

CASE NO.: 2009-H20

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

STARTESTS, INC. and the COLONIAL FOOTBALL LEAGUE,

Respondent.

On Appeal from the United States Circuit Court of Appeals
For the Fourteenth Circuit
Case No.: 2010-W23

BRIEF OF RESPONDENT

January 13, 2010

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Oral Argument Requested

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QUESTIONS PRESENTED

- A. Under substantive Fourth Amendment law does CFL have the right to make a Fourth Amendment claim for an illegal search and seizure, where the government searched and seized evidence from StarTests' facility?
- B. Under Supreme Court common law may the court apply the Comprehensive Drug Testing test, where the warrant is too broad to meet the Fourth Amendment particularity test?
- C. Under the Supreme Court common law may the government rely on the plain view exception to the Fourth Amendment's warrant requirement in digital searches, and if so can the court conclude that the officers found the evidence against the other players legally?
- D. Under the Federal Rules of Criminal Procedure section 41(g) can the court appropriately return the property of the other players, where the warrant was not lawful?

OPINIONS BELOW

The opinion of the court of appeals case number 2010-W23. An order was given in favor of the respondents motion under Fed. R. Crim. P. 41(g). The memoranda and orders of the district court denying the respondent's motion under Fed. R. Crim. P. 41(g).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Rule 41 of the Federal Rules of Criminal Procedure:

(e)(2)(B) Warrant Seeking Electronically Stored Information. A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The 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.

(g) Motion to Return Property. 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.

STATEMENT OF THE CASE

The case arises out of FBI's the search and seizure of StarTests, Inc's (StarTests) facility in Millersville, Wythe, where the officers obtained evidence against players whom were not mentioned in the warrant. J.A. at 8-9¹. The magistrate judge issued a warrant authorizing the FBI to search through Colonial Football League's (CFL) drug testing files. J.A. at 8. The FBI could only obtain information on John Reeves, John Reynolds, Danny Rodriguez, Michael Fleming, and Ace Hall for evidence of use of illegal steroids as performance enhancers. J.A. at 7-8. The warrant also gave limitations. J.A. at 8. The investigation was preformed over some weeks for the five players mentioned above, and the officers also found positive test results of other players for illegal drug uses. J.A. at 9. They copied and retained the information, and announced they were expanding the scope of their investigation to cover illegal substance abuse by professional athletes. J.A. at 9.

To preserve the integrity of their organization and the privacy guarantee given to the players, StarTests and CFL filed a timely motion in the United State District Court for the District of Wythe for the return of the copied records and equipment under Fed. R. Crim. P. 41(g). J.A. at 2 and 9. The District Court denied the Rule 41(g) motion for the return of property. J.A. at 1. StarTests and CFL then filed for an appeal; the Fourteenth Circuit Court reversed the district court's opinion. J.A. at 7. Now, the United States Supreme Court has granted a Writ of Certiorari to review the case. J.A. at 20.

¹ J.A. is the joint appendix that only includes the problem we were given. Not actually included in this brief because it was issued by the school and is not our product. The pages are indicated throughout for reference.

The District court found that CFL had standing and that the evidence was not illegally seized by the United States government; therefore, did not grant the motion for the return of property. J.A. at 1. Although the search was not at CFL's headquarters, the court decided that CFL had standing; they were considered as a party against whom the search was directed. J.A. at 3. And as an association, they had a right to sue on behalf of the players because the players had independent standing to sue, the interests sought to be protected are germane to the organization's purpose, and the claim asserted did not require the participation of the individual players. J.A. at 3. The court analyzed the case under the plain view doctrine. J.A. 4. With respect to the first element, whether the officer was lawfully present when the evidence was plainly viewed, the court decided to defer to Judge Leon's judgment for the scope of the warrant. J.A. at 4. Since Judge Leon's warrant was facially valid, the FBI was lawfully present on StarTests' computers when it accessed the drug test information about the CFL players. J.A. at 5. With respect to the second element, whether the officer had a lawful right of access to the evidence, the court stated that the valid search warrant gave the FBI a lawful right of access. J.A. at 5. With respect to the third element, whether the incriminating character of the evidence was immediately apparent, the court stated that when the FBI saw a positive result for steroids or cocaine that was evidence of criminal activity. J.A. at 6. Finding in such a way to the three elements, the Court found in favor of the United States of America. J.A. at 6.

StarTests and CFL filed a timely appeal and the Circuit Court of Appeals, in agreement with the District Court, found that CFL had standing. J.A. at 9-10. But the court reversed other parts of the District Court's opinion. J.A. at 7. The circuit court held that the District court erred by (1) upholding the search warrant despite its lack of particularity, and (2) applying the plain view doctrine in a digital evidence search and seizure case. J.A. at 7. The court agreed with the

District Courts' analysis of standing and stated that the databases were the property of CFL, which StarTests simply stored. J.A. at 10. The court held that plain view did not apply to a digital evidence search and seizure case, because it becomes a run around the Fourth Amendment; therefore, the court applied the Ninth Circuit's Comprehensive Drug Testing test. J.A. at 12-13.

The first element established that specialized personnel or an independent third party must do the segregation and redaction of information from computer documents; the court stated that the trained personnel collaborated with the FBI agents and were not independent. J.A. at 14. The second element established that the warrant must disclose the actual risks of destruction or concealment of information; the court stated that the FBI was not required to give any information about the risks of destruction or concealment other than what it volunteered for the affidavit. J.A. at 14. The third element established that the search must be designed to uncover only information for which it has probable cause, and only that information may be examined by the case agents; the court stated the warrant failed because the computer personnel turned over related and unrelated information that caused the FBI to expand its investigation. J.A. at 15. The final element required the government to destroy or return non-responsive data; the court stated that although the warrant failed under the other prongs, it satisfied this requirement. J.A. at 15. Lastly, the court held because the warrant did not pass the four-pronged test, it was overbroad. J.A. at 15.

To decide whether the return of the property was proper, the court applied the four-prong test from Kitty's East v. United States, 905 F.2d 1367 (10th Cir. 1990). The first prong asks whether the government displayed a callous disregard for the constitutional rights of the movant. J.A. at 16. The court stated that the FBI essentially shut the facility down, once they found the

information for which they lacked probable cause they actively sought to keep it and use it to go after other league players, and they are seeking to retain the property to use as evidence in an investigation that did not begin until after the search was executed. J.A. at 16. Therefore, the government acted with callous disregard. J.A. at 16. The second prong asks whether the movant has an individual interest in and need for the property he wants returned; the court stated both Plaintiffs have individual interests. J.A. at 16. StarTests has its business reputation to uphold and the removal of the results breaches CFL's agreement of confidentiality with its franchises and players. J.A. at 16. The third prong asks whether denying return of the property would irreparably injure the movant; the court stated that the damage was irreparable for both CFL and StarTests. J.A. at 16. For CFL it could cause serious litigation that could remove football players from the playing field, and StarTests cannot operate without its computer equipment. J.A. at 16. The fourth prong asks whether the movant has an adequate remedy at law for the redress of his grievance; the court stated that the reasonable remedy under Fed. R. Crim. P. 41(g) is to return all the property to the StarTests Millersville facility. J.A. at 16.

The court held in favor of StarTests and CFL and reversed the District Court's opinion finding that the warrant was overbroad, by applying the Comprehensive Drug Testing test, and that the reasonable remedy was to return the property. J.A. at 17. A Writ of Certiorari to the United States Supreme Court was granted to review the issues of the case. J.A. at 20.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly applied the Comprehensive Drug Testing test to grant the Plaintiff's motion for the return of the property under Fed. R. Crim. P. 41(g). Although the case involved a digital search, if the court concludes that the plain view doctrine was the proper

doctrine to apply, it should still grant the Plaintiff's motion because the exception's requirements were not met. Digital searches fall under the Fed. R. Crim. P. 41(e)(2)(b).

The case of Rakas v. Illinois, 439 U.S. 128, 139 (1978) establishes that rights secured by the Fourth Amendment are personal and standing is not used per se. This test focuses on legitimate expectation of privacy in the invaded space, which can be recognized by society or property common law. The first way CFL established legitimate expectation of privacy was with the contract they made with the players involving the confidentiality of their results. The second way CFL established legitimate expectation of privacy was with their complete control over access to the data, along with the fact they paid for the data to be taken and stored at StarTests facility. Together they both show CFL's legitimate expectation of privacy especially recognized by society.

The warrant violates the Fourth amendments requirement of particularity and fails to meet the test set forth by the Fourteenth Circuit Court. The warrant was sufficiently particular at the very most, and at the very least it was executed in a way that violates StarTest and CFL's rights. The warrant allowed for a catch-all phrasing making the warrant a general warrant. The Judge allowed for all data and computer storage devices to seized, though restricted. The FBI violated the restrictions placed on the warrant, invalidating the restriction broadened the scope of the warrant. Once the warrant became a general warrant. Since the warrants general construction and poor execution invalidates the warrant.

The court should not apply the plain view doctrine to a case that involves digital searches because the courts are applying the exception in ways that act as a run around the Fourth Amendment. And the Fourth Amendment is an important right that should not decrease in value.

If this court chooses to apply the plain view doctrine, the court will still come to find that the property was illegally searched and seized. To use the plain view doctrine as an exception to the Fourth Amendment one must show that: (i) the officer was lawfully present where the evidence was plainly viewed, (ii) the officer had a lawful right of access to the evidence found, and (iii) the incriminating character of the evidence was immediately apparent. Horton v. California, 496 U.S. 128, 136-37 (1990). (iv) Those who seek the exemption must also show that the exigencies of the situation made that course imperative. McDonald v. United States, 335 U.S. 451, 456 (1948).

Officers must employ methods to avoid going beyond what was necessary to find the evidence within the warrant. The officers were off-site and given more time to abide by such a rule; if they had applied it they would not have rummaged through the files. The officers were, therefore, not lawfully present. The FBI was not given permission to precede with a general search and should have gone by the above rule. Therefore, they also did not have a lawful right to access the evidence. The officers would have had to expand the search to find the incriminating evidence on the other players that were not mentioned in the warrant. If they had developed an intermediate step to avoid going beyond what was necessary to find the evidence within the warrant, the only incriminating evidence found would have been against the players within the warrant. There were no exigent circumstances involved; that is necessary before apply the court can apply the exception so the court would still have to uphold the Court of Appeals decision.

Under Fed. R. Crim. P. 41(g) the parties that have an interest in the seized property may make a motion at the district court level creating a civil equitable proceeding. This gives third parties with an interest or likelihood to be harmed by the seizure have the right for the return of

their belongings or can sue on behalf of others. The FBI can copy the data of the five players they had legal access and the rest of the data and equipment must handed back to Startesst. Startest and the CFL are being harmed and have no other recourse.

The conclusion of the Court of Appeals was proper because: CFL had a Fourth Amendment right to bring the case, using either the Comprehensive Drug Testing test or the plain view doctrine the evidence found against the other players was illegally searched and seized, and according to Fed. R. Crim. P. 41(g) the return of property is appropriate.

ARGUMENT

THE COURT OF APPEALS DECISION TO GRANT THE PLAINTIFFS' MOTION FOR RETURN OF PROPERTY SHOULD BE UPHELD, BECAUSE ACCORDING TO SUBSTANTIVE 4TH AMENDMENT LAW CFL HAS THE RIGHT TO BRING THE CASE, AND ACCORDING TO THE COMPREHENSIVE DRUG TESTING TEST OR THE PLAIN VIEW DOCTRINE THE COLLECTION OF EVIDENCE ON THE OTHER PLAYERS WAS ILLEGALLY PERFORMED.

The Court of Appeals correctly granted the Plaintiff's motion for the return of the property under Fed. R. Crim. P. 41(g).

Motion to Return Property. 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. Fed. R. Crim. P. 41(g).

The Plaintiffs submits that the evidence not involving John Reynolds, John Reeves, Danny Rodriguez, Michael Fleming, and Ace Hall was illegally seized; and therefore, should be returned to the Plaintiffs. 41(g) was designed to keep

The court shall use the de novo standard of review because the ultimate lawfulness of search is reviewed de novo as mixed question of law and fact. United States v. Taketa, 923 F.2d 665, 669 (9th Cir. 1991). The court is to look at the legal issues anew, as the court did in Ornelas

v. United States, 517 U.S. 690 (1996). The Court of Appeals properly applied the “Comprehensive Drug Testing” test of the Ninth Circuit because it clearly articulated what a search warrant for electronic data needed to be to meet the particularity requirement of the Fourth Amendment. The Court of Appeals also correctly decided that the government cannot rely on the plain view exception during a digital search because the courts have much difficulty applying the doctrine to such searches and in many situations it has acted as a run around the Fourth Amendment privacy right. If this court concludes that the Ninth Circuits test is not controlling, the court should still uphold the Court of Appeals decision because the evidence gathered against the other players was not included under the warrant as evidence to be searched and seized, and the evidence was not found and seized appropriately according to the Supreme Court’s plain view doctrine.

CFL and StarTests can prove that the return of the property is a valid decision. CFL has a personal right to bring the case according to substantive 4th Amendment law and a legitimate expectation of privacy, because CFL paid StarTests to administer and store the test, CFL has control over who does and does not have access to the results, and CFL has a contract with the players that says the players results will stay confidential. Rule 41(g) allows for both parties to make a motion in District court creating a civil equitable proceeding.

According to the “Comprehensive Drug Testing” test the government illegally obtained the evidence on the other players because the FBI failed to list the actual risk of destruction of the information in applying for a search and seizure warrant. The special agents failed to segregate and redact any information not pertaining to the five individuals in questions before passing the database on the Investigating agent. The FBI decided to keep all peripheral information instead of destroying it or returning.

The Defendant admits that the warrant did not include the evidence against the other players and claim that the evidence was lawfully searched and seized because they were within the officer's plain view. Plain view should not be used because of the difficulty and confusion it has caused the courts. Digital searches are searches of this new time and with such an important right involved, the Fourth Amendment, it should not decrease in value because the exception was not made for these types of searches. If the court should still come to the conclusion that plain view is still applicable the Defendant cannot show the evidence was found within the three elements. The officers were not lawfully present where he viewed the results of the other players. Although, the officers were given more time to avoid going beyond what was necessary to find the evidence within the warrant, they did not make any intermediate steps to do so. For the same reasons above the officers did not have lawful access to the evidence against the other players; the officers essentially extended the search to a general exploratory search. The incriminating character of evidence against the other players was not immediately present because without extending the search the officers would not have seen the evidence. See Coolidge v. New Hampshire, 403 U.S. 443 (1971). Even if the court concludes that the plain view elements are satisfied, the court should still uphold the Court of Appeals decision because there were no exigent circumstances involved and that is necessary before apply the exception to the case. See McDonald v. United States, 335 U.S. 451, 456 (1948).

Rule 41(g) allows parties that have an interest in the seized property to make a motion for the return of the property. There are four factors that the district court should consider. Ramsden v. United States 2 F.3d 322 at 325 (9th Cir. 1993) quoting Richey v. Smith, 515 F.2d 1239(5th Cir. 1975). The factors deal with how the warrant was executed, the interest the movant has, the

damage to the movant if the property is not returned and is there legal remedy outside of returning the seized property. *Id.* at 325

The Defendant should have retained another warrant if they obtained probable cause the databases contained information that could lead to the incrimination of other players before beginning a separate search; therefore, according to Fed. R. Crim. P. 41(g), the Plaintiffs are entitled to the return of the evidence of the other players.

A. CFL has a personal reasonable expectation of privacy and a right to bring this case according to substantive Fourth Amendment law, because the search was directed against them, and a contract involving the evidence searched specified the privacy and confidentially that was to be expected for the players.

The rights secured by the Fourth “Amendment are personal, in place of ‘standing,’ ...”

Rakas v. Illinois, 439 U.S. 128, 139 (1978).

Amendment IV. Search and Seizure. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

In the past the Supreme Court focused on substantive Fourth Amendment law in place of standing. *Id.* Katz v. United States, 389 U.S. 347, 353 (1967) held that “capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” Rakas, 439 U.S. at 143.

In Jones v. United States, 362 U.S. 257 (1960), the court established that the plaintiff had a legitimate expectation of privacy, although they did not have recognized property interest at common law, because he had permission to enter the apartment, he had a key to the apartment, and he had complete control over who could go in and out the apartment. The court later decided that a person has a legitimate privacy interest when they have a conversation in a phone

booth with the door closed in the case of Katz v. United States, 389 U.S. 347 (1967). Both were held to have a legitimate expectation of privacy because society has recognized the private interests. Rakas, 439 U.S. at 143.

In Minnesota v. Carter, 525 U.S. 83, 90 (1998) the court established that if a person does not stay as a guest in a house overnight, and only is in the home for a business transaction which lasts a few hours there is no reasonable expectation of privacy. “Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” Rakas, 439 U.S. at 143.

Similarly to Jones and Katz, CFL had a privacy interest that is recognized by society and they had a contract that also established privacy. CFL showed the control that they have over the evidence by establishing who had access to them and who did not; CFL also decided how much access was given. They paid StarTests to administer the test and store the results. CFL made a contract with the players stating that they would keep the information gained from the tests confidential; that contract represents the private interest they have in their players’ bodily fluids, and their ownership interest in the databases they entrusted to StarTests. CFL was given permission to store the results on StarTests’ property, they had complete control over who had access to the results, and a contract was made involving the confidentiality of the results; society would recognize that CFL has a legitimate reasonable expectation of privacy.

The opposing party may say that businesses are not treated the same as homes. New York v. Burger, 482 U.S. 691, 699-700 (1987). The expectation of privacy is reduced. Id. But the reasonableness of expectation of privacy is still the leading law, which is provided by Katz. Id. Where there is a history of government oversight there can be no reasonable expectation of

privacy. Id. at 700. Closely regulated businesses include: the liquor industry, firearms, and mining. Id. at 700-701. Drug-screening tests are not closely regulated and do not have a history of government oversight. Since the reasonableness of expectation of privacy is still appropriate and the government does not closely regulate drug-screening tests, CFL has a substantive Fourth Amendment right to no illegal search or seizure.

B. The Court of Appeals correctly applied the test in Comprehensive Drug Testing, regardless the warrant was not executed accordingly particular.

The Court of Appeals for the Fourteenth Circuit used the a modified test cited in United States v. Comprehensive Drug Testing Inc. 579 F.3d 989, (9th Circuit, 2009) to find that the warrant was overbroad. J.A. at 14-15. The Fourth Amendment requires warrants to be “particularly describing the place to be searched, and the persons or things to be seized.” In Comprehensive Drug Testing, the Court listed,

“2. Segregation and redaction must be either done by specialized personnel or an independent third part. If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant. 3. Warrant and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora. 4. The government’s search protocol must be designed to uncover only the information for which it has probably cause, and only that information may be examined by the case agents. 5. The government must destroy or, if the recipient may lawfully possess it, return non responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.” 579 F.3d 1006

i. The Court of Appeal correctly found that the warrant was not particular due to failing to meet the adopted test from Comprehensive Drug Testing.

The Fourteenth Circuit has decided on a test for warrants issued involving electronic data as found in Comprehensive. J.A. at 12-15. This case and Comprehensive are strikingly similar in the construction of the warrant on the execution. In Comprehensive the government had

probable cause that 10 Major League Baseball players were using steroids when seeking a search warrant of the CDT's digital information. Comprehensive 579 F.3d at 993. The court did set a requirement that government agents prove the risk of actual destruction of the documents. Id. at 1006. The court in Comprehensive noted to prevent future violations by the government agents the seizure of the data must be overseen by non-investigating agents or third party analysts. Id. at 1000.

The warrant set that the protocol that the non-investigating agents then should review the seized data for the specific data allowed under the search warrant. Then only the data specifically covered by the terms of the warrant should be given to the investigating agents and all other data should be redacted. Id. Once the information is discovered the computers should be returned as a whole. Major League Baseball had contracted with CDT to conduct anonymous drug testing of players to see if 5% or more tested positive. Id. at 993. During the CDT test federal investigators learned of ten players failing a drug test. This eventually led to the Federal investigators obtaining a warrant to search only for the ten players and seizure of the results for hundreds of players and many others drug test results. Id. This data was collected in this manner after on site personnel offered to provide all pertinent data on the ten players. Id. at 996.

The search warrant into the records at Star test facilities do not meet the standards put forth in Comprehensive used by the Fourteenth Circuit. In applying for the warrant the FBI failed to prove a risk of destruction of the information by StarTest for a seizure to be warranted in this situation. In requesting the seizure of the digital information the FBI only noted that it can be hard to find, not that it would be impossible to do search on site. J.A. at 1-2.

The FBI computer forensics agents found the test results to more than the five players that was the focus of the warrant. The FBI then decided to expand the investigation. This fails to

meet the requirement to segregate and redact additional information before passing the limited information onto the investigating agents. The only information that should have been transmuted to the investigating agent was the test results of the five players the subject of the warrant.

The instructions from Judge Leon did create an appropriate protocol for the search warrant by requiring “enforcement personnel trained in searching and seizing computer data” to make the decision on what computers should be searched and seized. *Id.* The head agent made the decision to seize all of the computers with a chance of having the information on the five players. While the last prong of returning the information taken has yet to be performed, and will be discussed in a later section.

ii. The Warrant was not sufficiently particular to circumvent the Fourth Amendment.

A warrant for search and seizure must be “particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. In Comprehensive, the court noted that “the government agents obviously were counting on the search to bring constitutionally protected data into the plain view of the investigating agents.” Comprehensive 579 at 999. Each person with in the database seized has a protected “legitimate expectations of privacy” under Fourth amendment. Ybarra v. Illinois 444 U.S. 85, at 91 (1979).

A warrant that fails to “particularize the place to be searched or the things to be seized” is not reasonably valid. United States v. Leon 468 U.S.897, at 923 (1984). Search and seizure warrants of computer data and equipment still must meet the particularity challenge. United States v. William A. Hunter 13 F. Supp. 2d 574, at 583 (D. VT, 1998). Warrants authorizing the seizer of “all computers” lacking sufficient particularity turns a warrant into a general warrant. Id. at 583. General searches are constitutionally invalid. Anderson v. Maryland 427 U.S. 463 at

480, (1976). See Also: Stanford v. Texas 379 U.S. 476, at 485 (1965), Marron v. United States, 275 U.S. 192, at 196 (1927).

The warrant in this case allowed for the search and seizure of either a copy of **all** data or a the computer equipment. There are restrictions on the searching of the information, but **all** of the information and computer equipment. The warrant allowing or using the wording “all” turn this warrant into a general warrant. Therefore the warrant violates the Fourth Amendment particularity provision. The problem is that a overbroad warrant allows the warrant to be issued for one thing and then used for another. In this case the FBI used the warrant issued for the five players to look at the results of all of the other players in the league.

C. The government cannot rely on the plain view exception during a digital search because too many courts apply it in such a way that it acts as a run around the Fourth Amendment privacy right.

The Defendant admits the evidence was not found within the specifics of the warrant and submits that the evidence was found lawfully according to the plain view doctrine. The Fourth Amendment is designed to protect the innocent and the guilty from unreasonable intrusions upon their right of privacy while leaving adequate room for the necessary processes of law enforcement. Trupiano v. United States, 334 U.S. 699, 709-710.

The circuit courts are not in agreement as to how to apply the plain view doctrine exception in digital search cases. Some courts have applied the exception carefully like in United States v. Carey, 172 F.3d 1268, 1273 (10th Cir. 1999) (holding the first photo of child pornography the officer came across accidentally, while looking for evidence of drug transactions, was within plain view, but the other documents opened purposely to search for child porn were not), and United States v. Turner, 169 F.3d 84, 88 (1st Cir. 1999) (holding plain view was not appropriate because consent of a house search did not allow the officer to search the computer

for documentary or photographic evidence, even though he saw a nude photo of an assault victim on the desktop).

Other courts have completely confused the first two prongs of the test and have held that when the first is satisfied the second is automatically satisfied. The court in United States v. Alexander, 574 F.3d 484, 490-91 (8th Cir. 2009) did not go through all the prongs of the test; the court stated that the officers were lawfully present because they were permitted by the warrant to search any area of the home and the incriminating character was immediately apparent because child porn addresses to websites were printed on the photos and the email printouts showed a subscription to child porn websites. The court mentioned all the prongs but did not apply the second prong to the case. The court in United States v. Miranda, 325 Fed. Appx. 858 (11th Cir. 2009) did something similar; it named the first two prongs of the test as one prong, so their test only consisted of two prongs. The plain view is an exception to the Fourth Amendment right that applies to all people, and this right is a very important right to the citizens of the United States.

When the Fourth Amendment and the plain view doctrine were established officers were not searching and seizing digital data. Digital data is new technology of our more progressed time. The Supreme Court understood that times do change, and in the case of Elkins v. United States, 364 U.S. 206 (1960) the court stated that if times have changed, the changes should make the values served by the Fourth Amendment more, not less, important. The Supreme Court reaffirmed this same idea in Coolidge, 403 U.S. at 454-55. Exceptions such as plain view are to be jealously and carefully drawn, and applying the plain view doctrine to digital search cases in many cases has turned an initially valid search into a general one. And plain view cannot be used to turn a valid limited search into a general search. Coolidge, 403 U.S. at 469. Because

times have changed and the Fourth Amendment right is highly important, the court should make a new exception for digital searches that courts can easily to apply without it serving as a run around the Fourth Amendment.

If the court were to still find that plain view is applicable to digital searches, it would still have to conclude in the favor of the respondent because the officer was not lawfully in a position to see the results, the officer did not have lawful access to the results, and the incriminating character of the evidence was not immediately apparent.

Exceptions such as plain view are to be jealously and carefully drawn. Coolidge, 403 U.S. at 454-55. The Defendant has admitted that the evidence was not found pursuant to a warrant, and when such is true the search and seizure is per se unreasonable under the Fourth Amendment. Jones v. United States, 357 U.S. 493, 499 (1958). In order for the plain view doctrine to be applicable (i) the officer must have been lawfully present where the evidence was plainly viewed, (ii) the officer must have had a lawful right of access to the evidence found, and (iii) the incriminating character of the evidence must have been immediately apparent. Horton v. California, 496 U.S. 128, 136-37 (1990). (iv) Those who seek the exemption must also show that the exigencies of the situation made that course imperative. McDonald v. United States, 335 U.S. 451, 456 (1948).

i. Since the officers had access to the databases off-site, they had more time to take intermediate steps to be more cautious of the other players privacy; therefore, the officers were not lawfully in a position to see the evidence against the other players.

The Defendant had a warrant to search and seizure the evidence they obtained. Searches deemed necessary should be as limited as possible because the problem is not one of intrusion but one of a general exploratory rummaging in a person's belongings. Coolidge, 403 U.S. at 467-68. A warrant is valid if it requires a particular description of things to be seized, Id., and the place to be searched is named. United States v. Grubbs, 547 U.S. 90, 97 (2006). Officers "must [also] engage in the intermediate step of sorting various types of documents and then only

search the ones specified in a warrant.” Carey, 172 F.3d at 1275 (citing United States v. Tamura, 694 F.2d 591, 596 (9th Cir. 2008)).

When the data is in their custody offsite, “law enforcement officers can generally employ several methods to avoid searching files of the type not identified in the warrant...” Carey, 172 F.3d at 1276 (10th Cir. 1999). There is no “practical reason to permit officers to rummage through all the stored data regardless of its relevance... to the information specified in the warrant.” Id. at 1275-76.

The magistrate judge issued a warrant authorizing the FBI to search computer equipment, storage devices, and where an on-site search would be impracticable, seize either a copy of all data or the computer equipment itself at Startests’ facility in Millersville, Wythe. First, the search was to be limited to information reasonable related to the investigation of John Reeves, John Reynolds, Danny Rodriguez, Michael Fleming, and Ace Hall’s illegal steroid use. Second, the law enforcement personnel trained in searching and seizing computer data were to decide when the seizure and removal of computer equipment was necessary. Third, the appropriately trained personnel were to review the data, retain the relevant information, and designate the remainder for return. The warrant seems to be limited and have the particular elements need to be considered valid.

When officers went beyond what was necessary to determine if the defendant had hidden narcotics among his papers and started to read the papers to determine whether they could find evidence of other illegal activity, the court concluded that the officers exceeded the scope of the consent and turned the search into a general search. United States v. Dichiarinte, 445 F.2d 126, 130 (7th Cir. 1971).

The Defendant in our case also went beyond what was necessary to find the five players results. Since the Defendants took the databases off-site, they were given more time to use several different methods to avoid invading the other players Fourth Amendment privacy. The Court of Appeals acknowledges that they should have looked for the information that was specified in the warrant without viewing the other players results; the officers should have found the part of the file they needed, highlighted the lines that contained the results of the five players they had a warrant against, and pasted the results they needed to another document before scrolling over to look at the results. The Defendant may proclaim they accidentally spotted the results of the other players while they were viewing the results of the 5 players' results they gained the warrant against. But the officers should have taken the above intermediate steps instead of freely rummaged through the information. The officers created a general search that enabled them to spot other evidence that may have been incriminating against the other players.

Although the Defendant had the time to avoid invading the other players' privacy, they did not take intermediate steps to avoid going beyond what was necessary to find the evidence within the warrant; therefore, the Defendant was not lawfully in a position to view the evidence pertaining to the other players.

ii. The officer did not have a lawful right of access to the evidence against the other players because a search cannot be extended in such a way as to become a general exploratory search.

Searches deemed necessary should be as limited as possible because the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. Coolidge, 403 U.S. at 467-68. The Fourth Amendment is there to prevent a wholesale seizure developed for a later detailed examination of the evidence. United States v. Tamura, 694 F.2d 591, 595 (9th Cir. 2008).

The above section explains how the Defendant went beyond what was necessary to find the evidence against the five players in the warrant. Therefore, the officers created a general search that enabled them to spot other evidence that may have been incriminating against the other players. The opposing party may submit that the file cabinet theory can be used in this case. The file cabinet theory is where the officer is advised to check all the documents in the file cabinet to make sure they are not ambiguously labeled. *Id.* at 1274-75. But in our case that would be the wrong method to use. Although StarTests did store the data according to identification numbers and not according to their names, the officers were given this information in a motion hearing before the search and by the employs just before beginning the search. The officers were also told how to find what identification number went with each player. “[E]lectronic storage is [also] likely to contain a greater quantity and variety of information than any previous storage method... Relying on analogies to closed containers or file cabinets may lead courts to oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage.” *Id.* at 1275.

The Defendant did not have lawful access to the evidence against the other players, because they extended the search to a general search when they did not take intermediate steps to prevent going beyond what was necessary to find the evidence within the warrant.

iii. The incriminating character of the evidence was not immediately apparent because the officers would have only seen the evidence against the other players if they expanded the scope of the search.

The incriminating character of the evidence is immediately apparent when an officer would have probable cause to believe the object was contraband or evidence of a crime. *See Horton*, 496 U.S. at 142; and *Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993). Many Circuit Courts do not like when plain view is used to open other files or go into other areas that are not

specified within the warrant. See Dichiarinte, 445 F.2d at 130-31; Carey, 172 F.3d at 1273; and Turner, 169 F.3d at 88.

The officer in Carey opened a JPG file while looking for drug evidence files and discovered child porn. Carey, 172 F.3d 1268. After opening the first JPG file the officer had probable cause that all the JPGs had contents of child porn. Id. When he continued to search through the JPGs anyway the court considered it as temporarily abandoning the case for a child porn case. Id. The court concluded that he knowingly expanded the search. Id. The officer was not authorized by the warrant to do so, and the closed files were neither immediately incriminating nor plainly viewed. Id. Similarly, the Turner case held that just because the government saw a sexually suggestive image in plain view on the computer screen did not make the rest of the files fair game. United States v. Turner, 169 F.3d 84, 86-88 (1st Cir. 1999). Even though the person gave consent to a search, the court decided in this manner because the detectives never announced that they were investigating a sexual assault or attempted rape prior to the consent. Id.

In our case the Defendants opened the databases looking for five specific players information. They were aware that the other players' results were also within the same files. If the intermediate steps, mentioned in the above sections, were taken to avoid going beyond what was necessary to find the evidence within the warrant, the Defendant would not have viewed the evidence against the other players. When the Defendant viewed the evidence against the other players, they temporarily abandoned the search within the warrant and expanded the search to find incriminating evidence against other players. They even announced that they were expanding the scope of the FBI's investigation to cover illegal substantive abuse by professional

athletes. If the FBI had probable cause for illegal abuse of some other players, the proper thing to have done was to obtain another warrant expanding the scope.

The opposing party could say that the officer could have just run across the results while viewing one of the five players results, which led to a belief of probable cause for incriminating evidence. First, that would show that the officer did not take the intermediate step to avoid going beyond what was necessary to find the evidence within the warrant. Second, the only way they could possibly connect the results to the actual player is to extend the search even more to find the identification number then match it to its owner. Both are inappropriate according to the information given in the proceeding paragraphs and sections.

The officers were to make intermediate steps to avoid going beyond what was necessary to find the evidence within the warrant. Therefore, if the officers did the search legally, the information they would have run across would not have shown any immediately apparent incriminating character.

The officers were not lawfully in a position to view the evidence against the other players, they did not have a lawful right of access to the evidence, and the incriminating character of the evidence against the other players would not have been immediately apparent if the warrant had been executed lawfully. Therefore, the evidence against the other players was illegally searched and seized according to the Fourth Amendment.

iv. Even if the court concludes that the Defendant satisfies all three elements of plain view, plain view alone has never justified a warrantless seizure because the Defendant must still prove exigent circumstances.

Plain view alone has never justified a warrantless seizure; the Defendant still must prove exigent circumstances. Coolidge, 430 U.S. at 468. This acts as a limitation on plain view. Id. “Warrants are ... required to [perform a] search ... unless ‘the exigencies of the situation’ make

the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” Mincey v. Arizona, 437 U.S. 385, 393-94 (1978) (citing McDonald, 335 U.S. at 456 and Johnson v. United States, 333 U.S. 10, 14-15 (1948)). Exigent circumstances are when a suspect’s escape is imminent, or when evidence is about to be removed or destroyed. Id. at 394. If there is no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant, there is no exigent circumstances. Id.

In our case the other players were not fleeing from the officer; therefore, the suspect’s escape was not imminent. The officers were never threatened with any removal of the evidence. And during the time it would have taken to obtain a search warrant against the other players, the evidence would not have been lost, removed, or destroyed. Even if the court concludes that the Defendant can prove the three elements of the plain view doctrine, the Defendant cannot prove any exigent circumstances; therefore, the court should not apply the plain view doctrine to the case at hand.

D. If the Court finds the warrant lacking constitutional muster, the data and computer equip should be returned Startest Inc. and the CFL.

The Federal Rules of Criminal Procedure 41 states,

(g) Motion to Return Property. 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.

In cases falling under 41(g) on searches for digital information the data should be copied and the originals returned along with any equipment seized. The wording of the rule does not require a proprietary interest, the rule allows anyone aggrieved by the seizure of property to seek its

return. Comprehensive 579 F. 3d at 1002. To retrieve ill-gotten property under 41(g) a motion should be filed. Invoking the “civil equitable jurisdiction” the district court has when no criminal charges have been brought against the moving party. Id. at 1001.

There are four factors for the Court to consider in returning the property: first, the government showed a “callous disregard” constitutional rights of the moving party; second, the interest or need the moving party has in the property to be returned; third, whether the moving party will be permanently damaged by not returning the property; fourth, does the moving party have a remedy at law to solve the injuries. Ramsden 2 F.3d 325.

In Comprehensive it was the Major League Baseball Players association seeking the return of the testing results as the search and seizure breached a contract section for confidentiality. Comprehensive 579 F.3d at 1002. In the case at hand, Startest Inc, and the CFL are the movants seeking the return of the results of the player drug tests. Startest Inc had a contract with the CFL to keep all of the testing results anonymous. The CFL promised its players that the drug tests were going to be anonymous. These two entities should be considered separate when applying the four factors.

Hence, Startest Inc. as a movant should have all of the test results returned and all of the equipment seized. Startest has a vital interest in having the computers needed to run its business. The results are just as vitally important because confidentiality is a huge part of the current contract and many other contracts. These additional searches have violated the privacy right of this business to conduct itself in the manner it sees fit. There is not an adequate remedy at law that would otherwise solve the problems created by these seizures. Considering all of the factors together it is clear that just outcome in this situation is to return the seized data and equipment.

On the other hand is the CFL, and its rights were callously disregarded in an attempt to convict CFL players. The CFL is the connection between the players and Startest, in that the CFL sent its players to Startest to receive the confidential drug testing. The CFL represents the players in having an interest in the seized drug test. CFL has an independent interest in not exposing however many players from the league all at once and protecting itself from something so damaging. This is the only way for the CFL to protect its players, and no other legal remedy will solve the problem.

CONCLUSION

The Fourteenth Circuit Court was correct in holding that the respondent Colonial Football League has standing in suing on behalf of the league's players. The particularity requirement is heightened per the guidelines in Comprehensive. 579 at 989. The extended search by the government is not an exception to the plainview doctrine. The respondents StarTest and Colonial Football League, under Fed. R. Crim. P. 41(g), have the right to have the seized data, and computer to be returned to them.