

No. 2009-H20

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STARTESTS, INC. AND THE COLONIAL FOOTBALL LEAGUE

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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Department of Justice
Washington, D.C. 20530-001
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QUESTIONS PRESENTED

1. Whether the Respondent, the Colonial Football League, has standing to sue on behalf of its players for the return of illegally seized property under Federal Rule of Criminal Procedure 41(g).
2. Whether the government may rely on the “plain view” exception to the Fourth Amendment’s warrant requirement in digital searches, i.e. searches of computers, hard drives, disks, etc.
3. Whether a federal magistrate may issue warrants authorizing the government to seize all computer equipment and files for later sorting, or whether the particularity requirement must be heightened in the digital evidence context, as per the guidelines announced in the Fourteenth Circuit below and in *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009).

PARTIES TO THE PROCEEDINGS

Pursuant to the Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

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OPINIONS BELOW

Judge Martin of the United States District Court for the District of Wythe held the evidence was not illegally seized by the United States government and denied the Colonial Football League's Rule 41(g) motion for return of property. The opinion, *StarTests, Inc. and the Colonial Football League v. United States*, No. 2010-W20, is unreported. Judge Freehouse of the United States Circuit Court of Appeals for the Fourteenth Circuit adopted new standards for drafting warrants and the use of the plain view exception in computer search cases, and reversed the district court's opinion. The opinion, *StarTests, Inc. and the Colonial Football League v. United States*, No. 2010-W23, is also unreported.

JURISDICTION

This is an appeal from the decision of the United States Circuit Court of Appeals for the Fourteenth Circuit. The United States appealed that decision and this Court granted certiorari. The jurisdiction of this Court rests on 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution 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.

Federal Rule of Criminal Procedure 41(g) provides:

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

In 2005, the Colonial Football League (“CFL”) began requiring its franchises to submit players for drug screening tests. CFL imposed this requirement to ensure compliance with federal and state laws, as well as its own athletic performance standards. (R. at 1). CFL subsequently hired StarTests, Inc. (“StarTests”) to administer the tests. (R. at 1). As an incentive to participate in the program, CFL and StarTests “represented” to the players that the tests were strictly to determine whether five percent or more of CFL’s players would test positive for illegal steroids. (R. at 1). Additionally, the players were told that their names and tests results would remain confidential, with only the percentage being released to the CFL and the public. (R. at 1).

Beginning in July 2008 the Federal Bureau of Investigation (“FBI”) began an investigation into the distribution and usage of illegal steroids by professional athletes. (R. at 1). The FBI spent the next few months investigating and collecting evidence for all of the major professional sports leagues, and found that there was a significant amount of illegal steroid traffic occurring between distributors, both legal and illegal, and numerous franchises within professional football league. (R. at 1). The investigation implicated five well-known football players from the Wythe City Lightning (Barry Reynolds and John Reeves) and the Marshall Phoenixes (Danny Rodriguez, Michael Fleming, and Ace Hall) as major distributors and users. (R. at 1). During the course of its investigation, the FBI assembled a case for probable cause that each of the five players had tested positive for steroid use during the CFL testing. (R. at 1). The evidence implicating the aforementioned players included numerous eyewitness reports and taped conversations where the five players discussed procuring the steroids in order to “keep the rivalry interesting.” (R. at 1).

As a result, the FBI applied for a search warrant to seize material related to the above enumerated findings from StarTests' facility. (R. at 1). In the supporting affidavit, the FBI requested permission to seize urine samples, documents, and all computer records, files, and equipment related to the drug tests StarTests administered. (R. at 1-2). In support of this request, the affidavit first explained that all computer equipment and files would need to be seized and reviewed at a later date because the data to be retrieved was massive in quantity, and time would not permit an on-site search. (R. at 2). The affidavit further explained the technical difficulty of locating, identifying, and retrieving files that may be mislabeled or deceptively hidden in various H- or S-drives. (R. at 8). Additionally, the affidavit acknowledged the fact that viewing and decoding the data might require software not available at StarTests' facilities. (R. at 8).

Magistrate Judge Leon issued the warrant, authorizing the FBI to search computer equipment, storage devices, and, where an on-site search would be impracticable, to seize either a copy of all StarTests' data or the computer equipment itself. (R. at 2). Additionally, Magistrate Judge Leon placed extensive restrictions on the search. (R. at 2). First, law enforcement personnel trained in searching and seizing computer data were to determine whether a computer needed to be seized. (R. at 2). Second, if computers or other equipment were seized, appropriately trained personnel were to then review the data, retaining the information authorized by the warrant and designating the remainder for return. (R. at 2). Lastly, Magistrate Judge Leon restricted the search and seizure to information reasonably related to the investigation into the five named players' illegal steroid use. (R. at 2).

The FBI executed the search warrant at StarTests on November 1, 2008. (R. at 2). When the agents inquired about the location of the of the CFL drug test results, StarTests personnel

revealed that most of the computers in the facility included at least one database on the CFL drug test. (R. at 2). CFL was one of StarTests' largest clients, and StarTests had conducted the drug tests for the past four years. (R. at 2). StarTests maintained three databases for the CFL players' drug test results. (R. at 2). One computer database contained the players' personal and health information. (R. at 2). A second computer database contained the assigned numbers given to the players prior to the test date. (R. at 2). The third computer database held the actual results of the test, with the subjects identified only by their identification number. (R. at 2).

Each database was saved on different computers in the StarTests facility under different names. (R. at 2). Additionally, many of the files were encrypted, while others were hidden in various H- and S-drives. (R. at 2). No one computer at the StarTests facility had two databases from any one test administered in any one year. (R. at 8). StarTests employed this procedure to reduce the risk of a third party or employee from gaining access to the drug test information. (R. at 2).

The head agent determined that the search for the five players' information could take a few days, and pursuant to the warrant, ordered StarTests' computer equipment to be either seized or copied, depending on the equipment's ease of movement. (R. at 2). At the FBI bureau office, computer forensics agents were able to eventually view the databases and match the test results to the players. (R. at 2). While conducting this search, the computer personnel also came across the test results of other CFL players who tested positive for steroids and a myriad of other illegal substances such as cocaine, marijuana, and various hallucinogens. (R. at 2). After this discovery, the FBI determined its investigation should include all illegal drug possession and sale within professional football. (R. at 2). In order to further this objective, the FBI copied and inventoried StarTests' computer equipment and promptly returned it to StarTests. (R. at 2).

SUMMARY OF THE ARGUMENT

The Colonial Football League does not have standing to sue on behalf of its players for the return of seized property under Federal Rule of Criminal Procedure 41(g). The Colonial Football League is not a party aggrieved, and was neither aggrieved by an unlawful search and seizure, nor the deprivation of property. Additionally, the Colonial Football League is not entitled to the return of StarTests' computer equipment.

The agents properly relied on the plain view exception to the Fourth Amendment's warrant requirement in the search of StarTests' computer equipment. The agents were in a lawful position from which to observe the document seized in plain view, the agents had a lawful right of access to the document itself, and the document's incriminating character was immediately apparent. The Ninth and Fourteenth Circuits' mandate that agents waive reliance on the plain view exception to the Fourth Amendment's warrant requirement directly conflicts with controlling authority. Furthermore, the Ninth and Fourteenth Circuits' mandate that agents waive reliance on the plain view doctrine in digital searches is unnecessary because existing doctrine adequately protects individual privacy interests in the computer context.

Magistrate Judge Leon properly issued the warrant authorizing the agents to seize all of StarTests' computer equipment and files for later sorting. The warrant set forth a protocol that adequately governed the agents' decision to remove StarTests' computer equipment off-site and the agents' subsequent sorting of the intermingled files. Magistrate Judge Leon was not required to review the relevance of particular files because the warrant set forth adequate protocols.

The particularity requirement does not need to be heightened in the digital context. The guidelines announced by the Ninth and Fourteenth Circuits conflict with controlling authority, and this Court should reject protocols unique to searches of computer equipment.

ARGUMENT

I. THE COLONIAL FOOTBALL LEAGUE DOES NOT HAVE STANDING TO SUE ON BEHALF OF ITS PLAYERS FOR THE RETURN OF SEIZED PROPERTY UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 41(G).

A. The Colonial Football League is neither a party aggrieved by an unlawful search and seizure, nor by the deprivation of property.

Federal Rule of Criminal Procedure 41(g) expressly authorizes a “person aggrieved by an unlawful search and seizure of property or by the deprivation of property” to “move for the property’s return...in the district where the property was seized.” Fed. R. Crim. P. 41(g). The disjunctive language of Rule 41(g) demonstrates that it is intended to aid either those “aggrieved by an unlawful search and seizure,” or those “aggrieved by the deprivation of their property.” *In re Grand Jury Investigation Concerning Solid State Devices, Inc.*, 130 F.3d 853 (9th Cir. 1997).

The Colonial Football League is not a party aggrieved by an unlawful search and seizure or by the deprivation of property, and thus does not have standing to bring a Federal Rule of Criminal Procedure 41(g) motion.

1. The Colonial Football League is not a party aggrieved.

In *Rakas v. Illinois*, 439 U.S. 128 (1978), this Court explicitly rejected concepts of “vicarious” or “target” standing to assert Fourth Amendment rights. *Id.* at 133-38. Reiterating that Fourth Amendment rights are *personal* rights, this Court stated that “[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed. *Id.* at 134; *see also Alderman v. United States*, 394 U.S. 165 (1969).

The agents searched *StarTests*’ facility, and subsequently seized *StarTests*’ computer equipment. (R. at 2, 8). Thus, the agents did not infringe on the Colonial Football League’s

Fourth Amendment rights. The Colonial Football League is aggrieved *only* by the potential introduction of damaging evidence secured by the search and seizure at StarTests' facility. Consequently, the Colonial Football League is not a party aggrieved, and this Court should find that the Colonial Football League does not have standing to bring a motion under Rule 41(g).

2. The Colonial Football League was not aggrieved by an unlawful search and seizure.

The Fourth Amendment's particularity requirement prevents a "general exploratory rummaging in a person's belongings," *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). Although this Court has observed that, "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant," *Marron v. United States*, 275 U.S. 192, 196 (1927), this admonition has not been applied strictly by the courts. *See, e.g., Davis v. Gracey*, 111 F.3d 1472, 1478 (10th Cir. 1997) (holding that a "warrant that describes the items to be seized in broad or generic terms may be valid when the description is as specific as the circumstances and the nature of the activity under the investigation permit"). A warrant satisfies the particularity requirement if it enables the executing officer to identify with reasonable certainty those items that the issuing magistrate has authorized him to seize. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). This is determined, *inter alia*, by the nature of the activity charged and the nature of the objects to be seized. *See, e.g., Andersen v. Maryland*, 427 U.S. 463, 479-80 (1976) (phrase seeking all evidence was not general when modified by sentence referring to specific crime). There is a need for deference to the issuing magistrate when deciding whether a warrant is reasonably particular in a digital evidence case. *See United States v. Hill*, 459 F.3d 966, 973-75 (9th Cir. 2006); *United States v. Wong*, 334 F.3d 831, 836 (9th Cir. 2003); *United States v. Carey*, 172 F.3d 1268, 1272-73 (10th Cir. 1999) (upholding the validity of a search warrant to search all computer files for "documentary evidence pertaining to the sale

and distribution of controlled substances”). Additionally, Federal Rule of Criminal Procedure 41(e)(2) as amended, does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving the application of this and other constitutional standards concerning both the seizure and the search to ongoing case law development. Fed. R. Crim. P. 41(e)(2), advisory committee notes, 2009 Amendments.

StarTests maintained an extensive series of databases, all mislabeled, encrypted, and deceptively filed on numerous computers in the facility. (R. at 2, 8). In fact, no one computer at StarTests’ facility had two databases from any one test administered in any one year. (R. at 2, 8). Given these conditions, the description provided in the warrant was as specific as the circumstances and the nature of the activity under investigation permitted. This Court should find that the Colonial Football League was not aggrieved by an unlawful search and seizure, and thus does not have standing to bring a motion under Federal Rule of Criminal Procedure 41(g).

3. The Colonial Football League is not aggrieved by the deprivation of property.

A motion for return of property is a remedy for a party “aggrieved by a *deprivation* of its property.” *In re Search of Kitty’s East*, 905 F.2d 1367, 1375 (10th Cir. 1990) (emphasis added). Under Rule 41(g), the movant must demonstrate that he “is entitled to lawful possession of the property.” Fed. R. Crim. P. 41(g); see *In re Designer Sportswear, Inc.*, 521 F. Supp. 434, 437 (S.D.N.Y. 1981) (holding that a movant fails to satisfy the requirements of Federal Rule of Criminal Procedure 41(e), when he does not contend that he is entitled to the lawful possession of the items allegedly owned by others); see also *United States v. Cardona*, 495 F. Supp. 147, 153 (E.D.N.Y. 1980). A movant who has not asserted an arguable claim of ownership has failed to demonstrate that he has standing to move pursuant to Rule 41(g). See *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1056 (9th Cir. 1990) (holding that under 41(e), a movant “must

assert his own legal rights and interest and cannot rest his claim to relief on the legal rights or interests of third parties”).

The agents searched *StarTests*’ facility, and subsequently seized *StarTests*’ computer equipment. (R. at 2, 8). The Colonial Football League cannot rest its claim to relief on *StarTests*’ legal rights and interests. Rather, the Colonial Football League must assert its own legal rights and interests. However, here, the Colonial Football League is not entitled to lawful possession of *StarTests*’ computer equipment, and thus does not have any rights or interests to assert. In fact, the only thing the Colonial Football League is aggrieved of is the government’s possession of inculpatory evidence. For these reasons, this Court should find that the Colonial Football League is not aggrieved by the deprivation of property, and thus does not have standing to move under Rule 41(g).

B. The Colonial Football League is not entitled to the return of *StarTests*’ computer equipment.

Owners of properly seized computer equipment must overcome several formidable barriers before a court will order the government to return the equipment. First, the owner must convince the court that it should exercise equitable jurisdiction over the owner’s claim. *See Floyd v. United States*, 860 F.2d 999, 1003 (10th Cir. 1988) (“Rule 41(e) jurisdiction should be exercised with caution and restraint.”).

1. The Colonial Football League fails to satisfy the necessary jurisdictional standards.

Although the jurisdictional standards vary widely among different courts, most courts will assert jurisdiction over a Rule 41(g) motion only if the movant establishes that: (1) the government displayed a callous disregard for the constitutional rights of the movant; (2) the movant has an individual interest in and need for the property it wants returned; (3) the movant would be irreparably injured by denying return of the property; and (4) the movant does not have

an adequate remedy at law for the redress of the grievance. *Ramsden v. United States*, 2 F.3d 322, 324-25 (9th Cir. 1993) (citing *Richey v. Smith*, 515 F.2d 1239, 1243-44 (5th Cir. 1975)). The Ninth Circuit acknowledged that, while not all four factors must be met, every factor should be weighed in determining whether the district court has jurisdiction over the motion to return property. *Ramsden v. United States*, 2 F.3d 322, 325 (9th Cir. 1993).

Jurisdiction over motions made under Rule 41(g) should be exercised with caution and restraint. This Court should not exercise jurisdiction because the Colonial Football League fails satisfy the four factors the Ninth Circuit set forth in *Ramsden*.

a) *The agents did not display a callous disregard for the constitutional rights of the Colonial Football League.*

In order to satisfy the first prong, some illegality in the search usually must be found. For example, the Ninth Circuit has held that the seizure of evidence pursuant to a warrantless search, which is not justified by exigent circumstances, constitutes callous disregard. *Id.* at 325.

The agents fully complied with the mandates of the Fourth Amendment when they secured a warrant authorizing the search of StarTests' facility and the seizure of StarTests' computer equipment. (R. at 1-2, 8). The agents assembled a case for probable cause and then applied for a search warrant with an extensive affidavit supporting the request. (R. at 1, 7-8). Magistrate Judge Leon issued the warrant only after including numerous restrictions on the agents' method of search and seizure. (R. at 1-2, 8). Given the similarity of this warrant to others that have been upheld, this Court should find that the agents did not act with callous disregard for the Colonial Football League's constitutional rights. *United States v. Hay*, 231 F.3d 630, 636-38 (9th Cir. 2000). Consequently this Court should decline to exercise jurisdiction over the Colonial Football League's motion.

- b) *The Colonial Football League does not have an individual interest in or need for StarTests' computer equipment.*

The second prong is satisfied where the movant can demonstrate a pressing interest in or need for return of the evidence, such as where the seized documents are integral to the operation of the movant's business. *Black Hills Inst. of Geological Research v. U.S. Dep't of Justice*, 967 F.2d 1237, 1240 (8th Cir. 1992) (holding landowner had interest in preservation of dinosaur fossil seized during criminal investigation into violations of the Antiquities Act); *In re Singh*, 892 F. Supp. 1, 3 (D.D.C. 1995) (ruling movant demonstrated such a pressing need where its principal business was preparation of tax returns and IRS had seized business equipment and business files).

The Colonial Football League does not express a need for access to any of the seized computer equipment. The agents copied StarTests' computer equipment, and subsequently returned the unneeded original computer equipment to StarTests. (R. at 2, 8). The Colonial Football League does not argue that it needs to possess StarTests' computer equipment or that copies of StarTests' computer equipment will not suffice. As such, this Court should find that the Colonial Football League does not have an individual interest in or need for StarTests' computer equipment, and should refrain from exercising jurisdiction.

- c) *The Colonial Football League will not suffer irreparable injury by deprivation of StarTests' computer equipment.*

Courts have declined to find irreparable injury, absent extraordinary circumstances. Threat of imminent indictment does not demonstrate "irreparable harm" for purposes of a pre-indictment Rule 41(g) motion. *Kitty's East*, 905 F.2d at 1371; *In re Search of Law Office*, 341 F.3d 408, 415 (5th Cir. 2003). Such a threat would merely be an "ordinary injury" everyone has the chance of suffering, rather than an extraordinary one requiring equitable relief. *In re Se.*

Equip. Co. Search Warrant, 746 F. Supp. 1563, 1573 (S.D. Ga. 1990). Although the Fifth Circuit has acknowledged that the threat of future prosecution can constitute irreparable harm, *Richey*, 515 F.2d at 1243 n.10, the position taken by the Eighth and Tenth Circuits, that the mere threat of prosecution is not sufficient to constitute irreparable harm, is more persuasive. In *Kiesel Company, Inc. v. Householder*, 879 F.2d 385 (8th Cir.1989), the court observed that, “if the mere threat of prosecution were allowed to constitute irreparable harm, every potential defendant could point to the same harm and invoke the equitable powers of the district court.” *Id.* at 389.

Threat of the Colonial Football League-affiliated players’ imminent indictments does not demonstrate “irreparable harm” for purposes of a pre-indictment Rule 41(g) motion. Additionally the agents did not retain StarTests’ computer equipment. (R. at 2, 8). Rather, the agents retained *copies* of StarTests’ computer equipment, returning the unneeded original computer equipment to StarTests. This Court should conclude that the Colonial Football League has failed to establish that it will suffer irreparable harm if the duplicate computer equipment is not returned, and should not exercise jurisdiction.

d) *The Colonial Football League has an adequate remedy at law.*

In order to satisfy the final prong, a movant must show that he will not have a fair opportunity to subsequently litigate the issue. The mere existence of a possible remedy is not sufficient to deny equitable relief. *Interstate Cigar Co. v. United States*, 928 F.2d 221, 223 (7th Cir. 1991). However, an adequate remedy will be found to exist where criminal charges are imminently pending because the propriety of the seizure can be challenged in a motion to suppress. *Angel-Torres v. United States*, 712 F.2d 717, 718-19 (1st Cir. 1983).

The Colonial Football League may challenge the constitutionality of the search warrant during future criminal proceedings, and thus has an adequate remedy at law. Consequently, this Court should decline to exercise jurisdiction.

2. The government's interest in StarTests' computer equipment outweighs the Colonial Football League's interest because a criminal prosecution is pending.

On the merits, seized property will be returned only if the government's continued possession is unreasonable. *See Ramsden*, 2 F.3d at 326. This test requires the court to weigh the government's interest in continued possession of the property with the owner's interest in the property's return. *See United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1304 (3d Cir. 1978). 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 215, 263 (6th Cir. 1981); *Premises Known as 608 Taylor Avenue*, 584 F.2d at 1303. This "continuing interest" can include a pending criminal investigation. *Warden v. Hayden*, 387 U.S. 294, 307 (1967). In *Ramsden*, the Ninth Circuit approved the government's retention of copies of documents seized without a valid warrant because it advanced a "legitimate law enforcement interest"—namely that of assisting the British government with an ongoing investigation of the defendant. *Ramsden*, 2 F.3d at 327. The Seventh Circuit held that requiring the government to provide copies of seized documents was an adequate remedy for movants who sought return of documents that were seized during a search of the business' office, given that the government was continuing to conduct an investigation into possible federal tax law violations. *In re Search of Office of Tylman*, 245 F.3d 978 (7th Cir. 2001).

The agents are continuing to conduct an investigation into the Colonial Football League-affiliated players' drug use. In order to further the investigation and the pending prosecution, the agents must have the copies of StarTests' computer equipment. Additionally, the government

returned the duplicated computer equipment to StarTests. Thus, this Court should find that the government's interests in StarTests' computer equipment outweigh those of the Colonial Football League.

3. The agents returned the computer equipment to StarTests.

Courts have generally held that the government may retain copies of seized evidence, absent "extreme circumstances." *Grims v. Comm'r*, 82 F.3d 286, 291 (9th Cir. 1996). In *Matter of the Search of the Scranton Housing Authority*, 436 F. Supp. 2d 714 (M.D. Pa. 2006), the court held that a balancing of the interests did not entitle the housing authority to the return of property seized pursuant to a search warrant because the government provided the housing authority with copies of all seized documents. Similarly, the Fifth Circuit refused to uphold a district court order requiring return of all copies of documents taken from a law office. *In re Search of Law Office*, 341 F.3d at 412. Federal Rule of Criminal Procedure 41(f)(1)(B) states that "[t]he officer may retain a copy of the electronically stored information that was seized or copied." Fed. R. Crim. P. 41(f)(1)(B). Furthermore, the Advisory Committee to the Federal Rules of Criminal Procedure specifically rejected the idea that the government has to return photocopies of business records it has lawfully seized and intimated that copies of illegally seized evidence could be retained in certain circumstances as well. Fed. R. Crim. P. 41(g), advisory committee notes, 1989 Amendment.

As established in the record, the agents made copies of StarTests' computer equipment, and returned the original computer equipment immediately thereafter. (R. at 2, 8). The agents' continued possession of StarTests' duplicated computer equipment is consistent both with case law and the Federal Rules of Criminal Procedure, which specifically reject the notion that the

government must return the duplicated equipment. Consequently, this Court should not exercise jurisdiction over the motion.

II. THE AGENTS PROPERLY RELIED ON THE PLAIN VIEW EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT IN THE SEARCH OF STARTESTS' COMPUTER EQUIPMENT.

A. During the course of the search of StarTests' computer equipment, the agents discovered the contested information in plain view

Evidence of a crime may be seized without a warrant under the plain view exception to the warrant requirement. *Coolidge*, 403 U.S. at 465. An officer may properly seize evidence of a crime without a warrant if: (1) the officer was lawfully in a position from which to view the object seized in plain view; (2) the officer had a lawful right of access to the object itself; and (3) the object's incriminating character was immediately apparent—i.e., the officer had probable cause to believe the object was contraband or evidence of a crime. *See Horton v. California*, 496 U.S. 128, 134 (1990). The District Court correctly ruled that the agents properly seized the additional illegal drug information under the plain view doctrine.

1. The agents were in a lawful position from which to observe the document seized in plain view.

“It is an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.” *Id.* at 136. If an officer has a right to be in the position from which an object can be seen in plain view, the object is admissible as evidence. *State v. Venzen*, 649 S.E.2d 851 (Ga. App. 2007).

The object of the agents' search was particularly described, and provided the agents the lawful right to search StarTests' computer equipment and access each of the files. The agents could not simply look at file names or types to determine whether they contained the drug test results of the five Colonial Football League-affiliated players. Rather the agents had to view

each file to determine whether the contents fell within the scope of the warrant. The District Court properly ruled that the agents were acting under a valid search warrant, and were lawfully in StarTests' facility, searching StarTests' computer equipment. *Wong*, 334 F.3d at 838.

a) *The agents' warrant satisfied the particularity requirement of the Fourth Amendment.*

The specificity required in a warrant varies depending on the circumstances of the case and the type of items involved. *United States v. Spilotro*, 800 F.2d 959, 643 (1986). Warrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible. *See United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982). In determining whether a description is sufficiently precise, courts examine both the warrant's breadth and particularity. *United States v. Kow*, 58 F.3d 423, 426 (9th Cir. 1995). In doing so, courts must consider one or more of the following: (1) whether there was probable cause to seize particular items in the warrant; (2) whether the warrant sets out objective standards by which executing officers can determine which items are subject to seizure; and (3) whether the government could have described the items more particularly when the warrant was issued. *Spilotro*, 800 F.2d at 963. All three *Spilotro* factors are satisfied in this case.

1) The agents had probable cause to seize the particular items described in the warrant.

Probable cause is determined by looking at the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). Probable cause exists if "it would be reasonable to seek the evidence in the place indicated in the affidavit." *United States v. Peacock*, 761 F.2d 1313, 1315 (9th Cir. 1985). The magistrate judge issuing the warrant must have a substantial basis for determining whether probable cause existed. *Id.* at 1315.

Over the course of several months, the agents investigated and collected evidence on the use of illegal steroids in the professional sports leagues. (R. at 2, 8). The evidence implicating the five Colonial Football League-affiliated players included numerous eyewitness reports and taped conversations where the five players discussed procuring the illegal steroids in order to “keep the rivalry interesting.” (R. at 2, 8). The Colonial Football League contracted with StarTests to perform drug tests and maintain the results at their facility. (R. at 2, 8). Thus, probable cause that evidence of criminal activity would be found on StarTests’ computer equipment existed.

- 2) The warrant set out objective standards by which the agents determined which items were subject to seizure.

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible, and prevents the seizure of one thing under a warrant describing another. *Marron*, 275 U.S. at 196. As to what is taken, nothing is left to the discretion of the officer executing the warrant. *Id.* at 196. Although technical precision of description is not required, *United States v. Drebin*, 557 F.2d 1316, 1322 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978), the warrant must so circumscribe an officer’s actions that the issuing magistrate can determine that “the search in all of its dimensions is based upon probable cause and particular descriptions.” *United States v. Hillyard*, 677 F.2d 1336, 1339 (9th Cir. 1982).

The agents were provided with objective standards alerting them to the items which could be seized. (R. at 2, 8). While the request to search the computer equipment and its components to obtain data did not specify the information the agents expected to find on the computers or the exact location of the evidence, it referred to the specific information relating to the five Colonial Football League-affiliated players. (R. at 2, 8). Magistrate Judge Leon imposed numerous

restrictions on the agents' search of StarTests' computer equipment for this information. (R. at 2, 8). These restrictions included a requirement that appropriately trained personnel were to review the data, retaining the information authorized by the warrant and designating the remainder for return. (R. at 2, 8). The warrant set forth sufficient objective standards by which the agents conducted their seizure of StarTests' computer equipment.

- 3) The agents described the items with as much particularity as the circumstances permitted.

Federal Rule of Criminal Procedure 41(e)(2), as amended, does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving its application to ongoing case law development. Fed. R. Crim. P. 41(e)(2), advisory committee notes, 2009 Amendments. The Fourth Amendment requires that a warrant particularly describe both the place to be searched and the person or things to be seized. U.S. Const., amend. IV. The description must be specific enough to enable the person conducting the search to reasonably identify the things authorized to be seized. This requirement prevents general, exploratory searches, and indiscriminate rummaging through a person's belongings. *United States v. McClintock*, 748 F.2d 1278, 1282 (9th Cir. 1984). It also ensures that the magistrate issuing the warrant is fully apprised of the scope of the search and can thus accurately determine whether the entire search is supported by probable cause. *See Hillyard*, 677 F.2d at 1339. The specificity required in a warrant varies depending on the circumstances of the case and the type of items involved. Warrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible. *See Cardwell*, 680 F.2d at 78. The court in *Upham v. United States*, 168 F.3d 532 (1st Cir. 1999) rejected an attack on the generic nature of the warrant application in a case which involved the computer transmission of child pornography, observing:

As a practical matter, the seizure and subsequent off-[site] search of the computer and all available disks was about the narrowest definable search and seizure reasonably likely to obtain the images. A sufficient chance of finding some needles in the computer haystack was established by the probable-cause showing in the warrant application; and a search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for weapon or drugs.

Id. at 535.

As was true in *Upham*, in this case no more specific description of the computer equipment sought was possible. *Id.* at 535. The agents knew that StarTests maintained the drug test results for the five Colonial Football League-affiliated players on its computers, but had no way of knowing where that information was stored. In these circumstances, generic classification is acceptable. *Id.*; *see also Hay*, 231 F.3d at 637.

b) *The agents' search of StarTests' computer equipment did not exceed the scope of the warrant.*

“[T]he scope of a lawful search is ‘defined by the object of the search’” *Garrison*, 480 U.S. at 84 (quoting *United States v. Ross*, 456 U.S. 798 824 (1982)). Such a search may “extend to the entire area covered by the warrant’s description.” 2 LaFave, § 4.10(a), at 731. Within the allowable area, the warrant gives the officers authority to examine any location where the object of the search could be concealed; it is not limited by separate actions of entry or opening. *Ross*, 456 U.S. at 820-21. This Court has recognized that, in the case of document searches, because the object of a search determines its allowable scope “it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. *Andersen*, 427 U.S. at 482 n.11. This cursory inspection is necessary to determine whether or not the document contains information covered in the warrant. Similar reasoning has been applied to computer searches. In *United States v. Khanani*, 502 F.3d 1281 (11th Cir. 2007) the Eleventh Circuit endorsed a search in which “a

computer examiner eliminated files that were unlikely to contain material within the warrants' scope." *Id.* at 1290. In *Manno v. Christie*, 2008 WL 2058016 (D.N.J. Aug. 22, 2008), the court found it "reasonable for [an agent] to briefly review each electronic document to determine if it is among the materials authorized by the warrant, just as he could if the search was only of paper files." *Id.* at *4. In *United States v. Potts*, 559 F. Supp. 2d 1162 (D. Kan. 2008), the court held that the warrant did not authorize an overbroad search when it allowed the investigator "to search the computer...by opening or cursorily reviewing the first few 'pages' of such files in order to determine the precise content." *Id.* at 1175-76.

The search warrant permitted the agents to open and view all files on StarTests' computer equipment to look for information related to the illegal steroid use of the five Colonial Football League-affiliated players. The agents knew computer files could be altered to disguise the contents, and that in fact, StarTests engaged in such deceptive practices. (R. at 2, 8). Accordingly, it was reasonable for the agents to briefly review each file to determine if it was among the materials authorized by the warrant.

- 1) The agents could not limit their search of StarTests' computer equipment based on file names or types because of StarTests' deceptive labeling and filing practices.

"Computer records are extremely susceptible to tampering, hiding, or destruction, whether deliberate or inadvertent." *United States v. Hill*, 459 F.3d 966, 978 (9th Cir. 2006) (quoting *United States v. Hunter*, 13 F. Supp. 2d 574, 583 (D. Vt. 1998)). Computer files can be placed in the wrong folder or directory, given idiosyncratic or non-descriptive names, or otherwise concealed. Images can be hidden in all manner of files, even word processing documents and spreadsheets. In *Hill*, the court stated that:

Forcing police to limit their searches to files that the suspect has labeled in a particular way would be much like saying police may not seize a plastic bag

containing a powdery white substance if it is labeled “flour” or “talcum powder.” There is no way to know what is in a file without examining its contents, just as there is no sure way of separating talcum from cocaine except by testing it. The ease with which child pornography images can be disguised—whether by renaming sexyteenyboppersxxx.jpg as sundayschoollesson.doc, or something more sophisticated—forecloses defendant’s proposed search methodology.

Hill, 322 F. Supp. 2d at 1090-91. Criminals will do all they can to conceal contraband, including the simple expedient of changing the names and extensions of files to disguise their content from the casual observer. Thus, the government may not discover relevant information even when the occupants of the searched premises act in good faith in identifying responsive information. See *United States v. Adjani*, 452 F.3d 1140, 1150 (9th Cir. 2006) (because “[c]omputer files are easy to disguise or rename,” government “should not be required to trust the suspect’s self-labeling when executing a warrant”). These authorities support the conclusion that the limitations on search authority based on file names or types set forth by the court in *Carey* do not comport with the ability of computer users to hide data in innocuously labeled files. *Carey*, 172 F.3d at 1272. Instead, the more sound approach, consistent with *Andersen*, is that “innocuous [computer files] may be scanned to ascertain their relevancy.” *Hunter*, 13 F. Supp. 2d at 583; see *Andersen*, 427 U.S. at 479-80.

When conducting the search of StarTests’ computer equipment, the agents were not required to accept representations of StarTests’ business personnel as to the location of the information relating to the illegal steroid use of the five Colonial Football League-affiliated players. (R. at 2, 8). This has no basis in the Fourth Amendment, and would have put agents at the mercy of the competency and honesty StarTests’ business personnel. To find the objects of the search, the agents had no choice but to look at all of the files on StarTests’ computer equipment. The agents knew exactly what they were looking for. Similar to the officers who searched with a “fine tooth comb” for objects listed in a drug warrant, the agents had the right to

look in any file where the information could be hidden. *See, United States v. Buckley*, 4 F.3d 552, 557 (7th Cir. 1993) (finding police may search in any place where objects of the search may be hidden); and *Ross*, 456 U.S. at 820-21 (“A lawful search...extends to the entire area in which the object of the search may be found and is not limited by...separate actions of entry or opening...”). A computer or other electronic media search “may be as extensive as reasonably required to locate the items described in the warrant.” *United States v. Wuagneux*, 683 F.2d 1343, 1352 (11th Cir. 1982). The search warrant placed the agents in a lawful position to open all files on the computers. The only way to determine the contents of the files was for the agents to view the contents. Observations that suggested there might be information relating to illegal steroid and drug use other than that set forth in the warrant did not require the agents to curtail the legitimate scope of their search. This Court should find that the government met the lawfully present requirement of the plain view doctrine.

2. The agents had a lawful right of access to the document itself.

In *Wong*, the court recognized that a valid search warrant not only gives a searching officer a right to be lawfully present on the defendant’s computer, but it also grants a lawful right of access by giving the agents permission to search the databases which included the contested information. *Wong*, 334 F.3d at 838 (upholding the use of an agent’s discovered evidence when “[w]hile searching for graphic files for evidence of murder, as allowed by the warrant, [the agent] discovered pictures of children...engaged in sexual acts.”). The language in *Carey* that, “the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges,” is not applicable in this circumstance. *Carey*, 172 F.3d at 1272 (quoting *Coolidge*, 403 U.S. at 466). In *Carey*, the police seized Carey’s computers pursuant to a warrant to find evidence of drug transactions. While a detective

was searching on one of the computers, he accidentally opened a .jpg file containing child pornography. *Carey*, 172 F.3d at 1271. Arguing that he then had “probable cause” and that the file was in plain view, the detective engaged in a search for evidence of child pornography. Subsequently, the detective returned to search for the original drug transaction evidence. *Id.* The court suppressed the evidence, finding that the files were closed, and thus not in plain view. Instead, the court stated, the detective was simply “open[ing] every JPG file to confirm his expectations.” *Id.* at 1273. However, in *United States v. Giberson*, 527 F.3d 882 (9th Cir. 2008), the Ninth Circuit acknowledged that *Carey* was “predicated only upon [its] particular facts,” and cited a concurring opinion to justify its position that “if the officer had merely continued his search for drug-related evidence and, in doing so, continued to come across evidence of child pornography...a different result would be required.” *Id.* at 890.

In light of *Giberson*, *Carey* would only apply if the agents here had ventured off their regular search path to discover the information about the other players. However, the agents did not end the search for the five Colonial Football League-affiliated players’ drug test results and subsequently begin another, unauthorized search for unrelated information relying on the protection of the plain view doctrine. *See Carey*, 172 F.3d at 1273, 1276. Rather, the agents were already searching a database that they had a lawful right to access under the search warrant. It was while matching the identification numbers to the results database in order to find the drug test results for the five players that the agents came across other positive test results. (R at 2, 8). Thus, this Court should find that the government has met the lawful access requirement of the plain view doctrine.

3. The document's incriminating character was immediately apparent.

"The incriminating nature of an object is 'immediately apparent' if, under the circumstances, the officer has 'probable cause to believe that the item is linked to criminal activity.'" *Russell v. Harms*, 397 F.3d 458, 465 (7th Cir. 2005) (quoting *United States v. Bruce*, 109 F.3d 323, 328 (7th Cir. 1997)). This requirement mandates that there be a nexus between the viewed object and illegality before the searching officer can seize the object, thus preventing the sanctioned search from turning into a general exploratory quest for incriminating material. *Texas v. Brown*, 460 U.S. 730, 741-42 (1983). The searching officer may rely on his expertise and experience to determine that an object is incriminating. *Id.* at 741-42.

In the present case, the government did not need to open any other file besides that containing the test results. (R. at 2, 8). When the agents opened the file, they did not have to study, manipulate, or seek expert advice to determine its incriminating nature—rather, a myriad of positive and negative results were immediately before it. (R. at 2, 8). Given the nature of the administered drug test, which tested *only* for illegal steroids and other controlled substances, it was immediately apparent to the agents that a positive result alongside words such as "anabolic steroids" or "cocaine" indicated criminal activity. (R. at 2, 8). Consequently, this Court should find that the incriminating nature of the drug results database was immediately apparent.

B. The Ninth and Fourteenth Circuits' mandate that agents waive reliance on the plain view exception to the Fourth Amendment's warrant requirement directly conflicts with controlling authority.

In *Coolidge* this Court quite clearly stated that "[i]t is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge*, 403 U.S. at 464, 465; *see also Horton*, 496 U.S. at 135. This Court further stated that "[a]n example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant

to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.” *Coolidge*, 403 U.S. at 464, 465; *see also Horton*, 496 U.S. at 135.

The Ninth and Fourteenth Circuits’ mandate that agents waive reliance on the plain view exception to the Fourth Amendment’s warrant requirement departs significantly from this Court’s precedent on the plain view exception. The Ninth and Fourteenth Circuits do not cite *any* case supporting this rule or explaining why the precedent should no longer apply. Despite the difficulty of line-drawing and the novelty of the plain view’s application to this area of the law, the Ninth and Fourteenth Circuits did not have a legal ground to entirely eliminate it as a constitutional rule, and as the court noted in *United States v. Farlow*, 2009 WL 4728690 (D. Me., Dec. 3, 2009) the decision is misguided:

[T]o require that the Government forswear the plain view doctrine is, in the Court’s view, an extreme remedy better reserved for the unusual, not common case. In [*United States v. Comprehensive Drug Testing*], the ill-gotten evidence was of baseball players’ use of steroids, certainly a matter of notoriety, but relatively benign in the scope of federal criminality...In a future case, the evidence in plain view could be profoundly serious, ranging from photographs of a kidnapped child to plans to commit acts of terrorism. The judicial directive to forswear in advance the plain view doctrine, placed in a different context, is equivalent to demanding that a DEA investigative team engaged in the search of a residence for drugs promise to ignore screams from a closet or a victim tied to a chair. To require the government before every computer search to forswear the plain view doctrine, which itself has its own constraints, seems unwise.

Id. at *7.

C. The Ninth and Fourteenth Circuits’ mandate that agents waive reliance on the plain view doctrine in digital searches is unnecessary because existing doctrine adequately protects individual privacy interests in the computer context.

A file that is not particularly described in the warrant can be seized by agents *only if* the file’s incriminating character becomes immediately apparent before it can be determined that the contents of the file are outside of the scope of the warrant. This “immediately incriminating” requirement of the plain view doctrine is especially important, because it limits the scope of searches to their authorized boundaries, and prevents them from becoming licenses for “general rummaging.” *See Horton*, 496 U.S. at 136-37; *United States v. Beal*, 810 F.2d 574, 576 (6th Cir. 1987); *United States v. Gray*, 484 F.2d 352, 255 (6th Cir. 1973). Probable cause to believe that there is a nexus between the item and the illegal activity must be both immediate and apparent to the officers from the object’s nature. *See Beal*, 810 F.2d at 576. The officers’ “instantaneous sensory perceptions” include all facts available to them at the time of discovery. *Id.* at 576-77.

Therefore, when an item appears suspicious to an officer but further investigation is required to establish probable cause as to its association with criminal activity, the item is not immediately incriminating. It is rarely the case that evidence of a crime other than the crime specified in the warrant would be immediately apparent to an officer examining a file. A court is more likely to find that the incriminating nature of an object was immediately apparent if the object, while not listed in the warrant, is still connected to the underlying crime in some way. *See, e.g., Rimmer v. State*, 825 So.2d 304, 315 (Fla. 2002) (finding that incriminating nature of lease agreement found during search for stolen goods was immediately apparent because officers thought that leased property was linked to theft). “For the vast majority of computer files, this limitation will shield private information from inspection by officers.” David J. S. Ziff, *Fourth*

Amendment Limitations on the Execution of Computer Searches Conducted Pursuant to a Warrant, 105 COLUM. L. REV. 841, 869 (2005)

III. MAGISTRATE JUDGE LEON PROPERLY ISSUED THE WARRANT AUTHORIZING THE AGENTS TO SEIZE ALL OF STARTESTS' COMPUTER EQUIPMENT AND FILES FOR LATER SORTING.

A. The search warrant set forth a protocol that adequately governed the agents' decision to remove StarTests' computer equipment off-site.

This Court has made clear that the magistrate issuing a warrant has authority to impose preconditions on the search and seizure in order to protect against the seizure of sensitive material or evidence outside the warrant. In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) this Court held that when the government seeks a warrant to search for and seize materials protected by the First Amendment, the issuing magistrate may enforce “the preconditions for a warrant – probable cause, specificity with respect to the place to be searched, and the things to be seized, and overall reasonableness – in order to protect against searches or seizures that exceed the scope of the government’s probable cause or disrupt First Amendment Activities.” *Id.* at 554, 565-66. In *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982) the Ninth Circuit applied this principle in ruling that when “the need for transporting the documents [to complete a search] is known to the officers prior to the search, they may apply for specific authorization for large-scale removal of material, which should be granted by the magistrate issuing the warrant only where on-site sorting is infeasible and no other practical alternative exists.” *Id.* at 596. Moreover, Federal Rule of Criminal Procedure 41(e)(2)(B) states that “[u]nless otherwise specified, *the warrant authorizes a later review* of the media or information consistent with the warrant” Fed. R. Crim. P. 41(e)(2)(B) (emphasis added). The Advisory Committee Notes further provide:

Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the

entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.

Fed. R. Crim. P. 41(e)(2)(B), advisory committee notes, 2009 Amendments (emphasis added).

The District Court's decision is entirely consistent with decisions from this Court that gives magistrates adequate authority to regulate the seizure of information for off-site review, as well as with Federal Rule of Criminal Procedure 41(e)(2)(B). Thus, the District Court's decision did not authorize agents to engage in "wholesale" seizures of information without judicial oversight.

1. The agents properly seized StarTests' computer equipment because a less intrusive alternative was not feasible in the particular circumstances of this case.

In *Hill* the court explained that the government may ordinarily seize computer media to determine whether it contains information specified in a search warrant only when the government makes "some threshold showing" that the government needs to "seize the haystack to look for the needle." 459 F.3d at 975. The court explained, "[w]e do not approve of issuing warrants authorizing blanket removal of all computer storage media for later examination when there is no affidavit giving a reasonable explanation...as to why a wholesale seizure is necessary." *Id.* at 976 (citing *Tamura*, 694 F.2d at 595); *see also Hay*, 231 F.3d at 637 (holding seizure of entire computer reasonable because affidavit "justified taking the entire system off-site because of the time, expertise, and controlled environment necessary for a proper analysis").

The District Court followed *Hill* in holding that the affidavit in support of the warrant must contain a candid recitation of the available information bearing on the question whether the agents may seize material for off-site review. Magistrate Judge Leon properly scrutinized the adequacy of the agents' recitation and further gave the agents more detailed instructions to guide their decision whether to review materials off-site. The District Court's decision that agents

executing a warrant may obtain a magistrate's approval to seize intermingled files for later review is wholly consistent with the approach approved by this Court.

- a) *The off-site search was necessary because of the difficulty of locating and identifying the evidence sought on StarTests' computer equipment.*

In *Hill*, the court concluded that the police were not required to bring with them equipment capable of reading computer storage media and an officer competent to operate it.

459 F.3d at 974. The Court observed:

Doing so would have posed significant technological problems and made the search more intrusive...Because computers in common use run a variety of operating systems...police would have had to bring with them a computer (or computers) equipped to read not only all of the major media types, but also files encoded by all major operating systems. Because operating systems, media types, file systems and file types are continually evolving, police departments would frequently have to modify their computer systems to keep them up-to-date. This would not be an insuperable obstacle for larger police departments and federal law enforcement agencies, but it would pose a significant burden on even smaller agencies.

Id.

StarTests maintained the drug testing results for the Colonial Football League-affiliated players in an extensive network of computers, all deceptively labeled and filed, and encrypted. It would have been overly burdensome, if not impossible, to bring computer equipment and personnel capable of fully addressing the challenges of this search.

- b) *It was necessary for the agents to conduct a controlled, off-site search to avoid destroying StarTests' data.*

Numerous courts have held that any effort to read computer files at the scene is fraught with difficulty and risk, justifying off-site review. The sorting of technological documents may require a search to be performed at another location "because that action requires a degree of expertise beyond that of the executing officers," not only to find the documents but to avoid destruction or over searching. *People v. Gall*, 30 P.3d 145, 154-45 (Colo. 2001). In affirming

the wholesale seizure of computer equipment, the court in *Hunter* acknowledged that oftentimes it is simply impractical to search computers on site. *Hunter*, 13 F. Supp. 2d at 583. The *Hunter* court further recognized that computers are extremely vulnerable to tampering, hiding, and destruction, and stated that “until technology and law enforcement expertise render on-site computer records searching both possible and practical, wholesale seizures, if adequately safeguarded, must occur.” *Id.*

The District Court’s decision approving the agents’ decision to search StarTests’ computer equipment off-site is consistent with precedent. StarTests maintained the drug testing information on numerous databases throughout a network of computers. In addition, the databases were mislabeled, encrypted, and deceptively hidden. The agents’ had no other practical alternative but to seize StarTests’ computer equipment for off-site review.

c) *The off-site search was necessary because of the time the agents’ required to conduct the search.*

The process of searching the files at the scene can be time consuming. *Hill*, 459 F.3d at 974-75. To be certain that the medium in question does *not* contain any seizable material, the officers would have to examine every one of what may be thousands of files on a disk—a process that could take many hours and perhaps days. *Id.* Taking that much time to conduct the search would not only impose a significant and unjustified burden on police resources, it would also make the search more intrusive. *Id.* Police would have to be present on the suspect’s premises while the search was in progress, and this would necessarily interfere with the suspect’s access to his home or business. *Id.* If the search took hours or days, the intrusion would continue for that entire period, compromising the Fourth Amendment value of making police searches as brief and non-intrusive as possible. *Id.*

The agents had to search through voluminous files to discover those that related to the drug test results of the five Colonial Football League-affiliated players. Although the warrant authorized the agents to remain at StarTests' facility to conduct the search, it would have been far more disruptive had the agents made a thorough search of each individual document and computer disc before removing them. To insist on such a practice "would substantially increase the time required to conduct the search, thereby aggravating the intrusiveness of the search." *United States v. Beusch*, 596 F.2d 871, 876-77 (9th Cir. 1979).

d) *It was necessary for the agents to conduct an off-site search because the evidence the agents sought consisted of intermingled files.*

The removal of a sealed container, which may amount to an "over-seizure," is not only authorized but preferred in limited circumstances, including where "the sorting out of the described items from the intermingled undescribed items would take so long that it is less intrusive merely to take that entire group of items to another location and do the sorting there." LaFare 2 Search & Seizure § 4.11(a), p. 686 (4th ed.). In *Tamura*, the Ninth Circuit suggested that in the "comparatively rare instances" where "documents are so intermingled that they cannot feasibly be sorted on site," law enforcement "can avoid violating [F]ourth [A]mendment rights by sealing and holding the documents pending approval by a magistrate of a further search." 694 F.2d at 595-96. The Tenth Circuit suggested in dicta that the same procedure might be followed for computer searches. *See Carey*, 172 F.3d at 1275 ("the officers may seal or hold the documents pending approval by a magistrate of the conditions and limitations on a further search through the documents"). Both courts, however, have subsequently clarified that a procedure in which the initial warrant establishes the criteria for off-site review is sufficient. *See Hay*, 231 F.3d at 637 (affidavit "justified taking the entire system off site," with magistrate approval, "makes inapposite *United States v. Tamura*"); *United States v. Brooks*, 427 F.3d 1246, 1251

(10th Cir. 2005) (“we have not required a specific prior authorization along the lines suggested in *Carey* in every computer search”). This is consistent with Federal Rule of Criminal Procedure 41(e)(2), which acknowledges that “officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.” Fed. R. Crim. P. 41(e)(2), advisory committee notes, 2009 Amendments.

The agents had to search through voluminous files to discover those that related to the drug test results of the five Colonial Football League-affiliated players. (R. at 2, 8). StarTests’ maintained databases containing four years worth of drug test results for the Colonial Football League. (R. at 2, 8). Given the volume of documents and the manner in which those documents were stored on StarTests’ computer system, it would not have been feasible for the agents to sort the files at StarTests’ facility. (R. at 2, 8). Additionally, the agents did not have to seal and hold the documents pending approval by Magistrate Judge Leon of a further search, because the warrant set forth specific criteria for off-site review. (R. at 2, 8).

B. The search warrant set forth a protocol that adequately governed the agents’ sorting of StarTests’ intermingled files; Magistrate Judge Leon was not required to review the relevance of particular files.

In *Tamura*, the Ninth Circuit stated that “any wholesale removal of intermingled documents [should] ‘be monitored by the judgment of a neutral, detached magistrate.’” 694 F.2d at 596. This advisory dicta has been interpreted to mean that a magistrate must, upon an aggrieved party’s motion, review evidence subsequent to removal of that evidence off-site to ensure that the evidence falls within the scope of the warrant. *United States v. Comprehensive Drug Testing*, 579 F.3d 989, 998 (9th Cir. 2009). However, *Tamura* does not require any such procedure, as the Ninth Circuit’s decisions in *Hill* and *Adjani* demonstrate.

In *Hill*, the defendant challenged the search of his computer for child pornography on the grounds that the warrant was overbroad and invalid because “it did not include a search protocol to limit the officers’ discretion as to what they could examine when searching the defendant’s computer media.” 459 F.3d at 977. The Ninth Circuit held that, under the circumstances, no search protocol was necessary, and that it was also unnecessary to explain the absence of a search protocol in the warrant application. *Id.* at 978 (“[W]e look favorably upon the inclusion of a search protocol; but its absence is not fatal.”) All that was required was that the government demonstrates to the magistrate why “such a broad search and seizure authority is reasonable in the case at hand.” *Id.* at 975. In other words, “there must be some threshold showing before the government may ‘seize the haystack to look for the needle.’” *Id.* *Hill* plainly contemplated that officers may at times conduct off-site computer searches pursuant to a magistrate-approved warrant even where there is no detailed search protocol.

Additionally, in *Adjani*, the Ninth Circuit found that a procedure in which agents broadly seized all computer data and later filtered it off-site satisfied the Fourth Amendment. Specifically, the agents “seized Adjani’s computer and external storage devices, which were later searched at a computer lab,” and also seized a computer owned by Adjani’s roommate. 452 F.3d at 1142. The warrant stated that “[i]n searching the data, the computer personnel will examine all of the data contained in the computer equipment and storage devices to view their precise contents and determine whether data falls within the items to be seized as set forth herein.” *Id.* at 1144. The Ninth Circuit upheld the warrant against a Fourth Amendment specificity challenge, and rejected defendants’ argument that the warrant should have restricted the government to search only parts of the computer, noting that “agents are limited by the long-standing principle that a duly issued warrant, even one with a thorough affidavit, may not be used to engage in a

general, exploratory search.” *Id.* at 1150. Because the warrant contained “a detailed computer search protocol,” however, the court found that “[s]uch specificity increases our confidence that the [magistrate] was well aware of what he was authorizing and that the agents knew the bounds of their authority in executing the search.” *Id.* at 1149 n.7.

The District Court’s decision below does not conflict with *Tamura*. First, the cited language in *Tamura* is merely advisory dicta and therefore not binding. Second, the instant case more than satisfies even the advisory guidance in *Tamura*. *Tamura* does *not* require a magistrate to review any evidence personally. Rather, *Tamura* merely *suggests* that, if evidence is to be moved off-site, either the warrant must specify procedures ahead of time to guide that removal, or the government must seek an additional warrant that provides such parameters. Unlike *Tamura*, the warrant in this case did specify the procedure both for the removal of computer records to an off-site location and for the subsequent search of those records. (R. at 2, 8). That procedure, which was approved by Magistrate Judge Leon beforehand when he issued the warrant authorizing the search, fully complies with *Tamura*’s suggested protocol.

- IV. THE PARTICULARITY REQUIREMENT DOES NOT NEED TO BE HEIGHTENED IN THE DIGITAL CONTEXT AS PER THE GUIDELINES ANNOUNCED BY THE NINTH AND FOURTEENTH CIRCUITS.
- A. The Ninth and Fourteenth Circuits’ mandates conflict with controlling authority, and thus this Court should reject protocols unique to searches of computer equipment.

There is no basis in the language of the Fourth Amendment or this Court’s precedent for such warrant requirements. *See Andersen*, 427 U.S. 463; *see also Berger v. New York*, 388 U.S. 41 (1967). As emphasized by this Court in *Dalia v. United States*, 441 U.S. 238 (1979), the Warrant Clause contains three requirements for a search warrant to issue: (1) an oath or affirmation; (2) probable cause to search; and (3) a particular description of the place to be searched. *Id.* at 255 (1979). Grounded in that language, this Court rejected the claim that a

warrant must specifically authorize a covert entry in order for such a manner of execution of a warrant to be legal. This Court reasoned:

Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that...warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant-subject of course to the general Fourth Amendment protection "against unreasonable searches and seizures"...It would extend the Warrant Clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers. Such an interpretation is unnecessary, as we have held...the manner in which a warrant is executed is subject to later judicial review as to its reasonableness.

Id. at 257-58 (footnote omitted). In the computer context, some courts have recognized that a warrant need not specify the methods of recovery of the data or the tests to be performed because "[t]he warrant process is primarily concerned with identifying *what* may be searched or seized-not how-and *whether* there is sufficient cause for the invasion of privacy thus entailed." *Upham*, 168 F.3d at 537.

This Court should not impose inflexible and unworkable requirements or procedures on magistrate judges confronted with an application for a warrant to seize documents located in a computer. Instead, this Court should uphold the District Court's finding that magistrate judges may use existing Fourth Amendment requirements to ensure that a warrant is executed in a manner that protects privacy or other sensitive individual interest. *See Zurcher*, 436 U.S. 547.

1. The requirement that segregation and redaction of the computer evidence must be either done by specialized personnel or an independent third party is not feasible.

"Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the [requirements set forth in the text] [of the Fourth Amendment], search warrants also must include a specification of the precise manner in which

they are to be executed.” *United States v. Grubbs*, 547 U.S. 90, 98 (2006). This Court has made clear that, subject to the Fourth Amendment’s general protection against unreasonable searches, “it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant.” *Dalia*, 441 U.S. at 257.

The Ninth and Fourteenth Circuits’ mandate that the government use computer personnel in all cases involving computer searches conflicts with those well-established principles, as well as this Court’s “repeated[] refus[al] to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.” *Veronia Sch. Dist. 47J. v. Acton*, 515 U.S. 646, 663 (1995). Additionally, placing computer personnel between the evidence and the agent effectively gives heightened protection to computer searches above that given to other forms of searches under the Fourth Amendment. *Giberson*, 527 F.3d at 888-89.

2. The requirement that agents restrict their search to a specified search protocol designed to uncover only the information for which it has probable cause is particularly burdensome.

Any significant limitations on the search techniques the government may use to find evidence that falls within the scope of the warrant is inconsistent with this Court’s precedent. This Court has held that “[n]othing in the language of the Constitution or in this Court’s decisions interpreting that language suggests that, in addition to the requirements set forth in the text [of the Fourth Amendment], search warrants also must include a specification of the precise manner in which they are to be executed.” *Grubbs*, 547 U.S. at 98 (quoting *Dalia*, 441 U.S. at 255). “It would extend the Warrant Clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers.” *Dalia*, 441 U.S. at 258. Furthermore, any limitation on the government’s ability to find evidence that falls

within the scope of a warrant is inconsistent with the rule that “[a] container that may conceal the object of a search authorized by a warrant may be opened immediately; the individual’s interest in privacy must give way to the magistrate’s official determination of probable cause.” *Ross*, 456 U.S. at 823. In *Andersen*, this Court noted that when search warrants authorize the seizure of documents, “responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.” 427 U.S. at 482 n.11. Under *Andersen*, it is appropriate for magistrates to strictly enforce the Particularity Clause in computer cases involving commingled records. However, nothing in *Andersen* authorizes magistrates to control the manner in which a warrant is *executed*. Such control was rejected by this Court in *Dalia* and *Grubbs*, and as the court in *Farlow* noted, “[e]ven the most computer literate of judges would struggle to know what protocol is appropriate in any individual case, and the notion that a busy trial judge is going to be able to invent one out of whole cloth or to understand whether the proposed protocol meets ill-defined technical search standards seems unrealistic.” 2009 WL 4728690, at *6.

In *Andersen* this Court recognized that it is necessary to look at “innocuous documents...in order to determine whether they are, in fact, among those papers authorized to be seized.” *Andersen*, 427 U.S. at 482 n.11. Specified search protocols are unnecessary, as investigators already operate under significant constitutional restrictions. As with any search, “the manner in which a warrant is executed is subject to later judicial reviews as to its reasonableness.” *Dalia*, 441 U.S. at 258; *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (“The general touchstone of reasonableness which governs Fourth Amendment analysis...governs the method of execution of the warrant.”); *Hill*, 459 F.3d at 978 (“reasonableness of the officer’s acts both in executing the warrant and in performing a subsequent search of seized materials remains

subject to judicial review”). Unreasonable conduct can be remedied after the fact, with suppression of evidence as a “last resort.” *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

The Ninth and Fourteenth Circuits’ mandate that the agents limit their searches to files containing particular keywords is unworkable and is entirely inconsistent with this Court’s precedent.

3. The requirements that agents must destroy, or, if the recipient may lawfully possess it, return non-responsive data conflicts with controlling authority.

Federal Rule of Criminal Procedure 41(f)(1)(B) as amended effective December 1, 2009 provides: (1) that “[i]n 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”; and (2) that the officer who executes the return “may retain a copy of the electronically stored information that was seized or copied.” Fed. R. Crim. P. 41(f)(1)(B).

The Ninth and Fourteenth Circuits’ mandate that agents destroy, or, if the recipient may lawfully possess it, return non-responsive data directly conflicts with Federal Rule of Criminal Procedure 41(f)(1)(B).

In *Ross* this Court adopted the view that there is no distinction between “worthy” and “unworthy” containers:

[T]he central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.

465 U.S. at 822 (footnote omitted). Based on this reasoning, this Court should reject a special rule for electronic evidence containers. Otherwise, contrary to this Court’s precedent and sound

reasoning, filing cabinets, diaries, books, floppy drives, hard drives, paper bags, and other storage devices would all require different rules. Moreover, given the pace of technological change, which permits ever greater storage information on ever smaller devices, such distinctions are illusory. Finally, the fact that some of the evidence in electronic storage is intermingled with other materials should not change the analysis. The same can be said of many other containers: diaries may contain evidence unrelated to the crime; filing cabinets often hold not only files of business-related paper but also miscellaneous other documents, ranging from personal tax records to family photographs.

While courts must always be vigilant against overbroad searches, “searches of computer records are no less constitutional than searches of physical records.” *Gray*, 78 F. Supp. 2d at 529 (citing *Hunter*, 13 F. Supp. 2d at 584 (internal quotation marks omitted)). When a warrant describes items that are small and can be easily hidden, the Constitution permits a meticulous search, even of someone’s home. There is no reason why the general rule cannot also be applied to computers. This Court has refused to rein in these sorts of searches and does not view them as overbroad even within the sanctity of a home. *See Horton*, 496 U.S. at 130. Thus, this Court should refrain from finding that the sanctity of a computer warrants a higher level of protection.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fourteenth Circuit should be reversed.

Respectfully submitted.

Team 9

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