reply on January 24, 2020 (Dkt. 198; Dkt. 199). The Court granted the government leave to submit a sur-reply

(Dkt. 206), which was filed on January 31, 2020 (Dkt. 215). The Court likewise granted Defendant's request to submit a response to the sur-reply (Dkt. 224), which was filed on February 3, 2020 (Dkt. 225). Oral argument was held before the undersigned on February 5, 2020, at which time the Court reserved decision. (Dkt. 236). For the reasons set forth below, Defendant's motion is denied without prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND

On May 10, 2018, a search warrant was issued for Morgan Management, LLC. Included in the items to be searched for and seized were "multiple servers, computers or storage media . . . including but not limited to . . . devices . . . associated with . . . Robert Morgan." (5/10/18 Warrant, Attachment B, at 1). Among the items seized by the government as part of that search was Defendant's iPhone that belongs to Robert Morgan. (Dkt. 189-1 at ¶ 2).

The iPhone was seized on May 14, 2018. (*Id.*). However, it was protected by a six-digit passcode. (*Id.* at ¶ 5). On May 15, 2018, agents asked Defendant to provide the iPhone's passcode and he declined. (Dkt. 215-1 at ¶ 5).

On May 22, 2018, a 62-count indictment was returned against defendants Frank Giacobbe, Patrick Ogiony, Kevin Morgan, and Todd Morgan. (Dkt. 1). Robert Morgan was not named in the indictment.

Sometime in May of 2018, the government started its quest to crack Defendant's iPhone's passcode, using a device called "GrayKey." (Dkt. 189-1 at ¶ 3). GrayKey uses "brute force" to try and access the iPhone, a process by which a computer program enters potential passcodes *seriatim* until the correct passcode is revealed. (*Id.* at ¶¶ 3-4). A six-

digit passcode yields 1,000,000 potential passcode combinations, but the iPhone's hardware only allows two or three passcode attempts each hour. (*Id.* at ¶ 5).

Defendant was not charged until the Superseding Indictment was returned on May 21, 2019, over one year after his iPhone was seized. (Dkt. 42). All the while, GrayKey's painstaking efforts to unlock the iPhone continued. (Dkt. 189-1 at ¶ 5). The government has apparently progressed from its initial one-in-a-million odds of breaking the passcode—as of January 9, 2020, a mere 960,526 possible passcodes remained. (*Id.* at ¶ 6).

III. DEFENDANT HAS NOT MET HIS BURDEN UNDER RULE 41(g)

Rule 41(g) allows "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property [to] move for the property's return. . . . 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." Fed. R. Crim. P. 41(g).

District courts in this Circuit have applied a three-part test that a moving party must demonstrate in order to prevail on a Rule 41(g) motion: "(1) [the party] is entitled to lawful possession of the seized property; (2) the property is not contraband; and (3) either the seizure was illegal or the government's need for the property as evidence has ended." *United States v. Pinto-Thomaz*, 352 F. Supp. 3d 287, 311 (S.D.N.Y. 2018), *reconsideration denied*, 2019 WL 1460216 (S.D.N.Y. Jan. 10, 2019) (quoting *Ferreira v. United States*, 354 F. Supp. 2d 406, 409 (S.D.N.Y. 2005)); *Peeples v. United States*, No. 3:17-MC-26 (TJM/ATB), 2017 WL 5891775, at *2 (N.D.N.Y. Nov. 3, 2017), *report and recommendation adopted*, 2017 WL 5891789 (N.D.N.Y. Nov. 28, 2017).

The Second Circuit has not ruled on the applicable standard of proof on a Rule 41(g) motion. District courts in this Circuit have held that when a criminal proceeding concludes "the evidentiary burden for a Rule 41(g) motion shifts to the Government because there is a presumption that 'the person from whom the property was allegedly taken has a right to its return.'" *Santos v. United States*, No. 04 Civ. 9716(JFK), 2005 WL 637427, at *1 (S.D.N.Y. Mar. 17, 2005) (quoting *Mendez v. United States*, No. S2 94 Cr. 466(JFK), 99 Civ. 3496 (JFK), 2003 WL 21673616, at *2 (S.D.N.Y. July 16, 2003)); *see also United States v. Gladding*, 775 F.3d 1149, 1152 (9th Cir. 2014) (the "burden of proof changes when the property in question is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or . . . the government has abandoned its investigation") (internal quotation marks omitted).

In *Pinto-Thomaz*, the court addressed the defendant's motion for the return of his iPhone pursuant to Rule 41(g), which by that point had been held by the government for almost five months. 352 F. Supp. 3d at 311-12. Like here, Pinto-Thomaz's iPhone was passcode protected, he was not willing to provide the passcode, and the government had thus far been unable to bypass the iPhone's encryption. *Id.* Pinto-Thomaz sought the return of his device, based largely on the premise that the time for executing the warrant had passed. *Id.* at 312. The Court rejected this argument, holding that "Rule 41 is clear . . ., for warrants seeking electronically stored information, '[t]he time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.'" *Id.* (quoting Fed. R. Crim. P. 41(e)(2)(B)).

Here, Defendant does not argue that the government's continued possession of the iPhone and its efforts to access it constitute an untimely seizure. Instead, Defendant argues that his interest in his iPhone and the information contained therein exceeds the government's interest in the device, and thus, the Court should order its return. Integral to Defendant's argument is his assertion that the three-part test articulated in *Pinto-Thomaz* and district courts in the Second Circuit is inapplicable. According to Defendant, this test is "not faithful" to the 1989 amendments to Rule 41 because those amendments clarified that the property can still be returned under the rule, "even where the government has a legitimate interest" in that property. (Dkt. 198 at 6-7). While the government argues that it is Defendant's burden to show that either the seizure was illegal or the government's need for the device as evidence has ended, Defendant argues that regardless of the government's stated need for the property, it is unreasonable for the government to continue its retention of the iPhone.

A. The History of Rule 41(g)

It has become almost axiomatic that technology outpaces the letter of the law. Here Defendant argues that the history of Rule 41(g) holds the key to addressing a very modern conundrum—how long can the government labor to access a potential cache of data on a device, the very existence of which was virtually unfathomable when the first iteration of that rule came to fruition?

The provision at issue here was originally promulgated as Fed. R. Crim. P. 43(e), and was premised on existing case law decided when Ford's Model T was still in

production.[1] The rule allowed "[a] person aggrieved by an unlawful search and seizure [to] move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained." Report of the Advisory Committee on Rules of Criminal Procedure, Rule 43(e) (June 1944). The first codification of the rule applied only to property that was unlawfully seized and set forth a common process and venue for motions seeking the return of the property and the suppression of unlawfully obtained evidence. (*See id.*).

The same year that Atari released its now infamous Pong game, the 1972 Amendments dropped from the rules a listing of the substantive grounds for suppression.[2] The rule, now codified as Rule 41(e), continued to provide redress only where the movant was aggrieved "by an unlawful search and seizure." Report of the Advisory Committee on Rules of Criminal Procedure, Rule 41(e) (Mar. 1972).

In 1989, Apple launched its first "portable" computer, which weighed in at a scant 16 pounds,[3] and Rule 41(e) not only continued to apply to those aggrieved by an unlawful search and seizure, but was extended to movants who were "aggrieved . . . *by the deprivation of property*." *See In re 6455 South Yosemite*, 897 F.2d 1549, 1553 (10th Cir. 1990) (quoting 1989 version of Rule 41(e) (emphasis added)). Like the previous version

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[1] Wikipedia, Ford Model T, https://en.wikipedia.org/wiki/Ford_Model_T (last visited Feb. 29, 2020).

[2] Wikipedia, Pong, https://en.wikipedia.org/wiki/Pong (last visited Feb. 29, 2020).

[3] Wikipedia, Macintosh Portable, https://en.wikipedia.org/wiki/Macintosh_Portable (last visited Feb. 29, 2020).

of Rule 41(e), the Rule continued to provide for the return of the property to the movant, but the newly minted language allowed for the imposition of "reasonable conditions . . . to protect access and use of the property in subsequent proceedings." *Id.*

In 2002, as part of the general restyling of the Federal Rules of Criminal Procedure, Rule 41(e) was redesignated as 41(g) "without substantive change." *Adeleke v. United States*, 355 F.3d 144, 147 (2d Cir. 2004).

Defendant argues that preventing the return of property because the government has an evidentiary interest in the property is inconsistent with the 1989 Amendments, because such an "outdated" test ignores the "reasonableness approach" integral to the amendments. (Dkt. 198 at 7). Defendant argues that given his interest in the iPhone, and the amount of time that the government has held and may continue to hold the device, the test of reasonableness requires its return now.

Defendant's approach selectively cites the Advisory Committee's notes and does not contextualize those notes with the changes made to the rule. Prior to the 1989 amendment, the rule "failed to address the harm that may result from the interference with the lawful use of property by persons who are not suspected of wrongdoing." Fed. R. Crim. P. 41(e) advisory committee's note to 1989 amendment. The Committee's discussion of reasonableness is directed largely to the addition of provisions that allow for the imposition of conditions to effect the return of property while still protecting the government's interest in it. More importantly, even under a general reasonableness test as advanced by Defendant, "the government's need for the property as evidence" (the third part of the *Pinto-Thomaz* test) necessarily informs any determination concerning reasonableness. In

other words, reasonableness cannot be evaluated in a vacuum, but rather must be based upon the circumstances concerning any given seizure—including the government's stated need for the evidence.

There may be instances where the government articulates a need for the property as evidence, but retention of the property is nonetheless unreasonable when viewed against the moving party's interest in the property. In other words, the Court recognizes that the *Pinto-Thomaz* test fails to expressly consider the moving party's interest in the property, and that omission may countenance against strict adherence to that test. However, such a scenario has not been presented here, because even when considered against Defendant's professed interest in the iPhone, the government's interest in the potential evidence that would be obtained upon cracking the iPhone passcode outweighs Defendant's right to have it returned at this stage of the proceedings. In short, existing case law and the history of Rule 41(g) serve as a useful guide in evaluating this contemporary issue, but there is no one-size-fits-all answer to the question of how long the government can attempt to access an encrypted device. But as discussed below, the answer here is that the government may continue its attempts to unlock Robert Morgan's iPhone.

B. The government's evidentiary interest in the iPhone outweighs Defendant's interest in its return, at least at this stage of the proceedings

The iPhone was seized pursuant to a warrant, and for purposes of this motion, Defendant does not challenge the validity of that warrant. As such, probable cause for seizure of the iPhone exists. *See* Fed. R. Crim. P. 41(d)(1). Shortly after acquiring the iPhone, the government began the laborious process of attempting to access it. As it has

been unsuccessful thus far in accessing the contents of the iPhone, the government continues to rely on the issuance of the warrant itself to establish the potential evidentiary value of the iPhone. The Court agrees that, at this stage in the proceedings, the issuance of the warrant sufficiently establishes the government's evidentiary interest in the device.

Defendant has suggested that the iPhone could be returned to him, and his counsel could preserve all material on the iPhone. This is not a practical or reasonable solution. The government could not continue its systematic attempts to unlock the iPhone without the physical device, and therefore its return would effectively bar the government's access to the data in the iPhone. As such, Defendant's offer to preserve the iPhone is no solution at all—nor does it render the government's continued retention of the device unreasonable.

Likewise, Defendant has not established that his interest in his iPhone outweighs the government's evidentiary interest. Defendant argues that because the iPhone could contain personal information, he has a privacy interest in its return. However, should the device be successfully accessed, the same protocol used by the government to search and access other seized electronic information would be applied to this device. Defendant also argues that he has lost access to the data on the iPhone, but he has offered no evidence to that effect. There is no question Defendant has lost the use of the device itself, and thus, for now, the value of that device. However, Defendant was apparently able to acquire a new device the day after the iPhone was seized (Dkt. 215-1 at ¶ 5), and there has been no evidence presented that Defendant presently lacks a useable portable telephone device.

Defendant argues that at its current pace, it may take the government 37 years to successfully unlock the iPhone. The Court agrees that anywhere close to 37 years is an

unreasonable time to retain the iPhone. This does not mean, though, that the government should be compelled to return it now. The government suggests that if it is successful, the contents of the iPhone could still be used at trial, regardless of when the contents are eventually accessed. At this stage of the proceedings—with a trial not scheduled to commence until next year (Dkt. 147)—the Court agrees that there is still plenty of time for the government to access the iPhone's contents. In the context of the current motion, the Court will not resolve whether that may cease to be the case as the trial date approaches. Indeed, the question of specifically how long the government can retain the device is not before this Court. There may very well come a point where the government's retention of the iPhone is unreasonable—and that may be a time when the government continues to maintain that it needs the iPhone as evidence—but that date has not yet occurred.

IV. CONCLUSION

For the reasons set forth herein, Defendant's Motion for Return of Property Under Federal Rule of Criminal Procedure 41(g) (Dkt. 175) is denied without prejudice.

SO ORDERED.

ELIZABETH A. WOLFORD
United States District Judge

Dated: March 6, 2020
Rochester, New York