

No. 2009-H20

**IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA**

United States of America,
Petitioners,

v.

StarTests, Inc. and the
Colonial Football League,
Respondent.

On Writ of Certiorari To The
United States Court Of Appeals
For The Fourteenth Circuit

BRIEF FOR THE PETITIONER

Team # 3
Counsel for Petitioner
13 January 2010

Table of Contents

Table of Contents i

Table of Authorities iv

Questions Presented..... ix

Constitutional Provisions and Statutes Involved 1

Statement of the Case 1

Summary of the Argument 4

Argument..... 7

I. The files were in plain view, because the agents were legally present, they had a legal right of access to the computer files, and the incriminating nature of the information was immediately apparent.....7

A. The agents had a legal right to be present because the warrant was facially valid and not overbroad..... 8

B. The agents had a legal right of access to the computer databases and any enclosed files they were in a lawful position from which both to view the information and to ascertain whether its criminal nature was immediately apparent. 12

1. The agents were entitled to view all the files within the database in order to ascertain their relevancy to the information covered by the warrant. 13

2. The agents were entitled to view all the files within the database because of the confusing configuration of the files, the complexity of the databases, the hidden and mislabeled files..... 15

3.	The agents were entitled to view all the files within the database because they looked in places where they would reasonably expect to find the information covered by the warrant, and never abandoned their original search to conduct a search not covered by the warrant.....	16
C.	The criminal nature of the information was immediately apparent because the evidence provided probable cause that criminal activity had occurred.	19
D.	In concluding the discussion of the first issue, the government properly seized the evidence pursuant to a valid warrant and under the plain view exception.....	20
II.	The CFL does not have standing to sue on behalf of its members.	20
A.	The Court granted certiorari to determine whether the CFL has standing to bring suit on behalf of its members, thus the CFL must meet the associational standing test.....	21
B.	The CFL does not possess associational standing because its individual members do not meet the standing requirements that justify the Court’s exercise of equitable jurisdiction.	22
1.	The government did not act with callous disregard of the players’ Fourth Amendment rights.	23
2.	The players are not plainly aggrieved by the deprivation because they have no need for the copies and have no possessory interest in the copies.....	25
3.	The players have not and will not suffer any irreparable injury if the copies are not turned over to StarTests.	27
4.	The players have another adequate remedy at law available.....	29

III. The heightened warrant issuance protocols required in the decision below and in <i>Comprehensive Drug Testing</i> should be rejected.	31
A. The <i>CDT</i> protocol improperly under-rules this Court’s plain view jurisprudence, which has been followed by numerous circuit and state courts and remains valid law.....	32
B. The <i>CDT</i> rule contradicts the new Federal Rule of Criminal Procedure 41 adopted in December 2009.	35
1. <i>CDT</i>’s inventory requirement conflicts with Rule 41’s inventory requirement.....	35
2. <i>CDT</i>’s data-retention requirement conflicts with Rule 41’s data-retention requirement.....	36
Conclusion	37
Appendix.....	I

Table of Authorities

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV. 9, I

STATUTES

Rules Enabling Act, 28 U.S.C. § 2072 (West, Westlaw through 1990 amendments) 42, 45

RULES

Fed. R. Crim. P. 12(b)(3)(C) (West, Westlaw through 2002) 35, 45

Fed. R. Crim. P. 41(f)(1)(B) (West, Westlaw through 2009) 42, 43, 45

Fed. R. Crim. P. 41(g) (West, Westlaw through 2002) 25, 46

REGULATIONS

Sup. Ct. R. 24.1(a) 25, 46

UNITED STATES SUPREME COURT CASES

Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976) 20

Arizona v. Hicks, 480 U.S. 321 (1987) 23, 40

Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) 11

Horton v. California, 496 U.S. 128, 136-37 (1990) passim

Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333, 343 (1977) 26

Kyllo v. United States, 533 U.S. 27, 41 (2001) 40

Mincey v. Arizona, 437 U.S. 385, 390 (1978) 40

Nynex Corp. v. Discon, 525 U.S. 128, 140 (1998) 25

<i>Pennell v. San Jose</i> , 485 U.S. 1, 7 (1988).....	25, 26
<i>Texas v. Brown</i> , 460 U.S. 730, 741-42 (1983).....	23
<i>United States v. Calandra</i> , 414 U.S. 338, 347-48 (1974).....	38
<i>Vernonia Sch. Dist. 47J v. Acton</i> , 515 U.S. 646, 663 (1995).....	20
<i>Warth v. Seldin</i> , 422 U.S. 490, 515 (1975).....	26
<i>Weeks v. United States</i> , 232 U.S. 383, 398 (1914)	38

UNITED STATES COURT OF APPEALS CASES

<i>22 Blackwatch Trail v. United States</i> , 271 Fed. Appx. 52, 53 (2d Cir. 2008).....	27
<i>Angel-Torres v. United States</i> , 712 F.2d 717, 720 (1st Cir. 1983)	35
<i>In re 6455 South Yosemite</i> , 897 F.2d 1549, 1557 (10th Cir. 1990)	33
<i>In re EyeCare Physicians of Am.</i> , 100 F.3d 514, 516 (7th Cir. 1996).....	34
<i>In re Grand Jury Proceedings</i> , 115 F.3d 1240, 1246 (5th Cir. 1997)	27, 33
<i>In re Search of 4801 Flyer Ave.</i> , 879 F.2d 385, 387 (8th Cir. 1989).....	passim
<i>Kitty's East v. United States</i> , 905 F.2d 1367, 1370 (10th Cir. 1990).....	27, 28, 33
<i>O'Rourke v. City of Norman</i> , 875 F.2d 1465, 1472 (10th Cir. 1989).....	40
<i>Pieper v. United States</i> , 604 F.2d 1131, 1133 (8th Cir. 1979).....	27
<i>Ramsden v. United States</i> , 2 F.3d 322, 324-25 (9th Cir. 1993)	passim
<i>Richey v. Smith</i> , 515 F.2d 1239, 1243 (5th Cir. 1975).....	27, 33
<i>Sovereign News Co. v. United States</i> , 690 F.2d 569, 577-78 (6th Cir. 1982).....	36
<i>Standard Drywall, Inc. v. United States</i> , 668 F.2d 156, 157 n.2 (2d Cir. 1982)	34
<i>United States v. Abrams</i> , 615 F.2d 541, 543 (1st Cir. 1980)	39
<i>United States v. Adjani</i> , 452 F.3d 1140, 1149-50 (9th Cir. 2006)	14, 15, 39, 41
<i>United States v. Beusch</i> , 596 F.2d 871, 877 (9th Cir. 1979).....	18

<i>United States v. Brooks</i> , 427 F.3d 1246, 1252 (10th Cir. 2005).....	16
<i>United States v. Buchanan</i> , 910 F.2d 1571, 1573 (7th Cir. 1990).....	15
<i>United States v. Campos</i> , 221 F.3d 1143 (10th Cir. 2000)	39
<i>United States v. Cardwell</i> , 680 F.2d 75, 77 (9th Cir. 1982)	39
<i>United States v. Carey</i> , 172 F.3d 1268 (10th Cir. 1999)	21, 23, 39
<i>United States v. Cartier</i> , 543 F.3d 442, 448 (8th Cir. 2008)	14
<i>United States v. Comprehensive Drug Testing</i> , 579 F.3d 989 (9th Cir. 2009).....	passim
<i>United States v. Copeman</i> , 458 F.3d 1070, 1073 (10th Cir. 2006).....	35
<i>United States v. Dean</i> , 80 F.3d 1535, 1542 (11th Cir. 1996).....	27, 33
<i>United States v. Donnes</i> , 947 F.2d 1430, 1438 (10th Cir. 1991).....	40
<i>United States v. Francis</i> , 646 F.2d 251, 263 (6th Cir. 1981).....	36
<i>United States v. Giberson</i> , 527 F.3d 882, 886 (9th Cir. 2008)	15, 41
<i>United States v. Grimmett</i> , 439 F.3d 1263 (10th Cir. 2006).....	21
<i>United States v. Hill</i> , 19 F.3d 984, 989 (5th Cir. 1994).....	23
<i>United States v. Kama</i> , 394 F.3d 1236, 1238 (9th Cir. 2005).....	28, 33
<i>United States v. Khanani</i> , 502 F.3d 1281 (11th Cir. 2007)	14
<i>United States v. Law Offices of Brown and Norton</i> , 341 F.3d 404, 415 (5th Cir. 2003)..	33
<i>United States v. Peacock</i> , 761 F.2d 1313, 1315 (9th Cir. 1985).....	15
<i>United States v. Premises Known as 608 Taylor Avenue</i> , 584 F.2d 1297, 1303 (3d Cir. 1978)	36
<i>United States v. Spilotro</i> , 800 F.2d 959, 963 (9th Cir. 1986)	12, 13
<i>United States v. Tamura</i> , 694 F.2d 591, 596 (9th Cir. 1982).....	passim
<i>United States v. Walser</i> , 275 F.3d 981 (10th Cir. 2001).....	21

<i>United States v. Wong</i> , 334 F.3d 831, 835-36 (9th Cir. 2003).....	15, 23
<i>Watson v. Abington Twp.</i> , 478 F.3d 144, 151 (3d Cir. 2007)	32
<i>White Fabricating Co. v. United States</i> , 903 F.2d 404, 413 (6th Cir. 1990)	35
<i>Young v. Murphy</i> , 90 F.3d 1225, 1236 (7th Cir. 1996).....	32

UNITED STATES DISTRICT COURT CASES

<i>In re Search of Florilli Corp.</i> , 33 F. Supp. 2d 799, 802 (S.D. Iowa 1998).....	28
<i>Johnson v. United States</i> , 971 F. Supp. 862, 866 (D.N.J. 1997).....	30, 31
<i>United States v. Borowy</i> , 577 F. Supp. 2d 1133, 1137 (D. Nev. 2008)	11, 24
<i>United States v. Gray</i> , 78 F. Supp. 2d 524, 529 (E.D. Va. 1999).....	16, 17, 19, 21
<i>United States v. Hunter</i> , 13 F. Supp. 2d 574, 583 (D. Vt. 1998)	16, 17, 19
<i>United States v. Maali</i> , 346 F. Supp. 2d 1226, 1265 (M.D. Fla. 2004)	16
<i>United States v. O'Brien</i> , 498 F. Supp. 2d 520, 538-39 (N.D.N.Y. 2007)	12
<i>United States v. Rosario</i> , 558 F. Supp. 2d 723, 727 (D. Ky. 2008).....	23, 24
<i>United States v. Triumph Capital Group, Inc.</i> , 211 F.R.D. 31, 47 (D. Conn. 2002)	19

STATE CASES

<i>Commonwealth v. Hinds</i> , 768 N.E.2d 1067 (Mass. 2002).....	17
<i>El-Amin v. Commonwealth</i> , 607 S.E.2d 115, 117 (Va. 2005)	20
<i>People v. Carratu</i> , 755 N.Y.S.2d 800, 809 (N.Y. Sup. Ct. 2003)	16
<i>Rosa v. Commonwealth</i> , 628 S.E.2d 92 (Va. Ct. App. 2006).....	17, 20
<i>State v. Schroeder</i> , 613 N.W.2d 911, 917 n.3 (Wis. Ct. App. 2000).....	17, 19, 22, 41

UNREPORTED CASES

Account Servs. Corp. v. United States, 2009 U.S. Dist. LEXIS 76531, at *8 (S.D. Cal. Aug. 27, 2009) 29

United States v. Daprano, 2008 U.S. Dist. LEXIS 92693, at *14 (D.N.M. July 3, 2008).35

United States v. Farlow, 2009 U.S. Dist. LEXIS 112623, at * 20 n.3 (D. Me. Dec. 3, 2009)
..... 38, 41

United States v. Mann, 2008 WL 1701743 (N.D. Ind. Apr. 8, 2008)..... 20, 21

Questions Presented

I. Under the plain view exception to the Fourth Amendment's warrant requirement, when agents are in a position to legally see computer files whose incriminating nature is immediately apparent, may they seize and retain those files without conducting any further searches?

II. Does the Colonial Football League lack standing to sue under Fed. R. Crim. P. 41(g) on behalf of its players to recover property when the original property has been returned and only copies are held by the FBI, the players are not injured by the FBI's retention of the copies, and the FBI is conducting an ongoing investigation using the copies?

III. Should this Court reject the heightened warrant issuance protocols required in the Fourteenth Circuit below and in *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (2009) when the protocols prohibit the government from relying on the plain view doctrine during electronic computer searches?

Constitutional Provisions and Statutes Involved

The texts of the following constitutional provisions and statutes relevant to the determination of the present case are set forth in the Appendix: Const. amend. IV; Rules Enabling Act, 28 U.S.C. § 2072 (West, Westlaw through 1990 amendments); Fed. R. Crim. P. 12(b)(3)(C) (West, Westlaw through 2002); Fed. R. Crim. P. 41(f)(1)(B) (West, Westlaw through 2009); Fed. R. Crim. P. 41(g) (West, Westlaw through 2009); Sup. Ct. R. 24.1(a).

Statement of the Case

I. Opinions Below

StarTests, Inc. (StarTests) and the Colonial Football League (CFL), in the United States District Court for the District of Wythe, filed a Federal Rule of Criminal Procedure 41(g) motion seeking return of seized property. (R. at 1.) The District Court denied that motion (R. at 6), after which StarTests and the CFL appealed the District Court's decision to the United States Court of Appeals for the Fourteenth Circuit. (R. at 7.) The Circuit Court then reversed the District Court's decision, ordering a return of all digital equipment to StarTests. (R. at 17.) Subsequently, the United States petitioned for a writ of certiorari from this Court, which it granted in its Order Granting Review. (R. at 20.)

II. Statement of the Facts

A few weeks after (R. at 9) the 1 November 2008 (R. at 2) seizure of StarTests, Inc.'s (StarTests) computer equipment, FBI agents confirmed suspicions of widespread steroid, narcotic, marijuana and other illegal substance abuse among the athletes in the Colonial Football League (CFL). (R. at 2, 9.) Inspired by the illegal-substance-abuse controversies infecting other professional sports at the time (R. at 8), the CFL has required annual drug testing since its first

test in 2005. (R. at 1, 8.) To administer the tests, the CFL hired StarTests (R. at 1, 8)—an independent business that administers drug tests for businesses, sports organizations and schools, among others (R. at 1, 8)—to conduct blood or urine tests on the players (R. at 8), assuring the players that their names and results would be kept confidential at the StarTests facility, with only percentages of outcomes reported to CFL and the public. (R. at 1, 8.)

In July of 2008, the FBI commenced an investigation in response to intense media scrutiny of illegal substance abuse in the CFL. (R. at 1, 7.) During its investigation, the FBI gathered evidence revealing that there was significant illegal steroid traffic between distributors and several franchises within professional football, (R. at 7), that five specific players within the CFL had talked about procuring steroid to “keep the rivalry interesting,” (R. at 7), and that of these five players, the rookies hoped to advance their status in their team, while the two MVPs hoped to increase their salaries and endorsement deals. (R. at 8.) The five players suspected of involvement in illegal substance trafficking and abuse were Barry Reynolds (Wide Receiver) and John Reeves (Quarterback) of the Wythe City Lightning, and Danny Rodriguez, Michael Fleming and Ace Hall (all rookies) of the Marshall Phoenixes. (R. at 1, 7.) Using the evidence described above, the FBI assembled a case for probable cause that the players had used steroids during the testing program (R. at 1), requesting in its affidavit for a warrant for permission to seize, among other things, “all computer records, files, and equipment” related to the StarTests-administered tests. (R. at 1-2, 8.) The affidavit also explained that computer equipment and files would need to be seized and reviewed at a later date because the data was massive in quantity (discouraging an on-site search), some files may be mislabeled or deceptively named for confidentiality purposes, and de-encryption may require software not available on-site. (R. at 2, 8.) Magistrate Judge Leon issued the warrant, authorizing a search of computer equipment and

storage devices, and, “where an on-site search would be impracticable—seizure of either a copy of all data or the computer equipment itself.” (R. at 2, 8.) Law enforcement personnel trained in searching and seizing computer data were to determine whether the equipment should be seized, and, if the equipment was seized, “appropriately trained personnel” were then to review the data and retain information authorized by the warrant while returning the rest. (R. at 2, 8.)

Throughout, the search and seizure were to be restricted to information “reasonably related to the investigation into the five named players’ illegal steroid use.” (R. at 2, 8.)

FBI agents executed the warrant on the morning of 1 November 2008. (R. at 2.) Upon arrival and initial investigation of the StarTests facility, the agents learned that StarTests had been conducting tests for the past four years (R. at 2) and that most computers in the facility included at least one database relating to the drug tests. (R. at 2.) The basic structure was a “computer-hopping” system as follows: one computer contained a database recording players’ personal and health information (R. at 2, 8 n.3); one computer contained a database listing the assigned numbers given to the players prior to the test date and the numbers’ corresponding names (R. at 2, 8 n.3); and one other computer contained a database containing the actual results of the test, corresponding to the subjects’ identification numbers (R. at 2, 8 n.3) Further, databases were saved on different computers under different names (R. at 2, 8 n.3), many of the files were encrypted or hidden on various H- or S- drives, and the computer-hopping procedure was repeated for every year the test was administered (R. at 2) so that no computer had two databases from any one test administered in any one year (R. at 8 n.3). The purpose of this structure was to reduce the risk of an employee or third party from gaining access to the information and to meet the confidentiality commitment made by the CFL and StarTests to the players (R. at 2 n.1, 8). When the manager of the StarTests facility explained the computer-

hopping system to the head FBI agent (R. at 8), the agent—a computer forensics agent (R. at 8)—decided to seize or copy all computer equipment, depending on the equipment’s ease of movement (R. at 2, 8), since the search could have taken several days (R. at 2). Subsequently, the computers and digital media were taken to the FBI bureau office in Wythe City. (R. at 2, 8-9.)

At the bureau office, computer forensics agents (R. at 2) spent the next few weeks (R. at 9) viewing the databases and matching the test results to the five players (R. at 2). During their review of the information, the computer personnel came across test results of other CFL players who tested positive for steroids and other illegal substances (R. at 2, 9), including widespread narcotics and marijuana use (R. at 9). As a result of the discovery of this extensive illegal-substance abuse, (R. at 2, 9), the FBI decided to expand its investigation to include all illegal drug possession and sale within professional football. (R. at 2.) Deciding to retain StarTests’ databases, the FBI returned all unneeded equipment to StarTests after copying and inventorying the computer hard drives. (R. at 2, 9.) StarTests and CFL brought a timely motion pursuant to Federal Rule of Criminal Procedure 41(g) to compel return of the property.

Summary of the Argument

The FBI agents properly seized the information in question pursuant to the plain view exception to the general warrant requirement. The evidence was in plain view because the agents were legally present, the agents had a legal right to view all of the files within the databases, and the incriminating nature of the information was immediately apparent.

The agents had a legal right to be present because the warrant was facially valid and not overbroad. The warrant was substantiated by the evidence for probable cause articulated by the

government in its affidavit. It was not overbroad because it contained objective standards for the agents to follow in determining which evidence would fall under the scope of the warrant.

The agents also had a legal right of access to the computer databases and any enclosed files because they were not only present under a valid warrant, but were accessing databases specifically described in the warrant. The agents conducted a search consistent with the purposes of the warrant, and thereby placed themselves in a legal position to view the information not covered by the warrant and to ascertain whether its incriminating nature was immediately apparent. In order to ascertain the relevancy of the information covered by the warrant, the agents were entitled to view all of the files within the database while looking in places they would reasonably expect to find the information covered by the warrant.

Finally, when the agents viewed the test results revealing illegal drug use, the criminal nature of the evidence was immediately apparent. The test results provided probable cause that criminal activity had taken place, and therefore the agents were justified in seizing the information as evidence.

As for the second issue, the CFL does not have standing to sue for the return of property under Fed. R. Crim. Pro. 41(g) on behalf of its members. Associational standing depends on three conditions, two of which the CFL meets and one of which it does not. The unmet condition requires that the CFL members meet Rule 41(g)'s four standing requirements.

The players lack standing because they cannot and do not demonstrate (1) that the government has callously disregarded their rights under the Fourth Amendment, (2) that they are plainly aggrieved by the deprivation of the property, (3) that the government's continued possession of the property injures them irreparable, and (4) that they lack an adequate remedy at law.

First, the government respected the players' rights when conducting the seizure at StarTests. Since the search and seizure occurred both pursuant to a warrant supported by probable cause and under the plain view exception, the government did not act with callous disregard.

Second, the players lack a sufficient possessory interest in the copied discs and data. Since the agreement between the CFL, StarTests, and the players did not indicate that the players gained a possessory interest in the test results or in the equipment on which they were stored, there is no evidence to support a player's claim of possessory interest.

Neither has the government injured the players irreparably, for the government has returned the original data and computer equipment. The government is entitled to maintain its possession of the copied discs and data, since the government is using it in an ongoing investigation.

Finally, the players do not lack an adequate remedy at law because, upon indictment, they may offer a motion for suppression of evidence. A movant lacks an adequate remedy at law only if no other sufficient option exists by which the movant can protect his or her interests. As a result, the individual members cannot establish standing, so the CFL likewise lacks standing to represent its members in this action. This Court should dismiss the CFL as a party for lack of standing.

This Court should also reject the protocol proposed in *United States v. Comprehensive Drug Testing*, 579 F.3d 989 (9th Cir. 2009), because it constitutes a rogue under-ruling of the Supreme Court's plain-view jurisprudence, hampers the legitimate needs of law enforcement, and contradicts the Supreme Court's recent revision of Federal Rule of Criminal Procedure 41, which took effect on December 1, 2009.

The plain view doctrine is a legitimate tool by which a law enforcement official may protect the community from criminal activity. To require the police to forswear reliance on the plain view exception in every computer-search case would severely hamper the ability of law enforcement to protect society from criminals.

Furthermore, the *CDT* protocol contradict the newly-adopted Federal Rule of Criminal Procedure 41, which only requires the government to provide notice of the hardware or physical-storage media obtained pursuant to a warrant. The *CDT* protocol, however, requires a detailed report of every piece of data obtained. Likewise, the *CDT* protocol bars a searching officer from retaining copies of electronically-stored information, which the new Rule 41 allows. Since the *CDT* rules contradict this Court's constitutional and statutory authority to adopt and promulgate binding rules, *CDT*'s onerous protocol must yield to the Supreme Court's rules.

Argument

I. The files were in plain view, because the agents were legally present, they had a legal right of access to the computer files, and the incriminating nature of the information was immediately apparent.

The plain view doctrine is an essential legal tool, allowing the courts to consider evidence of criminal activity in situations where the suspect himself has not demonstrated any expectation of privacy. Allowing police officers to extend their justification for conducting a search to allow them to view and subsequently seize, without a warrant, incriminating evidence left in plain view, is critical to preserving order in society.

Although the plain view exception cannot “extend a general exploratory search,” it is nevertheless an essential tool that allows officers to “supplement the prior justification [of a warrant].” *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971); *see also United States v. Borowy*, 577 F. Supp. 2d 1133, 1137 (D. Nev. 2008) (“[T]he plain view doctrine is just an

extension of the original justification for an intrusion.”). Given this supplemental role, the plain view doctrine may justify a warrantless seizure whenever the agents have both a legal right to be present and a legal right of access to the object seized, and when the incriminating nature of the object is immediately apparent. *Horton v. California*, 496 U.S. 128, 136-37 (1990). In this case, because the agents seized the information without searching outside the scope of the warrant, the seizure was justified under the plain view exception to the warrant requirement.

This Court reviews a district court's decision to exercise its equitable jurisdiction under Rule 41(g) for abuse of discretion. *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993). When reviewing the district court's interpretation of 41(g), however, this Court applies the de novo standard. *Id.* Additionally, the district court's acceptance of jurisdiction need not be given deference if it did not apply the proper jurisdictional analysis. *In re Search of 4801 Flyer Ave.*, 879 F.2d 385, 388 (8th Cir. 1989) (applying de novo review where the district court did not require "a showing of callous disregard of the fourth amendment, irreparable injury if relief is not granted, and lack of an adequate remedy at law" before assuming jurisdiction). Since the United States District Court for the District of Wythe did not apply the standing requirements which would justify that court's exercise of equitable jurisdiction under 41(g), this Court reviews the standing decision de novo. *Id.*

A. The agents had a legal right to be present because the warrant was facially valid and not overbroad.

Because the plain view doctrine only applies to seizures, *Horton*, 496 U.S. at 134, it preliminarily requires the seizing officers to have been legally present under a valid warrant. *Id.* at 136-37. Under the Fourth Amendment, a warrant is only valid when it is “issue[d] . . . upon probable cause, supported by oath or affirmation, and particularly describ[es] the place to be

searched, and the persons or things to be seized.” U.S. Const. amend. IV. A valid warrant, therefore, must be issued by a neutral and detached magistrate, it must be supported by an oath, it must describe with particularity the objects to be seized, and the oath must establish probable cause to believe that the things to be seized will be found in the place to be searched. *United States v. O’Brien*, 498 F. Supp. 2d 520, 538-39 (N.D.N.Y. 2007) (internal citations omitted).

The warrant in this case was issued by Judge Leon, of the United States District Court for the District of Wythe. (R. at 2, 8.) Judge Leon was apprised of the facts and the probable cause present to support the warrant in an affidavit submitted by the government. (R. at 1, 8.) There is no evidence that he was not a neutral and detached magistrate. The Record is also silent as to whether the warrant was supported by an oath or affirmation, so presumably the government swore to the truth of the information it provided in the affidavit.

In order for a warrant to be sufficiently particular under the Fourth Amendment, it must be specific enough to allow the agent conducting the search to “reasonably . . . identify the things authorized to be seized.” *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986). This requirement interfaces with the probable cause requirement by keeping the issuing magistrate “fully apprised of the scope of the search” to enable him to “determine whether the entire search is supported by probable cause.” *Id.* The Supreme Court has relied upon this particularity requirement as the objective standard necessary to protect against unreasonable seizures. In *Horton*, the Court refused to require that police officers discover evidence subjectively and inadvertently in order to seize it under the plain view exception. The Court supported this new rule by arguing that “evenhanded law enforcement is best achieved by the application of *objective standards* of conduct, rather than standards that depend upon the subjective state of mind of the officer.” *Horton*, 496 U.S. at 138 (emphasis added). The requirement for

particularity is essential as an objective standard protecting against the wavering intent of a police officer.

There are several factors that courts consider when determining the specificity of a warrant. These factors include whether there is probable cause to seize all of a class of items described in the warrant, whether the warrant contains reasonably objective standards to allow officers to pinpoint for seizure only items covered by the warrant, and whether the government could have described the items in the warrant with more specificity at the time the warrant was issued. *Spilotro*, 800 F.2d at 963. The first consideration does not apply here because the warrant did not describe any class of information that needed probable cause beyond that established by the affidavit.

The warrant contained reasonably objective standards by which the agents could determine which information would fall under the warrant. The agents initially requested access to “all computer records, files, and equipment” related to the tests of the five players. (R. 1-2, 8.) Judge Leon granted them permission to search “computer equipment” and “storage devices,” and where it was impractical to conduct an on-site search, to seize “either a copy of all data or the computer equipment itself.” (R. 2, 8.) They were only to search for information “reasonably related to the investigation into the five named players’ illegal steroid use.” (R. 2, 8.) Moreover, officers “trained in searching and seizing computer data” were to determine whether a computer needed to be seized. (R. 2, 8.) Finally, if a computer was seized, trained officers were required to review the information and retain only information authorized by the warrant. (R. 2, 8.) These standards are reasonably objective because the warrant could not have been more particular at the time it was issued, as the information about the three-part database system used

by StarTests was not discovered until after the agents had already executed the warrant. (R. at 1-2.)

The warrant's lack of a more particularized search strategy does not render it invalid *per se*, because no court requires a meticulously planned search method to fulfill the particularity requirements. Computer searches are inherently complex, and requiring officers to pinpoint their search beforehand would prevent them from casting a net wide enough to gather the information authorized under the warrant. *United States v. Adjani*, 452 F.3d 1140, 1149-50 (9th Cir. 2006). *See also United States v. Cartier*, 543 F.3d 442, 448 (8th Cir. 2008) (“[W]e decline to make a blanket finding that the absence of a search methodology or strategy renders a search warrant invalid *per se*.”). For example, the court in *United States v. Khanani*, 502 F.3d 1281 (11th Cir. 2007), found a search warrant valid even though it lacked a written search protocol because the agents only seized computers relating to the warrant while computer examiners determined what information the warrant covered. *Id.* at 1290. These are the same requirements contained in the warrant in this case. The agents only seized nearly all the computer equipment at StarTests because they discovered that no one computer contained two databases from any one test administered in any one year. (R. 8, n.3.) The warrant was facially valid given the information available before the search, and the absence of a more specific search methodology does not render it invalid or lacking in particularity.

Finally, probable cause is reviewed for plain error, and determined by the totality of the circumstances. *United States v. Wong*, 334 F.3d 831, 835-36 (9th Cir. 2003). The agents in this case had probable cause to search the computers at the facility because, given the media attention and information gathered regarding the use of illegal steroids by players Reynolds, Reeves, Rodriguez, Fleming, and Hall, it was “reasonable to seek the evidence in the place indicated in

the affidavit,” namely, the StarTests testing facility. *United States v. Buchanan*, 910 F.2d 1571, 1573 (7th Cir. 1990) (quoting *United States v. Peacock*, 761 F.2d 1313, 1315 (9th Cir. 1985)).

The warrant in this case was “based on probable cause and clearly limited the types of documents and records that were seizable, ‘objectively describ[ing] the items to be searched and seized with adequate specificity and sufficiently restrict[ing] the discretion of agents executing the search.’” *United States v. Giberson*, 527 F.3d 882, 886 (9th Cir. 2008) (quoting *Adjani*, 452 F.3d at 1148). Moreover, the warrant “described the items to be searched and seized as particularly as could be reasonably expected given the nature of the crime and the evidence [the government] then possessed.” *Adjani*, 452 F.3d at 1149. Because the warrant met all the requirements, the agents had a legal right to be present at the StarTests facility and to search the computer databases.

B. The agents had a legal right of access to the computer databases and any enclosed files they were in a lawful position from which both to view the information and to ascertain whether its criminal nature was immediately apparent.

The essential safeguard against unreasonable intrusions under the Fourth Amendment is the watchful gaze of a “neutral, detached magistrate,” represented symbolically by a valid warrant. *United States v. Tamura*, 694 F.2d 591, 596 (9th Cir. 1982). The requirement that an agent be lawfully viewing an object is based on the policy that an agent may not seize evidence under the plain view exception when “he expects to find the item and discovers that which he was actually seeking.” *People v. Carratu*, 755 N.Y.S.2d 800, 809 (N.Y. Sup. Ct. 2003). The agents in this case, however, were acting under a valid warrant and searching within the scope of that warrant. Hence, everything they viewed was within the magistrate’s “watchful gaze,” and thus legally viewed.

1. The agents were entitled to view all the files within the database in order to ascertain their relevancy to the information covered by the warrant.

Courts recognize that, “[g]iven the numerous ways information is stored on a computer, openly and surreptitiously, a search can be as much an art as a science.” *United States v. Brooks*, 427 F.3d 1246, 1252 (10th Cir. 2005). Moreover, given the “massive storage capacity of modern computers,” searches of computer files “present the same problem as document searches—the intermingling of relevant and irrelevant materials.” *United States v. Gray*, 78 F. Supp. 2d 524, 529 (E.D. Va. 1999) (quoting *United States v. Hunter*, 13 F. Supp. 2d 574, 583 (D. Vt. 1998)). Therefore it is often inevitable that a search will uncover some irrelevant and innocuous files. *United States v. Maali*, 346 F. Supp. 2d 1226, 1265 (M.D. Fla. 2004).

Because the courts recognize the inherently disorganized nature of searching computer files, agents are justified in searching “all items in a set of files” so long as they follow the sufficiently specific guidelines contained in the warrant. *Tamura*, 694 F.2d at 595. Just as officers would be allowed to sort through a pile of papers to seek the documents authorized by the warrant, agents conducting a computer search may scan “innocuous documents” to “ascertain their relevancy.” *Hunter*, 13 F. Supp. 2d at 584.

Even if an agent encounters evidence not covered under the warrant, he or she conceivably need not obtain a new warrant for that evidence so long as he or she “continued the search under the original warrant, only actively seeking evidence of the underlying crime.” *State v. Schroeder*, 613 N.W.2d 911, 917 n.3 (Wis. Ct. App. 2000).

For example, in *United States v. Gray*, an agent was entitled to search “all of defendant’s files to determine whether they contained items that fell within the scope of the warrant.” *Gray*, 78 F. Supp. 2d at 529. Similarly, even though the agent in *Commonwealth v. Hinds*, 768 N.E.2d

1067 (Mass. 2002), possessed only a warrant for e-mail evidence, he was “not obligated to disregard files listed in plain view on the . . . directory whose titles suggested contents that were contraband.” *Id.* at 1073. In *Rosa v. Commonwealth*, 628 S.E.2d 92 (Va. Ct. App. 2006), an officer was even entitled to open and search deleted files on the defendant’s hard drive, because the officer was “entitled to examine all of appellant’s files to determine whether they contained items that fell within the scope of the initial warrant.” *Id.* at 96.

The agents in this case were clearly justified in viewing all the files within the set of files in the databases, if not only to determine which files related to the five players named in the warrant. In the course of their search, the agents would necessarily have examined both the databases containing the players’ identification information and the databases containing the players’ test information. It was reasonable for them to have expected to find, in those databases, information reasonably related to the five players named in the warrant. Their observation of other information while in the database was therefore justified because of their legal right to view the information contained in those files under the purview of the warrant.

The structure of the databases used by StarTests is similar to the structure of a book or set of files, giving the agents the same right to view the files contained within the databases as they would have to view all the information contained in several chapters of a single book. Although the record is unclear as to the precise structure of each of the three databases, the information not covered by the warrant was nevertheless contained in the same “volume, book, or file with other documents . . . covered by the warrant.” *Tamura*, 694 F.2d at 595 n.2 (citing *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979)). Because this information was only “theoretically separable” from the information within the warrant, it “constitute[d] one volume or file folder” because it was included in the same database as the warranted information. *Beusch*, 596 F.2d at

877. Hence, the agents were legally viewing a volume of information within each database, and thus were entitled to view all the information contained within those “volumes.” Though they would not have been justified in conducting a rummaging, exploratory search through those files, they did possess a legal right to view them under the purview of the warrant.

2. The agents were entitled to view all the files within the database because of the confusing configuration of the files, the complexity of the databases, the hidden and mislabeled files.

Moreover, courts have found that computer files on a suspect’s computer are especially prone to being mislabeled, organized in a confusing way, or even deliberately concealed to hide criminal activity. *Gray*, 78 F. Supp. 2d at 528 (quoting *Hunter*, 13 F. Supp. 2d at 582). The probability of mislabeled files has compelled courts to recognize that “[a]lthough care must be taken to minimize the intrusion, records searches require that many, and often all, documents in the targeted location be searched.” *Gray*, 78 F. Supp. 2d at 528. The court in *Schroeder* argued that “[w]hen searching computer files, investigators *necessarily* must look at all files.” *Schroeder*, 613 N.W.2d at 917. (emphasis added).

The court in *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 47 (D. Conn. 2002), noted that,

[d]irectories and files can be encrypted, hidden or misleadingly titled, stored in unusual formats, and commingled with unrelated and innocuous files that have no relation to the crimes under investigation. Descriptive file names or file extensions such as “.jpg” cannot be relied on to determine the type of file because a computer user can save a file with any name or extension he chooses. Thus, a person who wanted to hide textual data could save it in a manner that indicated it was a graphics or image file.

Id. at 47. The court in *Triumph Capital* found that because of this potential for hidden and confusingly labeled files, the officers acted within the scope of the warrant by “opening, screening and manually reviewing data and files in all areas of the hard drive, including image files.” *Id.*

In this case, the government’s affidavit anticipated that some of the files at StarTests would be mislabeled or deceptively labeled for confidentiality purposes. (R. at 2, 8.) Moreover, when the government began searching, they found that the databases were indeed saved on different computers under different names. (R. at 2, 8 n.3.) Many of the files were also encrypted or hidden on various H- or S- drives, and the computer forensics agent executing the warrant found the system far more complex than anticipated. (R. at 2, 8.) This level of complexity, due to the files being hidden and mislabeled in various ways to heighten confidentiality, provided the officers with a legal right to view all the files within the databases as they searched for evidence covered by the warrant.

3. **The agents were entitled to view all the files within the database because they looked in places where they would reasonably expect to find the information covered by the warrant, and never abandoned their original search to conduct a search not covered by the warrant.**

Armed with a legal right to view all files within a set of files, agents are only search for items covered by the warrant. The Supreme Court requires that “responsible officials, including judicial officials . . . take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy.” *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). The overriding question is always one of “reasonableness.” *Rosa v. Commonwealth*, 628 S.E.2d at 102 n.2 (citing *El-Amin v. Commonwealth*, 607 S.E.2d 115, 117 (Va. 2005)). Therefore, officers may not rummage through the files of a computer, abusing their legal privilege to legally view the files in the course of their search, and yet, officers are not required to use the least intrusive means of searching. *Rosa*, 628 S.E.2d at 102 n.2 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995)). The court in *Rosa* found that although the appellant’s expert had testified that another search alternative existed, the “officer acted reasonably in opening the

jpeg files to determine whether or not they contained relevant material.” *Rosa*, 628 S.E.2d at 102 n.2.

Particularly, officers may not abandon their search for the warranted information in order to conduct a side-search. For example, the officer in *United States v. Mann*, 2008 WL 1701743 (N.D. Ind. Apr. 8, 2008), while searching for images of voyeurism, properly seized images of child pornography because he “did not abandon his search for images of voyeurism.” *Id.* at *7. Similarly, the court in *United States v. Walser*, 275 F.3d 981 (10th Cir. 2001), justified an officer’s search that turned up incriminating evidence outside of the scope of the warrant because “no . . . wholesale searching occurred.” *Id.* at 987.

Likewise, the officer in *Gray*, while viewing evidence of child pornography, nevertheless “did not target those particular subdirectories because of their names, and, at all times . . . was searching for the materials that were the subject of the search warrant.” *Gray*, 78 F. Supp. 2d at 530. *See also United States v. Grimmett*, 439 F.3d 1263 (10th Cir. 2006) (search of computer for images justified because searching agent avoided exploratory, general search). Although the officer in *Gray* obtained a second warrant before searching for more child pornography, the court noted that he could have “continued his systematic search of defendant's computer files pursuant to the first search warrant, and, as long as he was searching for the items listed in the warrant, any child pornography discovered in the course of that search could have been seized under the "plain view" doctrine.” *Gray*, 78 F. Supp. 2d at 531 n.11. In contrast, the officer in *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), after legally viewing a single image of child pornography, “proceeded to rummage through the hard drive for more images of child pornography,” a search that the court found to be unreasonable under the Fourth Amendment. *Walser*, 275 F.3d at 987 (discussing *Carey*, 172 F.3d 1268 (10th Cir. 1999)).

The agents in this case acted like the agents in *Walser, Gray, Mann, and Grimmett*. As in each of those cases, the agents did not conduct any searches for evidence not covered by the warrant, but merely viewed the extra evidence in the course of searching for evidence authorized by the warrant. There is no evidence that the agents ever abandoned their original search before seizing the evidence in plain view, or that they conducted any search for the extra evidence either before or after the seizure.

The turning point in the consideration is the time-line of action. If the agents in this case had been viewing files outside of the scope of the warrant and had not seized them, but continued to search for more of those kinds of files (i.e. outside of the scope of the warrant), they would not have been legally viewing those files and the search would have been invalid. Because the agents did not search the documents until they had seen the immediately incriminating evidence and seized it, they were justified in viewing the evidence in the first place. Hence, they legally viewed the documents that led to the seizure of the additional information.

Although the government in this case announced, after it had seized the evidence in plain view, that it intended to expand its investigation, there is no evidence that the government either searched or intended to search for evidence of illegal drug usage without obtaining a second warrant. Moreover, the first warrant provided the agents with a legal right to view all the files within the databases. Although the record is silent on the precise structure of the databases, this legal right most likely includes all the necessary evidence to prosecute the players not named in the warrant. Consequently, because the agents were “only actively seeking evidence of the underlying crime,” *Schroeder*, 613 N.W.2d at 917 n.3, they had every right to view the evidence not covered by the warrant, to seize it, and to subsequently obtain a second warrant if they believed a further search was necessary.

C. The criminal nature of the information was immediately apparent because the evidence provided probable cause that criminal activity had occurred.

Probable cause lies at the heart of the plain view doctrine. In *Arizona v. Hicks*, 480 U.S. 321 (1987), the Court finally clarified that plain view could no longer be based on reasonable suspicion. *Id.* at 326. In that case, the Court found that because an officer could not determine whether a speaker system was stolen by just looking at it, his seizure of the system based on his search for the serial numbers was unjustified. *Id.* at 325-26. In the context of computer searches, courts have found that plain view does not justify opening files purposefully to discover their incriminating nature, since that violates the legal-right-of-access requirement. *See Carey*, 172 F.3d at 1273 (finding that an officer was not justified in seizing files which were originally unopened, to which he did not have a legal right of access, and for which he had to purposefully search before their incriminating nature became apparent); *United States v. Wong*, 334 F.3d 831, 838 (9th Cir. 2003) (finding that an officer was justified in seizing graphic files because he was searching for files related to the warrant and discovered the photos, the criminal nature of which was immediately apparent).

In order for the officers to be able to seize something the criminal nature of which is immediately apparent, the officers must have “probable cause to believe that the object they are viewing is contraband or evidence of a crime.” *United States v. Rosario*, 558 F. Supp. 2d 723, 727 (D. Ky. 2008) (citing *Texas v. Brown*, 460 U.S. 730, 741-42 (1983)). *See United States v. Hill*, 19 F.3d 984, 989 (5th Cir. 1994) (“[T]he seizure must be supported by probable cause to believe that the item viewed is either contraband or will be useful in establishing that a crime has been committed.”). In *Rosario*, because the officers had received reports of child pornography on the defendant’s computer, they had “probable cause to believe that Rosario’s computer hard drive . . . contained child pornography,” and thus were justified in seizing the computer.

Rosario, 558 F. Supp. 2d at 727. Similarly, the court in *United States v. Borowy*, found that because the officer viewing the file names had probable cause to believe that they were files containing child pornography, given their titles, he was justified in seizing the computer files. *Borowy*, 577 F. Supp. 2d. at 1138. The same is true in this case, where the agents seized the databases containing information beyond the scope of the warrant because they were lawfully viewing those files, and because they had probable cause to believe that the databases would contain evidence of criminal activity, i.e. illegal drug use.

D. In concluding the discussion of the first issue, the government properly seized the evidence pursuant to a valid warrant and under the plain view exception.

Because the agents were acting under a valid, particular warrant, they had a legal right to be present at the StarTests facility to search and possibly seize the necessary computers.

Because of the inherent complexity of computer searches, because the warrant was sufficiently particular, because the files were hidden and encrypted, and because the agents never conducted a search for information not included in the warrant, the agents had a legal right to view all the files in the databases to determine which ones fell under the warrant. The evidence was in plain view because the information the agents viewed relating to illegal drug use constituted probable cause that it was evidence of criminal activity. Accordingly, the government meets all three requirements under the plain view doctrine, so it is justified in relying upon the exception to seize and retain evidence of the illegal drug use and use it as evidence against any relevant parties in a future prosecution. The government is also justified in using the evidence to expand its investigation and obtain further warrants, if necessary, to search and discover more incriminating evidence relating to illegal drug use.

II. The CFL does not have standing to sue on behalf of its members.

A. The Court granted certiorari to determine whether the CFL has standing to bring suit on behalf of its members, thus the CFL must meet the associational standing test.

This Court granted certiorari solely to determine whether the CFL has standing to bring a motion for return of property on behalf of its members under Federal Rule of Criminal Procedure 41(g). (R. at 20.) *See* Fed. R. Crim. P. 41(g) (West, Westlaw through 2002). This Court did not grant certiorari to determine whether the CFL has personal standing, (R. at 20), therefore the Respondent's arguments must be limited to associational standing. *See* Sup. Ct. R. 24.1(a); *see also Nynex Corp. v. Discon*, 525 U.S. 128, 140 (1998) (noting that matters outside the scope of the Supreme Court's grant of certiorari cannot be raised by the attorneys). The Petitioner, therefore, focuses solely on associational standing in concluding that the Respondent lacks standing.

An organization may sue on behalf of its members, even when the organization itself would otherwise lack standing, if the organization meets three criteria. *Pennell v. San Jose*, 485 U.S. 1, 7 (1988) (citing *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). First, associational standing is appropriate only where the individual members of the movant organization would have personal standing to bring the motion. *Pennell*, 485 U.S. at 7. Second, the members' interests that the organization seeks to protect must be "germane to the organization's purpose." *Id.* (quoting *Hunt*, 432 U.S. at 343). Finally, an organization may bring suit on behalf of its members if neither the claim asserted nor the relief sought "require[] the participation of [the] individual members in the lawsuit." *Id.* at 7 (quoting *Hunt*, 432 U.S. at 343); *see also Warth v. Seldin*, 422 U.S. 490, 515 (1975) (holding that while damages may not be sought when standing is gained only through association, other forms of prospective relief are appropriate). The CFL, however, has not satisfied these requirements.

B. The CFL does not possess associational standing because its individual members do not meet the standing requirements that justify the Court's exercise of equitable jurisdiction.

While the interest asserted is germane to the CFL's purpose and the relief requested does not require the participation of the CFL's members, the individual members do not possess personal standing to bring the 41(g) motion for a return of property, so the CFL does not have associational standing. Since the CFL cannot meet this requirement of the associational standing test, this Court should dismiss CFL for lack of standing.

When offered before a criminal indictment, a Rule 41(g) motion for return of property is a claim in equity that requests the court to invoke its equitable jurisdiction. *22 Blackwatch Trail v. United States*, 271 Fed. Appx. 52, 53 (2d Cir. 2008). Accordingly, a district court must exercise caution and restraint before assuming jurisdiction, which is only appropriate in exceptional cases. *United States v. Dean*, 80 F.3d 1535, 1542 (11th Cir. 1996); *Kitty's East v. United States*, 905 F.2d 1367, 1370 (10th Cir. 1990). In light of the equitable and exceptional nature of a preindictment Rule 41(g) motion, the federal courts have created a four-fold analysis to determine whether a plaintiff has standing to compel a court to exercise its equitable jurisdiction. *Ramsden*, 2 F.3d at 324-25 (listing four factors that a district court should consider in deciding whether to entertain a Rule 41(e) (now 41(g)) motion made prior to the initiation of criminal proceedings). In jurisdictions applying the full four-fold analysis when determining whether a movant has standing, the requirements include (1) whether the government showed a callous disregard for the constitutional rights of the movant, (2) whether the movant is plainly aggrieved by the deprivation of the property, (3) whether the movant will suffer irreparable injury if the government does not return the property, and (4) whether the movant has no other adequate remedy at law. *See In re Grand Jury Proceedings*, 115 F.3d 1240, 1246 (5th Cir.

1997); *see also Ramsden*, 2 F.3d at 325; *Richey v. Smith*, 515 F.2d 1239, 1243 (5th Cir. 1975). The Eighth Circuit applies a three-part analysis, requiring the movant to show “callous disregard of the fourth amendment, irreparable injury if relief is not granted, and lack of an adequate remedy at law,” *In re Search of 4801 Flyer Ave.*, 879 F.2d 385, 387 (8th Cir. 1989) (citing *Pieper v. United States*, 604 F.2d 1131, 1133 (8th Cir. 1979)), while the Tenth Circuit applies a two-part analysis, requiring the movant to demonstrate that deprivation of the property causes irreparable injury and that the movant is “otherwise without adequate remedy at law.” *Kitty’s East*, 905 F.2d at 1371. After evaluating all applicable requirements, if the balance of equities tilts in favor of reaching the merits of the Rule 41(g) motion, then the movant has sufficiently demonstrated standing and “the district court should exercise its equitable jurisdiction to entertain the motion.” *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005). The CFL’s standing claim fails under all four conditions and, consequently, this Court should dismiss the party.

Neither the District Court for the District of Wythe nor the Fourteenth Circuit below provided any analysis concerning the four requirements when these courts asserted jurisdiction over the Respondent’s Rule 41(g) motion. Thus, this Court determines each factor *de novo*. *See In re Search of 4801 Flyer Ave.*, 879 F.2d at 388 (explaining that the district court’s acceptance of jurisdiction need not be given deference in view of its failure to apply the proper four-factor analysis underlying the standing claim).

1. The government did not act with callous disregard of the players’ Fourth Amendment rights.

A government official acts with callous disregard of a movant’s Fourth-Amendment rights when he or she disregards “the requirements of Rule 41 or the authority of the investigator,” *In re Search of Florilli Corp.*, 33 F. Supp. 2d 799, 802 (S.D. Iowa 1998). Since

the seizure of the drives, documents, and specimens here was supported by a warrant, the seizure of the property was not a callous disregard of the movant's Fourth-Amendment rights.

Where the government agents comply with the Fourth Amendment, no callous disregard for the movant's rights occur. *See In re Search of 4801 Flyer Ave.*, 879 F.2d at 388 (holding that officers acting in good faith by searching under a warrant based on probable cause did not display callous disregard). When, however, the government conducts a search and seizure without an initial warrant or without some warrant exception justifying the seizure, the courts find that the government acts with callous disregard of the movant's rights. In *Ramsden*, the Ninth Circuit noted that a search of the movant's hotel room was unconstitutional because no "warrant was obtained and no exception to the warrant requirement was applicable." *Ramsden*, 2 F.3d at 325. Additionally, in *Ramsden* "the district court found that although the Government had the opportunity to secure a warrant, it simply chose not to comply with its obligations under the Fourth Amendment." *Id.* In another case, arising in the District Court for the Southern District of California, the court found that since the seizures at issue "were effected based on seizure warrants for which the magistrate judges made neutral and independent findings of probable cause," the government agents did not act with callous disregard of the movant's rights. *Account Servs. Corp. v. United States*, 2009 U.S. Dist. LEXIS 76531, at *8 (S.D. Cal. Aug. 27, 2009).

Rather than acting with callous disregard of the players' Fourth Amendment rights, the FBI agents in the instant case seized the data, drives, and specimens pursuant to a valid warrant and only seized unauthorized information pursuant to the plain view exception. By acting in accordance with the valid warrant and the plain view exception, the agents did not callously

disregard the players' rights, so the balance weighs against the ability of the players to assert standing.

2. The players are not plainly aggrieved by the deprivation because they have no need for the copies and have no possessory interest in the copies.

One is aggrieved by deprivation of property when one has been deprived of property in which one has a possessory interest and for which one has a legitimate need. *See Ramsden*, 2 F.3d at 325 (finding that the movant was aggrieved by the deprivation of his illegally obtained business records because “the documents are necessary for Ramsden to run his business”). When an individual has a possessory interest and a legitimate need for certain property, the government may satisfy the movant’s interests—thereby eliminating the grievance—by copying the documents and returning the originals (or copies) to the movant while retaining the information for legitimate government use. *See id.* at 327 (“documents and records that are relevant to ongoing or contemplated investigations and prosecutions may be returned to their owner as long as the government preserves a copy for future use”). Where the movant has established his possessory interest in the property and demonstrated a need for the property, “a court may order either the originals or copies of seized documents be returned to their owner and permit the Government access and/or use of the information.” *Johnson v. United States*, 971 F. Supp. 862, 866 (D.N.J. 1997). Additionally, when the movant has access to the information contained on the media that the government has seized, the movant cannot establish grievance at the deprivation. In *Johnson*, the United States District Court for the District of New Jersey denied a movant’s claim that he needed the seized tape because he was “in possession of the information contained on the [t]ape and, accordingly, return of the [t]ape [did] not appear necessary.” *Id.* at 867.

First, there is no indication that the players need the property. Not only as the government returned the original equipment and information, but, unlike in *Ramsden*, in which the movant needed the seized documents in order to run his business, the players have never needed the information for any purpose whatsoever. *See Ramsden*, 2 F.3d at 325.

Further, neither the CFL nor its players has a possessory interest in the copied discs or copied computer drives that the FBI has retained for its ongoing investigation. The agreement between StarTests, the CFL, and the players expressly noted that the players' "names and test results would remain confidential and stored in at [sic.] the StarTests facility, with only the percentage being released to the CFL and the public." (R. 1.) The agreement does not indicate that the players would ever receive a copy of their test results. Notably, the agreement does not state that the players have any sort of possessory right to the data, discs, or other drives that StarTests maintains. Since StarTests separates the data on multiple computers and drives, it is reasonable to conclude that the agreement did not vest the players with any possessory right to the discs, data, or computer drives, which were the sole property of StarTests. Since the data was stored on StarTests' property and requires advanced knowledge of the storage method in order for one to comprehend the information, it is reasonable to expect that the agreement would clearly state that a possessory right was created if the parties intended such. Since it is unreasonable to assume that the players have a possessory interest in StarTests' property, this Court should consider that condition unmet.

The lower courts refrained from making an ownership determination regarding the retained copies. (R. at 3.) The District Court for the District of Wythe merely assumed, without analysis, that "[e]ach player certainly would have the right to seek the return of his own drug testing records." (R. at 3.) This assumption seems to rest on another assumption, that privacy

interests are possessory interests which justify a 41(g) motion. This assumption is false. While a patient may have a privacy interest in a medical record, the Fourth Amendment expressly permits search and seizure of private information pursuant to a warrant. *Watson v. Abington Twp.*, 478 F.3d 144, 151 (3d Cir. 2007) (“Generally, a search or seizure must be carried out pursuant to a warrant to be considered reasonable under the Fourth Amendment.”). But “privacy” is not “possession” within the meaning of 41(g). Indeed, medical records are not considered the property of a patient. *Young v. Murphy*, 90 F.3d 1225, 1236 (7th Cir. 1996). Even a statutorily-vested right of a patient to view and inspect a medical record maintained by a hospital or doctor does not give a “property interest in those records to the patient.” *Id.* Thus, while the players may have a privacy interest in preventing their medical records from becoming publicly known, this privacy interest is not a possessory interest within the meaning of 41(g) sufficient to satisfy the grievance requirement. In light of the legitimate abrogation of the players’ privacy interest pursuant to the warrant and the plain-view exception, the players cannot establish an actual grievance.

3. The players have not and will not suffer any irreparable injury if the copies are not turned over to StarTests.

While every jurisdiction requires the movant to demonstrate that he or she will suffer irreparable injury if the seized property is not returned, the CFL has failed to do so. *See generally, Kama*, 394 F.3d at 1238; *In re Grand Jury Proceedings*, 115 F.3d at 1246; *Dean*, 80 F.3d at 1542; *Kitty's East* 905 F.2d at 1370; *In re Search of 4801 Flyer Ave.*, 879 F.2d at 387; *Richey*, 515 F.2d at 1243. The CFL has failed to make this demonstration because imminent indictment based on the content of seized property is not an irreparable injury. *Kitty's East*, 905 F.2d at 1371; *see also United States v. Law Offices of Brown and Norton*, 341 F.3d 404, 415 (5th Cir. 2003) (joining the other circuits in rejecting imminent indictment as an irreparable injury).

Since the lower courts in the instant case did not address the elements of 41(g) standing, the record is void of any argument concerning irreparable injury. Nonetheless, like the movants in countless other proceedings, the CFL may argue that the players would be irreparably injured by the risk of a future indictment resulting from the use of the information contained in the copies. The federal circuit courts, however, have foreclosed this argument. *See In re 6455 South Yosemite*, 897 F.2d 1549, 1557 (10th Cir. 1990) (holding that “the mere threat of imminent indictment does not establish irreparable injury as required for a motion under Rule 41([g])”); *Ramsden*, 2 F.3d at 326 (Ninth Circuit opinion holding that the “mere threat of prosecution is not sufficient to constitute irreparable harm”); *In re Search of 4801 Flyer Ave.*, 879 F.2d at 388-89 (Eighth Circuit opinion rejecting the argument that imminent indictment is an irreparable injury). In short, any argument that the CFL is injured because its players may face indictment pursuant to the copied data is not a legally-cognizable claim.

Additionally, when the government returns seized property—even though keeping copies—any injury that might have existed disappears and the 41(g) motion should be moot. *See Standard Drywall, Inc. v. United States*, 668 F.2d 156, 157 n.2 (2d Cir. 1982) (“We seriously question whether . . . a party could ever demonstrate irreparable harm when the Government either provides the party with copies of the items seized or returns the originals to the party and presents the copies to the jury”). Additionally, “a deprivation of property is not an issue [when] the government has provided [the movant] with copies of the requested seized documents.” *In re EyeCare Physicians of Am.*, 100 F.3d 514, 516 (7th Cir. 1996).

The fundamental question, however, is whether CFL (or the players) can suffer any irreparable injury when the property they have urged this Court to give them has never before been in their possession. Every case claiming irreparable injury under a Rule 41(g) motion

concerns property that, prior to the government's seizure, was in the possession of or within the possessory rights of the movant. As discussed above, however, the CFL and its players have never had possession of the seized property nor any possessory right to it. Furthermore, the government has already returned all the original discs and data to the entity from which the property was taken: StarTests. (R. at 2.) Because the property has been returned, the CFL can show no irreparable injury. Without an irreparable injury, the CFL cannot meet the first universal requirement of the standing analysis under Rule 41(g).

4. The players have another adequate remedy at law available.

The second universally accepted standing factor, and the final factor in the four-part analysis, requires the movant to demonstrate that he or she lacks another adequate remedy at law. Generally, an individual may have an adequate remedy in two ways. First, if the evidence was illegally seized, then the defendant may move for suppression of the evidence under Federal Rule of Criminal Procedure 12, Fed. R. Crim. P. 12(b)(3)(C) (West, Westlaw through 2002), after indictment and before a criminal trial. *White Fabricating Co. v. United States*, 903 F.2d 404, 413 (6th Cir. 1990). Second, if the government has no intention of proceeding with the investigation or an indictment, then a motion for the return of property is appropriate, but the movant has the burden of establishing that the government's retention is unreasonable. *United States v. Daprano*, 2008 U.S. Dist. LEXIS 92693, at *14 (D.N.M. July 3, 2008). When other "avenues of relief are open to the movant, he cannot show an inadequate remedy at law." *United States v. Copeman*, 458 F.3d 1070, 1073 (10th Cir. 2006). Since other avenues of relief are open to the CFL, it cannot show a lack of an adequate remedy at law.

In the instant case, the players have both remedies available. The FBI is conducting an ongoing investigation and, if criminal charges are brought against any player (or the CFL itself),

a Rule 12 motion for the suppression of evidence would be appropriate at that time. A Rule 12 motion is an adequate remedy at law within the 41(g) analysis, and therefore the players have an adequate remedy at law. The First Circuit noted that when a defendant “can move to suppress the evidence (and obtain its return) at a trial in the fairly near future” or “can reapply to the district court for the return of the property if no indictment is forthcoming,” then the movant has an adequate remedy at law. *Angel-Torres v. United States*, 712 F.2d 717, 720 (1st Cir. 1983). Similarly, the Eight Circuit held that an adequate remedy at law is available to a movant when he or she may, upon indictment, make “a motion to suppress any evidence that has been improperly seized.” *In re Search of 4801 Flyer Ave.*, 879 F.2d at 389.

The second remedy is also available to the CFL and the players if this Court concludes that they have a sufficient possessory interest in the property. A “defendant's motion for return of property will be unavailing where the government has a continuing interest in the property.” *United States v. Francis*, 646 F.2d 251, 263 (6th Cir. 1981); *see also United States v. Premises Known as 608 Taylor Avenue*, 584 F.2d 1297, 1303 (3d Cir. 1978). If, however, the government has “held the copies for a ‘reasonable time’ and has no investigation in progress, it must return the copies as well as the originals.” *Sovereign News Co. v. United States*, 690 F.2d 569, 577-78 (6th Cir. 1982) (holding that if “the copies are needed for an ongoing or proposed specific investigation, the government is entitled to retain them”). In the instant case, however, the government is using the evidence to continue its ongoing investigation, (R. at 2.), so a motion for return of property by the CFL’s players would not prevail.

Since the FBI’s ongoing investigation is a legitimate purpose for retaining the copies at this time, and because no criminal charges have yet been brought against the players, all remedies at law are available to the players. Thus, the final component of the standing analysis

joins the previous three in tipping the balance against the district court's decision to exercise its equitable jurisdiction.

Since the District Court of for the District of Wythe failed to provide any analysis under the four-part standing test when deciding to exercise equitable jurisdiction, its decision demands no deference of this Court, and this Court should reject that decision. *See In re Search of 4801 Flyer Ave.*, 879 F.2d at 388. Each of the four components of the 41(g) standing analysis opposes the conclusion that CFL's individual members have personal standing to bring this Motion, so the first requirement for associational standing lies unmet. Therefore, this Court should deny associational standing to the CFL and dismiss the party for lack of standing.

III. The heightened warrant issuance protocols required in the decision below and in *Comprehensive Drug Testing* should be rejected.

The *Comprehensive Drug Testing (CDT)* protocol requires that the magistrate comply with five new rules before issuing a warrant. *Comprehensive Drug Testing*, 579 F.3d at 1006.

The rules are as follows:

- (1) Magistrates should insist that the government waive reliance upon the plain view doctrine.
- (2) Segregation and redaction of the computer evidence must be either done by specialized personnel or an independent third party. If done by government personnel, that personnel must agree not to disclose any information other than that which is the target of the warrant.
- (3) Warrants must disclose the actual risks of destruction or concealment of information, as well as prior efforts to seize that information in other courts.
- (4) The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by non-computer personnel agents.
- (5) The government must destroy, or, if the recipient may lawfully possess it, return non-responsive data, at all times keeping the court informed of its progress.

(R. at 17.) These rules constitute an improper under-ruling of the Supreme Court's plain view jurisprudence, hamper the legitimate needs of law enforcement, and contradict the Supreme

Court's recent revision to Federal Rule of Criminal Procedure 41, which took effect on December 1, 2009. For these reasons, this Court should reject the *CDT* protocol.

A. The *CDT* protocol improperly under-rules this Court's plain view jurisprudence, which has been followed by numerous circuit and state courts and remains valid law.

By adopting the *CDT* protocol, the Fourteenth Circuit has joined with the rogue Ninth Circuit in under-ruling this Court's plain view jurisprudence. This Court has long held that the plain view exception is a legitimate means by which evidence lawfully gained can be used in court. *Weeks v. United States*, 232 U.S. 383, 398 (1914); *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). The *CDT* protocol precludes the plain view rule from ever being applied to a computer search situation. To require that the government forswear the plain view exception, however, is an extreme remedy better reserved for the unusual, not the common, case. *United States v. Farlow*, 2009 U.S. Dist. LEXIS 112623, at * 20 n.3 (D. Me. Dec. 3, 2009). This Court's jurisprudence has established that the plain view exception is sufficient to confer reasonableness upon a search. It is not the place of the Fourteenth or Ninth Circuit Courts to under-rule this Court. For this reason alone the Court should reject the *CDT* protocol.

The plain view doctrine is a well-developed and fully-delineated area of law. The general policy of the courts clearly prohibits general, exploratory searches conducted under the guise of plain view. *Horton*, 496 U.S. at 135-36. The court in *United States v. Tamura* specifically refused to justify the government's "wholesale seizure for later detailed examination of records not described in a warrant." *Id.* at 595. The court noted that any search conducted as an "investigatory dragnet" violates the very heart of the Fourth Amendment. *Id.* (quoting *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980)). Hence any seizure under the plain view exception requires some prior justification for an agent's presence, such as a warrant, hot pursuit,

search incident to lawful arrest, or some other legitimate reason unconnected with the contested search. *Horton*, 496 U.S. at 135-36.

The Supreme Court has always held that the requirement of a specific and particular warrant is a safeguard against broad searches under the plain view exception. The Ninth Circuit, in *United States v. Adjani*, noted that the specificity requirement would prevent officers from engaging in exploratory searches by “limiting their discretion and providing specific guidance as to what can and cannot be searched and seized.” *Id.* at 1147. A specific warrant, while it allows for something in plain view to be seized, leaves nothing “to the discretion of the officer executing the warrant.” *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982).

Moreover, courts have suggested a variety of safeguards to help lower the risk of unreasonable searches and seizures under the plain view exception. For example, the court in *Tamura* noted that when “documents are so intermingled that they cannot feasibly be sorted on site, we suggest that the [g]overnment . . . seal[] and hold[] the documents pending approval by a magistrate.” *Tamura*, 694 F.2d at 595-96. Similarly, the Tenth Circuit, in both *United States v. Campos*, 221 F.3d 1143 (10th Cir. 2000), and *United States v. Carey*, has suggested, in the case of intermingled documents, that officers “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.

In sum, past case law has adequately developed and established the plain view doctrine. This exception is a legitimate extension of the warrant requirement, and preserves the “cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.” *United States v. Donnes*, 947 F.2d 1430, 1438 (10th Cir. 1991) (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)).

Moreover, the plain view doctrine is a resourceful and legitimate tool used by police officers to curtail criminal activity. The law allows an officer to seize an item that is criminal evidence in plain view, because the owner of that object has obviously and clearly relinquished his or her privacy interest in that object by leaving it in plain view. *Horton*, 496 U.S. at 133. The plain view doctrine is the logical supplement to the warrant requirement for searching. *Id.* at 135-36. As the Supreme Court articulated in *Arizona v. Hicks*, the theory behind the plain view doctrine is based upon the police officers' "longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband." *Arizona*, 480 U.S. at 327. Historically, the Fourth Amendment was adopted as a "direct response to the evils of the general warrants in England and the writs of assistance in the Colonies." *O'Rourke v. City of Norman*, 875 F.2d 1465, 1472 (10th Cir. 1989). Allowing officers to seize criminal evidence in plain view does not abrogate this foundation of the Fourth Amendment's protections.

In computer searches, despite the complexity and difficulty of searching computer files, courts have noted that Fourth Amendment restrictions based only on the development of technology are "unwise[] and inconsistent with the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 41 (2001) (Stevens, J., dissenting). The only firm principle upon which to construct a reasonable plain view doctrine is that "to search a container, it must be reasonable to expect that the items enumerated in the search warrant could be found therein." *Giberson*, 527 F.3d at 888. This general principle precludes any requirement of an overly specific search protocol, since in a complex computer structure, a highly specific and preconceived protocol will likely miss much. *See Adjani*, 452 F.3d at 1150 ("[M]uch evidence could escape discovery simply because of [the defendant's] labeling of the files documenting [his] criminal activity").

To require the police to forswear in advance the plain view doctrine is equivalent to demanding that an investigative team engaged in a legal “search of a residence for drugs promise to ignore screams from a closet or a victim tied to a chair.” *Farlow*, 2009 U.S. Dist. LEXIS 112623, at *20 n.3. For example, the court in *State v. Schroeder*, found that an agent was entitled to seize a computer after viewing child pornography in plain view because it was “no different than an investigator opening a drawer while searching for drugs and seeing a nude picture of a child on top of a pile of socks.” *Schroeder*, 613 N.W.2d. at 916. In short, to “require the government before every computer search to forswear the plain view doctrine, which itself has its own constraints, seems unwise.” *Farlow*, 2009 U.S. Dist. LEXIS 112623, at *20 n.3.

B. The *CDT* rule contradicts the new Federal Rule of Criminal Procedure 41 adopted in December 2009.

In addition to the five new rules, the *CDT* opinion provides explanatory limitations on the rules. Two of these limitations contradict the current Federal Rule of Criminal Procedure 41. First, the *CDT* limitation concerning the second rule contradicts the notice requirement in Federal Rule of Criminal Procedure 41(f)(1)(B), Fed. R. Crim. P. 41(f)(1)(B) (West, Westlaw through 2009). The *CDT* limitation supporting the fifth rule contradicts the retention rule in Fed. R. Crim. P. 41(f)(1)(B). The changes to Rule 41 were adopted and promulgated by the Supreme Court in March 2009 and took effect on December 1, 2009, pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 (West, Westlaw through 1990 amendments).

1. *CDT*'s inventory requirement conflicts with Rule 41's inventory requirement.

The Ninth Circuit's guidelines, which the Fourteenth Circuit adopted below (R. at 13), require the government, as soon as practicable, to “provide the issuing officer with a return disclosing precisely what data it has obtained as a consequence of the search, and what data it

has returned to the party from whom it was seized.” *Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1000-01 (9th Cir. 2009). The recent amendments to Rule 41, however, only require the inventory to describe “the physical storage media that were seized or copied.” Fed R. Crim. P. 41(f)(1)(B). Thus, while the *CDT* rule requires disclosure of the data obtained, the Supreme Court specifically limited Rule 41 to require only disclosure of the physical storage media obtained. Since the *CDT* burden exceeds the limits of Rule 41, it contradicts this Court’s rulemaking power and this Court should reject it.

2. *CDT*’s data-retention requirement conflicts with Rule 41’s data-retention requirement.

The *CDT* rule also contradicts the last sentence in the new Rule 41. Rule 41 states that an “officer may retain a copy of the electronically stored information that was seized or copied.” Fed R. Crim. P. 41(f)(1)(B). In direct contradiction, the *CDT* opinion declares that “the government may not retain copies of such returned data, unless it obtains specific judicial authorization to do so.” *Comprehensive Drug Testing, Inc.*, 579 F.3d at 1000.

This Court’s authority to promulgate rules governing criminal procedure, civil procedure, and evidence, pursuant to the Rules Enabling Act, is not subject to a lower court’s veto power. The Act provides that the “Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.” Rules Enabling Act. An inferior court does not have the power to alter the procedures or rules promulgated by the Supreme Court. By promulgating the new Rule 41, this Court has already determined that the *CDT* requirements concerning notice and data retention are unacceptable. As a matter of coherence within the judiciary as a whole, this Court should prohibit the lower courts from refashioning the rules that this Court adopts and intends to apply to all federal courts. In light of

the contradictory nature of the *CDT* rules, which essentially amount to a lower court's attempt to veto this Court's constitutional and statutory power to establish procedural rules governing all courts, this Court should reject the *CDT* protocols and allow the courts to operate under the newly-promulgated rules in the normal fashion.

Conclusion

Because the CFL lacks associational standing, this Court should dismiss CFL from the action. Because the government relied properly on the plain view exception when seizing the evidence and because the *CDT* protocol unduly hampers the efforts of law enforcement, this Court should deny the Respondent's Rule 41(g) Motion for Return of Property.

In light of the foregoing reasons, the Petitioners pray this Court to deny the opinion of the court below, to dismiss CFL from the complaint, and to deny the Motion for Return of Property under Federal Rule of Criminal Procedure 41(g).

Appendix

The Fourth Amendment to the United States Constitution, Const. amend. IV, provides as follows:

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.

Section 28, section 2072 of the United States Code, Rules Enabling Act, 28 U.S.C. § 2072 (West, Westlaw through 1990 amendments), provides as follows:

- (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
- (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
- (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Section 12(b)(3)(C) of the Federal Rules of Criminal Procedure, Fed. R. Crim. P. 12(b)(3)(C) (West, Westlaw through 2002), provides as follows:

- (b) Pretrial Motions, (3) Motions That Must Be Made Before Trial: the following must be raised before trial:

(C) a motion to suppress evidence

Section 41(f)(1)(B) of the Federal Rules of Criminal Procedure, Fed. R. Crim. P.

41(f)(1)(B) (West, Westlaw through 2009), provides as follows:

(f) Executing and Returning the Warrant, (1) Warrant to Search for and Seize a Person or Property, (B) Inventory:

An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

Section 41(g) of the Federal Rules of Criminal Procedure, Fed. R. Crim. P. 41(g) (West, Westlaw through 2009), provides as follows:

(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.

Rule 24.1(a) of the Rules of the Supreme Court, Sup. Ct. R. 24.1(a), provides as follows:

24.1. Briefs on the Merits: In General, (a) The questions presented for review under Rule 14.1(a):

The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evidence from the record and otherwise within its jurisdiction to decide.