

PRIMER ON SEEKING THE RETURN OF SEIZED PROPERTY

Return of Seized Property in General

It is common for law enforcement authorities to seize property alleged to be connected to a crime, especially cars and cash, and to refuse to return them to the property owner even in the absence of the filing of a civil forfeiture petition. This places a burden upon the property owner to take necessary and timely steps to seek the return of their property.

Pennsylvania law provides no statutory authority for the automatic return of seized property back to the owner. *E.g., Commonwealth v. Allen*, 107 A.3d 709, 718 (Pa. 2014) (“[I]t is apparent that there is no authority to support automatic return [of seized property].”) As a result, it appears that the police may seize cars or cash, for example, and retain them in their possession without filing a civil forfeiture petition or returning them to the rightful owner. If the prosecutor does not voluntarily return seized property, the owner must file a timely motion in court to obtain return of seized property. *E.g., Allen*, at 716-18. To do so, the owner must follow the procedure for filing a motion for return of property set forth in Section 5806 of the Forfeiture Act. See 42 Pa. C.S. § 5806. Otherwise, the seized property may remain in the government’s custody and the owner may lose his or her right to obtain its return. *E.g., Allen*, at 716-18.

Notably, however, the Forfeiture Act provides a post-acquittal presumption. In cases where an owner is acquitted of all related crimes which authorize forfeiture, a rebuttable presumption is created that the property was lawfully used or possessed by the claimant. In these cases, the owner of the property is entitled to a hearing under § 5806 (described below). It should be noted that “acquittal” does not include plea agreements, acceptance of ARD, or any other form of preliminary disposition. 42 Pa. C.S. § 5805(m).

Forfeiture Act: Motion for Return of Property under § 5806.

Effective July 1, 2017, the Pennsylvania legislature added provisions to the Forfeiture Act addressing the procedure for obtaining the return of seized property. 42 Pa. C.S. § 5806. To obtain the return of seized property, an individual who believes that he or she is entitled to lawful possession of the property may file a motion in the court of common pleas in the judicial district where the property is located and serve a copy of that motion on the Commonwealth. 42 Pa. C.S. § 5806(a)(1)-(2).

Contents of Motion Required by Statute.

A motion for the return of seized property should contain the basic information related to a seizure of property. It should describe “the nature and extent of

the movant's right, title or interest in the property," as well as the "time and circumstance of the movant's acquisition of the right, title or interest in the property." It should also include any additional facts supporting the movant's claim, including: (i) a description of the property seized; (ii) a statement of the time and place where the property was seized, if known; (iii) the owner, if known; and (iv) the person in possession, if known. 42 Pa. C.S. § 5806(b)(2).

In addition to providing the basic information related to the property and seizure (listed above), the movant must also identify the relief sought, which may include: (i) return of the property; (ii) reimbursement for the movant's legal interest in the property; (iii) severance of the movant's property from the forfeited property; and (iv) any relief the court deems appropriate and just. 42 Pa. C.S. § 5806(b)(3).

Pennsylvania Criminal Rule 588: Motion for Return of Property

In General.

To obtain the return of seized property, an individual who believes that he or she is entitled to lawful possession of the property must timely file a *Rule 588 Motion for Return of Property* in the court of common pleas for the judicial district in which the property was seized. PA. R. CRIM. P. 588(A); see *Allen*, 107 A.3d at 716-18. A Rule 588 motion refers to Rule 588 of the Pennsylvania Rules of Criminal Procedure, which provides the method for requesting a court to return seized property. A Rule 588 motion is the proper method to obtain the return of seized property *regardless of whether the Commonwealth files criminal charges or files a forfeiture petition against the seized property*. E.g., *Commonwealth v. Johnson*, 931 A.2d 781, 783 (Pa. Commw. Ct. 2007) ("[M]otions to secure the return of property seized by police are initiated pursuant to Pa. R. Crim. P. 588.").

Contents of Motion Required by Rule 588.

A Rule 588 motion for return of property should contain the basic information relating to the seizure of property. It should include the name and address of the movant, the date of the seizure, the place of the seizure, a description of the property seized, the movant's relationship to the seized property, the property receipt number provided by the police (and a copy of the property receipt, if available), whether criminal charges were filed, the reason for requesting the return of the property, and the exact sum or property sought to be returned. The motion must be signed by the movant and the statements in the motion verified to be true and correct subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities. In light of this unsworn verification, the motion does not need to be notarized.

A Rule 588 motion may be joined with a motion to suppress evidence under Rule 581 of the Pennsylvania Rules of Criminal Procedure, but note that they are separate motions and should not be confused.

If a Rule 588 motion is granted by the court, the property will be returned unless the court should determine that the property is contraband (in other words, the property is by its nature illegal, such as illicit drugs). In such a case, the court may order the property to be forfeited.

Time Requirements for Filing Rule 588 Motion.

There are important time requirements that apply to Rule 588 motions. The Pennsylvania Supreme Court has ruled that a person accused of a crime must file a motion for return of property during the pendency of his criminal proceedings or within 30 days following the disposition of the criminal charges; otherwise, the right to request the return of property from the court will be waived. See *Allen*, 107 A.3d at 717. "It is the search and seizure of the property . . . [not the criminal trial] . . . that triggers the ability to seek return of the seized property." *Id.* Thus, a "forfeiture pursuant to Rule 588 may occur prior to conviction and in the absence of a criminal conviction." See *Irland*, 193 A.3d at 395.

The Pennsylvania Supreme Court *has not* ruled on the time requirements for filing a Rule 588 motion when it is a third-party claim for the return of seized property. In *Allen*, the Court expressly limited its holding to the facts of the case before it; namely, when a party to the underlying criminal proceeding seeks the return of seized property in connection to that criminal proceeding. *Id.* at 717 n.10. Therefore, it remains unclear whether there is any time requirement for the filing of a Rule 588 motion by a property owner whose property is seized by the police and is never accused of a crime. Nonetheless, it is advisable to file a Rule 588 motion as quickly as possible following the seizure of property by the police.

Sample: Rule 588 Motion in Philadelphia County.

On August 11, 2016, Philadelphia County adopted a new local Rule 588 of the Philadelphia Rules of Criminal Procedure to supplement Pennsylvania Rule 588 of the Pennsylvania Rules of Criminal Procedure. See Administrative Order No. 02 of 2016 issued by Judge Jacqueline F. Allen, Administrative Judge, Trial Division of the Court of Common Pleas, Philadelphia County, *available at* <http://www.courts.phila.gov/pdf/regs/2016/cp-aj-ad-02-2016.pdf>, and included in the Appendix to this Manual.

Under this local rule, the aggrieved person does not have to wait for criminal charges to be filed, and the relief sought may be the temporary return of the property (pending the disposition of the criminal case) or the permanent return of the property. Even if criminal charges are not filed, a motion under

Rule 588 should be filed to obtain a return of seized property. Under current law, there is no right to have an attorney appointed at public expense in connection with a motion for return of property. A low-income person may represent him or herself, seek free legal assistance from a nonprofit organization, or hire an attorney.

In Philadelphia, if criminal charges have been filed against the owner of the property or person in possession of the property, the motion will be assigned the CPCMS number assigned to the criminal case. If no criminal charges have been brought, the motion will be assigned a Miscellaneous Docket number.

Under Administrative Order No. 02 of 2016, Philadelphia County has adopted a standard form for filing a Motion for Return of Property, which is available online at : <https://www.courts.phila.gov/pdf/forms/criminal/Motion-for-Return-of-Property-Packet.pdf> and is attached to the manual in the Appendix. In addition to the previously described identifying information related to the seizure, the form asks whether the movant requests a prompt hearing to obtain the return of seized property, or whether the movant is filing the motion to preserve the right to request the return of the seized property at a later date. The latter option may be appropriate where there are pending criminal charges and the movant wants to preserve the timeliness of the motion but does not want to jeopardize his or her rights relating to the defense of those criminal charges.

Procedure for Filing a Rule 588 Motion in Philadelphia County.

The standard form cited above requires you to provide identifying information about yourself, describe the property seized, and provide a specific reason for requesting the return of the property. You will be required to sign the motion and verify the truthfulness of the statements under penalty of perjury (statements are subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities). When completed, the Rule 588 Motion for Return of Property should be filed at the Office of Judicial Records via the Motion Counter on the second floor of the Criminal Justice Center. When facing the cut-outs on the Second Floor, it is the cut-out on your left. There is a filing fee of \$12.50 (as of August 2023). Note that the filing office may require you to file a separate Rule 588 motion for each property receipt you have. You may be able to file the motion IFP (*in forma pauperis*) and ask the court to waive the filing fee, but that may delay the actual filing and so be careful to observe any time requirements for filing.

You should attach a copy of the Police Property Receipt to the Rule 588 Motion. If you do not have a copy of the Property Receipt but know the Police Property Receipt Number, you should be certain to put that number in the Motion.

Under Rule 588, you are required to serve a copy of the filed Motion on the

Commonwealth through the District Attorney's Office, and an affidavit of service should be attached to the filing. However, the District Attorney's Office has agreed to accept service of the Motion directly from the Office of Judicial Records, and therefore you should just bring an additional copy of the Motion with you at the time of filing so that the Office of Judicial Records can accept the copy and serve the District Attorney's office for you. [If the property has been seized by state police authorities, rather than by the Philadelphia Police, the Commonwealth should be served through the Pennsylvania Attorney General's office. The Pennsylvania Attorney General's office has also agreed to accept service directly from the Office of Judicial Records and therefore an additional copy should be brought to the Office of Judicial Records at the time of filing].

You may also file a motion to suppress evidence under Pennsylvania Criminal Rule 581 along with your Motion for Return of Property, if desired.

- i. When the court schedules a hearing date, you must attend and be prepared to prove to the court that you are entitled to the return of your property (either temporarily or permanently). Failure to appear may result in your Motion being dismissed or denied.
- ii. In Philadelphia under past practices, the case will usually be listed at 8:00 a.m. at the Criminal Justice Center. At 8:30 a.m. a trial commissioner will take the bench, deliver an explanatory statement, and then engage in a call of the list. There is no judge at the outset while the trial commissioner manages the court list. The presiding judge will usually take the bench later after the call of the list is completed and will hear any motions or other matters requiring court orders or rulings.

A property owner of real property arriving at the courtroom should check in with the clerk of the court. When the assistant district attorney assigned to that case arrives, he or she will generally discuss the status of the case with the property owner or his or her counsel if the owner is represented.

- iii. The presiding judge assigned to the motion may require that an Answer be filed to the motion. In Philadelphia County, an answer is typically not required. This allows the assistant district attorney to propound interrogatories to the claimant at their first appearance, often promising that the property may be recoverable that same day if the interrogatories are completed on the spot. Counsel should weigh whether time

permits a complete and appropriate response to the interrogatories, including appropriate objections, on the spot in court that day. For guidance on responding to interrogatories, see Section VI(B)(3) of the Manual.

- iv. Following completion of interrogatories, there will usually be an opportunity to negotiate with the assistant district attorney for the return of property prior to the presiding judge actually hearing the motion. Upon settlement, a simple order is presented to the presiding judge to approve the unopposed grant of the motion for return of property.
- v. If the Motion is granted by the Court, you should arrange with the Forfeiture Unit of the District Attorney's office for the return of your property. (Note that with your order granting return of your property you may still be required to make multiple stops in City Hall and/or at Police Headquarters to actually obtain your property).

The forfeiture unit of the Philadelphia DA's office (Public Nuisance Task Force Unit) is located at Three South Penn Square, Corner of Juniper and South Penn Square, Philadelphia, PA 19107-3499, (215) 686-8000.

If the property was seized by state police authorities, you should arrange for the return of your property by contacting the Office of the Pennsylvania Attorney General, Asset Forfeiture and Money Laundering Section, 7801 Essington Avenue, Philadelphia, PA 19153, at (215) 937-1346.

Sample Rule 588 Motion: Outside of Philadelphia County.

The Lehigh County Law Library has prepared a sample, one-page form for the Return of Tangible Evidence or Property. The sample form is provided in the appendix for convenience only; it is not intended to be legal advice and *should not* be treated as such. The form can be downloaded at the following web address:

www.lccpa.org/pathfinder/ReturnTangibleEvidencePropertyPathfinder.pdf.

Important Practice Tips.

There are important issues to consider when seeking the return of property that is seized by the police. Two such issues are as follows:

Statements made in a Rule 588 Motion are under oath and may be used against the person filing the motion. Therefore, a person whose property is seized may want to consult an attorney before filing a motion for return of property, especially if criminal charges have been filed, or are likely to be filed, against the person filing the motion for return of property.

If a car (or other property requiring third-party storage) is seized, the prosecutor may attempt to charge the owner storage fees for each day that the car or other property remains in third-party storage. In Philadelphia, it has been the practice of the District Attorney's office to stop assessing storage fees upon the filing of a Rule 588 motion. Therefore, the Philadelphia DA has required that a car owner pay storage fees from the date of the seizure of a car until the date that a Rule 588 motion is filed with the court. Once the motion is filed, the DA stops assessing storage fees against the owner. Since daily storage fees can be substantial, there is a direct financial benefit in filing a Rule 588 motion as quickly as possible after a vehicle seizure occurs. Of course, whether a movant is required to pay any storage fees at all is a matter for negotiation with the prosecutor and ultimately, if no agreement is reached, an issue to be decided by the court.

Burden of Proof at a Return of Property Hearing

A party seeking return of seized property has the burden to prove by a preponderance of the evidence that he or she is entitled to lawful possession of the property at issue. *Commonwealth v. Wolfgang*, 97 A.3d 1274, 1279 (Pa. Commw. Ct. 2014); *Commonwealth v. Morelli*, 55 A.3d 177, 180 (Pa. Commw Ct. 2012); 42 Pa.C.S.A. § 5805(j)(2). Indeed, once the Commonwealth establishes that a property is subject to forfeiture, "the burden shifts to the claimant to prove, by a preponderance of the evidence, that she acquired the property lawfully." *Commonwealth v. 605 University Drive...*, --- A.3d ---- (2021 WL 3716686); 42 Pa.C.S.A. § 5805(j). A motion for return of property should be granted where the movant has presented the common pleas court with credible evidence of ownership of or entitlement to the property that is the subject of the motion. *Commonwealth v. Janda*, 14 A.3d 147, 167 (Pa. Super. Ct. 2011).

Once the moving party meets the initial burden of establishing entitlement to lawful possession of the property, the Commonwealth must prove by a preponderance of evidence that that property is contraband *per se* or derivative contraband. *Commonwealth v. Crespo*, 884 A.2d 960 (Pa. Commw. Ct. 2005).

Contraband *per se* is property the mere possession of which is unlawful, such as heroin or other illegal drugs. *Commowalth v. One 2001 Toyota Camry*, 894 A.2d 207, 210 (Pa. Commw. Ct. 2006) *overruled on other grounds by Commonwealth v. Irland*, 153 A.3d 469 (Pa. Commw. Ct. 2017). An unregistered handgun is not contraband *per se*. See, e.g., *City of Cleveland v. Fulton*, 898 N.E.2d 983, 988-89 (Ohio Ct. App. 2008).

Derivative contraband is property that is innocent by itself but which is used in perpetration of an unlawful act, such as a car that is used to transport illegal goods. See *Wolfgang*, 97 A.3d at 1279. Firearms used in the perpetration of

an unlawful act constitute derivative contraband. *In re Firearms, Eleven*, 922 A.2d 906, 911 (Pa. Super. Ct. 2007).

When there are disputed issues of fact, the common pleas court must hold an evidentiary hearing. *Commonwealth v. Howard*, 931 A.2d 129 (Pa. Commw. Ct. 2007). *See also Commonwealth v. \$4,522.00 U.S. Currency*, 2015 WL 5436833, at *2 (Pa. Commw. Ct. Apr. 14, 2015) (unreported panel decision).^[**]

Review of a trial court's decision on a petition for return of property is limited to examining whether the findings of fact were supported by competent evidence and whether the trial court abused its discretion or otherwise committed an error of law. *Commonwealth v. Johnson*, 931 A.2d 781, 783 n. 2 (Pa. Commw. Ct. 2007). *See also, Commonwealth v. Coon*, J-S58042-19 (Pa. Super. Ct. 2020).