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## Research Guide

### Federal Search & Seizure: Motion for Return of Property

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#### **SCOPE:**

This guide is *only an introduction* to the law of recovery of seized property. It offers a general outline of the procedure a party may use to request that the government return property it has taken as the result of an unlawful seizure, or a lawful seizure where the person is aggrieved by the government's continued possession of it. **NOTE:** The focus of this guide is on the RETURN of property, *not* the suppression of evidence, *nor* the response to a forfeiture proceeding.

#### **APPLICABLE FEDERAL RULE:**

Federal Rule of Criminal Procedure 41(g) states:

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.

#### **FILING A CLAIM:**

- The moving party must have "standing" to file a claim for return of seized property. To have standing, the party must have at least a "colorable claim" that he/she owned, possessed or had a security interest in at least a portion of the property seized. See *Federal Procedural Forms, Lawyers Edition*, v.7, §20:559 (KF 8836.F4) for a list of persons who may be entitled to request the return of property under the law, as well as cases you might cite for each (see also *Federal Procedure, Lawyer's Edition*, v.8A, §§22:228, et seq. (KF8835.F43)).
- The moving party has the burden of showing that he/she is entitled to lawful possession of the property seized if there is a pending criminal proceeding. To defeat the Rule 41(g) motion once criminal proceedings end, the government has the burden of showing that the moving party's possession was unlawful or that the government has a right to retain

the property. (see *Federal Procedure, Lawyer's Edition*, v.8A, §§22:230, 22:233, 22:234 (KF8835.F43)).

- The moving party must also prove that he/she will suffer irreparable injury because of the loss of seized property, such as the inability to operate a business due to seized documents or inventory (see *Federal Procedure, Lawyer's Edition*, v.8A, §22:238 (KF8835.F43)).
- The moving party must show that he/she has no other adequate legal remedy (see *Federal Procedure, Lawyer's Edition*, v.8A, §22:239 (KF8835.F43)). For example, if the government has already begun a forfeiture action, the court may argue that the claimant has a statutory remedy for the seizure of property as part of the forfeiture proceeding (see *Federal Procedure, Lawyer's Edition*, v.8A, §22:239 (KF8835.F43) for more examples).

For additional information and cases that may be cited in your motion, see:

- *Federal Procedure, Lawyer's Edition*, vol.8A, §22:228, et seq. (KF8835.F43)
- Moore's *Federal Rules Pamphlet*, v.3, §41.7[27] (KF8820.A313.M635)
- Ringel's *Searches & Seizures, Arrests and Confessions 2d*, v.2, §20.23 (KF9625.R53)

For sample forms and other information, see *Federal Procedural Forms, Lawyer's Edition*, v.7, §§20:558, 20:559, and 20:563 et seq. (KF 8836.F4).

#### **FILING THE MOTION:**

- Each motion shall be **accompanied by** a:
  - notice of motion,
  - memorandum of points and authorities or memorandum of law in support of the motion (no more than 25 pages), and,
  - where appropriate, a separate statement of material facts upon which you are basing your motion.(See Federal Southern District Local Criminal Rule 47.1(b)(3), (e)).
- **Declarations in Support of Motions:** If there are any facts in support of the motion you wish to present to the court, include these in one or more witness declarations stating that the facts are within the declarant's personal knowledge and signed by the declarant(s) under penalty of perjury. The declaration(s) must be filed with the motion. The declarant(s) should attend the hearing of the motion so they are available for cross-examination (see Federal Southern District Local Criminal Rule 47.1(g)).
- **Filing:** File the original motion and two (2) conformed copies with the clerk for the Federal Southern District Court at least fourteen (14) days prior to the scheduled hearing date (see Federal Southern District Local Criminal Rule 47.1(b)(1)).
- **Service upon the United States:** When serving the United States as prosecutor, you may serve the motion on the prosecutor by filing the second copy with the clerk; the clerk will then forward the motion to the U.S. Attorney's Office (see Federal Southern District Local Criminal Rule 47.1(b)(1)).
- **Service upon others:** If there are any other parties to the case, each such party, or his/her attorney, must be served at least fourteen (14) days prior to the hearing date, as well (see Federal Southern District Local Criminal Rule 47.1(b)(2)).