

December 14, 2018

Secretary Elaine F. Marshall
Secretary of State of North Carolina
(via email to Assistant Attorney General
Jeremy D. Lindsley – jlindsley@ncdoj.gov)

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Re: DSOS's Non-Compliance with Order for Return of Property

Dear Secretary Marshall:

I write on behalf of my firm's client, Frank Edward Calabro, Jr., whose property was seized by and continues to be held by the North Carolina Department of the Secretary of State (the "DSOS"). The DSOS has now held Mr. Calabro's property for more than nine months, and now is failing to comply with a court order explicitly ordering the DSOS to return the property immediately to Mr. Calabro. We regret to have to write you regarding this issue, but the DSOS's failure to comply with an explicit court order and continued deprivation of Mr. Calabro's property in violation of his constitutional rights has left Mr. Calabro few options. We wanted to make you aware of this issue, and respectfully request that the DSOS comply with the court order.

On March 9, 2018, a team of DSOS agents seized more than 50 items from Mr. Calabro's home and vehicle, including significant amounts of cash and precious metals, documents, and almost all of Mr. Calabro's computers and electronics. After attorneys for the DSOS repeatedly refused to return any of Mr. Calabro's property, Mr. Calabro filed an application for return of the property in the Wake County Superior Court, and a hearing was held on the application in October. On December 12, 2018, the Honorable Rebecca W. Holt granted the application, finding that "[c]ontinued holding of the Seized Property by the DSOS is not authorized by law," and that it violates Mr. Calabro's rights under the law, including the Fourth and Fourteenth Amendments of the United States Constitution and the equivalent rights under the North Carolina Constitution. Judge Holt explicitly ordered that the DSOS must return a list of specified items "to Mr. Calabro's counsel immediately". Judge Holt also ordered that the DSOS could have until December 17, 2018 to return a smaller list of specified items. Judge Holt's order is enclosed with this letter for your reference. The case is *In re Matter of Search Warrant Executed on March 9, 2018 at the Residence of Frank Edward Calabro, Jr. 1431 Paulonia Way, McCleansville, NC 27301* (Wake County Superior Court 18-CV-3463).

Our attempts to arrange for the return of Mr. Calabro's property on December 12 and 13 were rejected by the DSOS. On December 13, we were contacted by Assistant Attorney General Jeremy D. Lindsley, who stated that he represents the DSOS. Mr. Lindsley informed us that the DSOS was not prepared to return Mr. Calabro's property and that the DSOS had not decided what it was going

to do in response to Judge Holt's order. We explicitly requested that the DSOS comply with Judge Holt's order and return the specified property by 1:00 pm today. The DSOS did not comply with this request and continues to hold Mr. Calabro's property in violation of Judge Holt's order.

It is troubling that the DSOS has chosen to blatantly disregard a court order. However, what makes the DSOS's non-compliance even more concerning is that the continued holding of Mr. Calabro's property is, and has been held to be, a violation of his constitutional rights. The DSOS's purpose for depriving Mr. Calabro of his property, a purpose stated in open court and recorded in the hearing transcript, is to keep it for use as restitution for potential victims of Mr. Calabro's alleged conduct and to prevent him from gaining access to his money, online accounts, and passwords. As North Carolina does not permit pre-conviction forfeiture, the DSOS's stated purpose is not legitimate under the law and establishes that Mr. Calabro's constitutional rights are being violated. We understand that earlier this afternoon the DSOS charged Mr. Calabro with securities fraud and selling an unregistered security. However, because North Carolina does not permit pre-conviction forfeiture, these charges in no way impact the DSOS's obligation to return the property and comply with the court order.

Our request is simple. We respectfully request that the DSOS comply with Judge Holt's order and immediately return Mr. Calabro's property. We sincerely hope that we can avoid having to take further steps to seek compliance with the court's order and to protect Mr. Calabro's constitutional rights.

We appreciate your consideration of this request.

Sincerely,

MOORE & VAN ALLEN PLLC


James P. McLoughlin, Jr.

Enclosure

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FILED

STATE OF NORTH CAROLINA
WAKE COUNTY

2018 DEC 12 AM 10:19

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO: 18 CV 3463

WAKE CO., C.S.C.

IN RE MATTER OF SEARCH)

WARRANT)

EXECUTED ON MARCH 9, 2018)

AT THE RESIDENCE OF)

FRANK EDWARD CALABRO, JR.,)

1431 PAULONIA WAY,)

MCCLEANSVILLE, NC 27301)

ORDER GRANTING APPLICATION FOR
RETURN OF SEIZED PROPERTY

This matter is before the Court on Mr. Frank Edward Calabro Jr.'s ("Mr. Calabro's") second application for return of seized property filed August 29, 2018 (the "Application"). A hearing on the Application was held before the undersigned on October 24, 2018. Based on the briefing, argument, and testimony presented, the Court hereby **GRANTS** Mr. Calabro's Application and **ORDERS** the return of his property on the timetable set forth below. The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On March 9, 2018, a team of agents from the North Carolina Department of the Secretary of State (the "DSOS") seized more than 50 items from the home and vehicle of Mr. Calabro. The inventory of items the DSOS seized from Mr. Calabro is incorporated herein and attached hereto as Exhibit A (the "Seized Property").

2. The search and seizure was performed pursuant to a search warrant dated and issued by Superior Court Judge Paul Ridgeway and based on the affidavit of La Tanya Brown, a Financial Investigator at the DSOS (the "Search Warrant"). In her affidavit, Ms. Brown asserted that there was probable cause to believe Mr. Calabro had sold unregistered securities through his website.

3. Mr. Calabro, through counsel, requested the return of the Seized Property from the DSOS and the Wake County District Attorney's Office. The DSOS and the Wake County District Attorney's Office refused to return the Seized Property to Mr. Calabro.

4. Mr. Calabro filed an initial application for return of the Seized Property in March 2018. A hearing was held on the initial application on April 3, 2018, and the application was denied by Judge O'Foghludha by order dated April 5, 2018.

5. Judge O'Foghludha found that three weeks was "not an unreasonable time to analyze and investigate the volume of documentary and electronically stored information seized pursuant to this Search Warrant in a complex financial crime investigation of this nature."

6. Following the filing of the Application, the DSOS provided Mr. Calabro with copies of certain 2017 tax documents that Mr. Calabro had requested in order to be able to file his 2017 taxes. Other than the copies of these tax-related documents, the DSOS has not returned Seized Property or provided Mr. Calabro with copies of the seized documents, information, or electronic storage devices (including computers, a cellphone, flash drives, and a cryptocurrency wallet).

7. The DSOS has possessed the Seized Property for more than nine months.

8. The DSOS has made copies of, photographed, or otherwise preserved the evidentiary value of all of the Seized Property other than the flash drives. The DSOS acknowledged that copies of the flash drives could be made within ten days of the date of the hearing.

9. The DSOS's stated purpose for holding Mr. Calabro's Seized Property is to keep it for use as restitution for victims of Mr. Calabro's alleged conduct and to prevent him from gaining

access to online accounts by denying him access to passwords that may be recorded on electronic storage devices for the same purpose.

10. Although nine months have passed since the seizure of the property, Mr. Calabro has not been charged with or convicted of any crimes related to the Seized Property.

11. The parties have agreed and consented that the Court may decide the Application and enter an order on the Application out of term.

CONCLUSIONS OF LAW

1. Article I, Section 19 of the North Carolina Constitution provides that “[n]o person shall be . . . in any manner deprived of his . . . property, but by the law of the land.” “The Law of the Land Clause is the equivalent of the Fourteenth Amendment’s Due Process Clause.” *State v. Chisholm*, 135 N.C. App. 578, 584 (1999).

2. The Fourteenth Amendment to the United States Constitution provides that no State shall deprive a person of property without due process of law.

3. The Fourth Amendment to the United States Constitution protects persons from unreasonable searches and seizures. This Court finds that holding seized property for more than nine months without filing criminal charges is unreasonable under the facts of this case.

4. North Carolina law does not have a civil forfeiture scheme. Under North Carolina law, forfeiture is criminal in nature; is *in personam* only; and may be obtained only following conviction of the property owner for certain felonies. *E.g.*, *State v. Hill*, 153 N.C. App. 716, 718 (2002); *City of Concord v. Robinson*, 914 F. Supp. 2d 696, 710 (2012).

5. The Seized Property is not currently eligible for forfeiture under North Carolina law as the property owner has not been convicted (nor charged) with any felony related to that property.

6. Because the DSOS has photographed, copied, imaged, or otherwise preserved the evidentiary value of the Seized Property (or can easily and quickly copy the flash drives it has not previously copied), the DSOS does not have a continuing evidentiary need to hold the Seized Property.

7. Holding the Seized Property for use as restitution for Mr. Calabro's alleged conduct pre-conviction is not a legitimate basis for holding the Seized Property and constitutes a *de facto in rem* and pre-conviction forfeiture.

8. The DSOS has not met its burden of demonstrating that it has a legitimate basis for continuing to hold the Seized Property.

9. Continued holding of the Seized Property by the DSOS is not authorized under the law.

10. Section 15-11.1(a) of the North Carolina General Statutes provides that, if the district attorney refuses to release seized property, the property owner may apply to the court for return of the property. The court, in its discretion, may order any or all of the seized property returned to its owner.

12. The Court finds, in its discretion, that the Seized Property should be returned to Mr. Calabro pursuant to N.C. Gen. Stat. § 15-11.1(a).

13. The scope of this order is limited to the issue of the return of the Seized Property, and this order does not address the validity of the Search Warrant and its execution. Mr. Calabro has reserved his right to challenge the Search Warrant (both its form and execution) and the seizure of the Seized Property.

IT IS, THEREFORE, ORDERED that:

1. Mr. Calabro's Application is GRANTED;

2. The DSOS must return the following items to Mr. Calabro's counsel immediately:
- a. Cardboard box labeled "2017" with assorted documents from upstairs office;
 - b. Cardboard check dated June 2015 from upstairs office;
 - c. Assorted documents and files from file cabinet under laptop desk in upstairs office;
 - d. Assorted documents and files from file cabinet beside laptop desk in upstairs office;
 - e. 10 clipboards with assorted documents from wall of upstairs office;
 - f. Assorted documents from top of black filing cabinet;
 - g. 2 "Bit Coin" gold coins from black metal filing cabinet of upstairs office;
 - h. \$8,000.00 in cash from black filing cabinet;
 - i. Legal pad from desk in upstairs master bedroom;
 - j. \$1,241.00 in cash from wooden jewelry box in master bedroom closet;
 - k. \$3,364.00 in cash from metal cash drawer from master bedroom closet;
 - l. 28 "rolled" plastic coin case with 20 pieces of silver coins 1 oz. each, value of \$9,296, from master bedroom closet;
 - m. 18 silver 10 oz. silver bars valued at \$2,988.00 from master bedroom closet;
 - n. 8.5 oz. dollar silver coins valued at \$664.00 from master bedroom closet;
 - o. 20 1 oz. silver bars from master bedroom closet;
 - p. 1 bag silver bullion containing 14 1 oz. coins valued at \$232.40 from master bedroom closet;
 - q. 1 bag of silver bullion with 82 1 oz. coins valued at \$1,361.20 from master bedroom closet;
 - r. 11 silver coins in cases from left small upstairs room;
 - s. 6 old quarters from wooden case from left small upstairs room;
 - t. 2 old dimes from wooden case from left small upstairs room;
 - u. 1 gram gold bar S/N 098000 from small left upstairs room;

- v. 1 gram gold bar S/N 098006 from small left upstairs room;
- w. 1 gram gold bar S/N 098011 from small left upstairs room;
- x. 2.5 gram gold bar S/N C124266 from small left upstairs room;
- y. 1 gram gold bar S/N B034564 from small left upstairs room;
- z. 2.5 gram gold bar S/N C116849 from small left upstairs room;
- aa. 2.5 gram gold bar S/N AA028233 from small left upstairs room;
- ab. 2.5 gram gold bar S/N C124263 from small left upstairs room;
- ac. Galaxy back up power in purple plastic from small left upstairs room;
- ad. Crystal ward in blue box from small left upstairs room;
- ae. Legal pad from wooden table from small left upstairs room;
- af. Notebook, wristbands, business cards from brick iron container in front dining room;
- ag. 2 boxes of assorted documents from garage;
- ah. Asus laptop from upstairs office;
- ai. Toshiba laptop from upstairs office;
- aj. Samsung N950 Android Smartphone;
- ak. Ledger Nano S cryptocurrency hardware wallet from top drawer black filing cabinet beside laptop desk in upstairs office;
- al. Asus K601 laptop in brown tote from under bed in upstairs master bedroom;
- am. Asus X550Z laptop from desk in master bedroom;
- an. Asus laptop from black case in front living room;
- ao. Lenova Yoga laptop in living room;
- ap. Canon G7X SD card from upstairs office
- aq. Red Sandisk 32gb SD card from Nikon D7100 from front dining room;
- ar. Black/Gold 64gb SD card from Nikon D7100 in black trunk from front dining room;

- as. Sandisk Micro SD 64gb from Go Pro hero in black trunk from front dining room;
- at. Ledger Nano S hardware walled filed cabinet in upstairs office;
- au. \$50,000 in cash from white Nissan Frontier (NC Reg. CHP-8519); and

3. The DSOS must return the following items to Mr. Calabro's counsel on or before December 17, 2018:

- a. Sandisk Cruzer 8gb from black cabinet under laptop desk in upstairs office;
- b. Chrome USB stick w/key ring from black filing cabinet under laptop desk in upstairs office;
- c. Red verbatim USB drive in 2nd drawer black cabinet under laptop desk from upstairs office;
- d. Black Sandisk Cruzer USB drive "Pics" in 2nd drawer black cabinet under laptop upstairs office;
- e. White USB flash drive "event music" in Lenovo laptop in living room.

SO ORDERED, this 11th day of December, 2018.


The Honorable Rebecca W. Holt