**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

**UNITED STATES OF AMERICA**,
*Plaintiff*,

v. Case No. **15-40043-01-CM**

**WILLIAM BARBER**,
*Defendant*.

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**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS FRUITS OF ILLEGAL SEARCHES**

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This motion concerns three search warrants. The first warrant was issued by a magistrate judge sitting in the District of Maryland, directed to Google, Inc. in California, for the contents of an email account belonging to the email address jesusweptone@gmail.com. This was not Mr. Barber's email account, but he had sent emails to that address, and those emails were found during that search. The second search warrant was also issued by a Maryland magistrate to Google, in California, for the contents of Mr. Barber's email account — bigw1991@gmail.com. The third warrant was issued by Judge O'Hara for a search of Mr. Barber's home in Kansas.

## ARGUMENTS & AUTHORITIES

Mr. Barber asks the Court to suppress the fruits of search warrants. Accordingly, he bears the initial burden of proving the illegality of those searches.[1]

### I. The search of Mr. Barber's emails was both an unconstitutional and prejudicial violation of Federal Rule of Criminal Procedure 41(b).

The Tenth Circuit developed the framework for addressing violations of the Federal Rules of Criminal Procedure in a case it decided in 1980 titled *United States v. Pennington*.[2] The first question is whether there has been a violation of the Rules at all.[3] If the court finds a violation, it then asks whether the violation is constitutional.[4] If so, the court must suppress the fruits of the violation. If not, the court will still suppress the evidence if "(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the

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[1] *E.g., Wilson v. United States*, 218 F.2d 754, 757 (10th Cir. 1955).
[2] 635 F.2d 1387.
[3] *Id* at 1390.
[4] *Id*. Mr. Barber acknowledges that *Pennington* is binding precedent on this Court. But, for issue-preservation purposes, he argues that *Pennington* was wrongly decided because Rule 52 puts the burden on the government to prove a Rule violation was harmless error. Since a violation of Rule 41(b) is such a violation, the burden should be on the government to prove the error harmless, rather than on the defendant to prove prejudice.

Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule."[5]

### *A. The Maryland warrants were issued in violation of Rule 41(b).*

Federal Rule of Criminal Procedure 41(b) sets the limits on a magistrate judge's authority. It gives "a magistrate judge with authority in the district" the "authority to issue a warrant to search for and seize a person or property *located within the district* [.]"[6] Rule 41(a)(2)(A) includes "information" within the definition of "property," and the Supreme Court has interpreted that definition to include intangible property such as emails.[7] A search for such information does not take place "in the airy nothing of cyberspace," it occurs "on a computer or some other form of electronic media that has a physical location."[8]

Here, a magistrate judge with authority in the District of Maryland issued two search warrants for property held by Google, Inc. in California. That property — emails — existed in a physical location in

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[5] *Id.*
[6] Fed. R. Crim. P. 41(b)(1)(emphasis added).
[7] *United States v. New York Tel. Co.*, 434 U.S. 159, 170 (1977).
[8] *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F.Supp.2d 753, 757 (S.D. Tex. Apr. 22, 2013)(citing H. Marshall Jarrett et al., *U.S. Dep't of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 84–85 (2009), available at http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf).

California. Since California does not lay within the District of Maryland, the magistrate lacked the authority to issue the warrants.

The Tenth Circuit recently found a similar a violation in *United States v. Krueger*.[9] A magistrate in Kansas issued a warrant for the search and seizure of property located in Oklahoma. The district court granted a motion to suppress, finding a violation of Rule 41(b).[10] On appeal, the government conceded that the warrant violated the Rule. The Tenth Circuit commented that, "[g]iven the obviousness of this Rule 41 defect on the record before us, the Government's belated concession a prudent one."[11]

### *B. This was a Fourth Amendment violation because the law protected people from invalid warrants at the time of the Amendment's adoption.*

The Fourth Amendment protects people against unreasonable searches and seizures.[12] Any interpretation of the Fourth Amendment starts with what it meant at the time it was adopted: what "traditional protections against unreasonable searches and seizures" were afforded "by the common law at the time of the framing."[13] And, as the United

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[9] No. 14-3035, 2015 WL 7783682 (10th Cir. Nov. 10, 2015)
[10] *Id* at *2.
[11] *Id* at *2.
[12] U.S. Const. Am. 4.
[13] *Atwater v. City of Lago Vista,* 532 U.S. 318, 326 (2001) (internal quotation mark omitted).

States Supreme Court recently held in *United States v. Jones*, the Fourth Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted."[14]

*1. The common law, at the time of framing, protected people against warrants issued without jurisdiction.*

When the Bill of Rights was enacted, a warrant issued in one English county was invalid outside that county: "the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace of in another, as Middlesex, before it can be executed there."[15] American courts found that same protection after the Amendment's ratification. Writing in 1837, the North Carolina Supreme Court held that an officer could only serve an arrest warrant "in his own county…."[16] The Delaware Supreme Court reached the same conclusion in 1842, interpreting the Fourth Amendment to say that a city constable had "no authority out of the city limits" to serve an arrest warrant.[17] A review of these principles led Judge Gorsuch, writing a concurrence in *Krueger*, to conclude "The principle animating the common law at the

[14] 132 S.Ct. 945, 953.
[15] William Blackstone, 4 Commentaries *291-92.
[16] *Copeland v. Isley*, 19 N.C. (2 Dev. & Bat.) 505, 505 (1837).
[17] *Lawson v. Buzines*, 3 Del. (3 Harr.) 416, 416 (Sup. Ct. 1842).

time of the Fourth Amendment's frame was clear: a warrant may travel only so far as the power of its issuing official."[18]

*2. The Fourth Amendment protects people against warrants issued without jurisdiction because they are not warrants at all.*

A warrant issued by a magistrate lacking territorial jurisdiction to issue it is void at inception. Our Supreme Court has held that, to satisfy the Fourth Amendment, a "valid warrant" can only be issued by "magistrates empowered to issue" them.[19] The Tenth Circuit has trod similar ground. In a 1990 per curiam opinion, titled *United States v. Barker*, a state-court judge issued a warrant to search in "Indian territory."[20] The Tenth Circuit held that the search "was not authorized by a valid warrant" and, accordingly, the resulting evidence "was not admissible in [the] defendant's federal prosecution …."[21]

Nor is the Tenth Circuit a lone voice on this issue. The Second Circuit held similarly in a 1942 case titled *Weinberg v. United States*, finding a warrant — issued by the Eastern District of Michigan for property in the Southern District of New York — invalid because "constitutional provisions" prohibit a district court from issuing "search

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[18] *Krueger*, 2015 WL 7783682 *12 (Gorsuch, J. concurring).
[19] *United States v. Lefkowitz*, 52 S.Ct. 420, 423 (1932).
[20] 894 F.2d 1144.
[21] *Id* at 1147.

warrants [that] may be used anywhere in the country."[22] In 2010, the Sixth Circuit used *United States v. Master* to hold that a warrant, issued by a state judge who lacked territorial jurisdiction, void at inception because it "violated [the] Defendant's Fourth Amendment rights."[23] And in 2013, the D.C. Circuit held in *United States v. Glover* that a District of Columbia judge's authorization of the installation of a recording device into a car in Maryland was more than a "technical defect," instead deeming it a "blatant disregard of a district judge's jurisdictional limitation…."[24]

These rationales apply equally to this case. Rule 41(b)(1) does not permit a magistrate judge to issue a search warrant anywhere in the country. Instead, it only permits a magistrate judge to issue a warrant for property found within the magistrate judge's district. The magistrate judge here, sitting in Maryland, penned a warrant to search for property held in California. The magistrate judge lacked the power to authorize such a warrant, making it void at inception. Accordingly, the resulting searches were performed without a warrant and violated the Fourth Amendment.

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[22] 126 F.2d 1004, 1006.
[23] 614 F.3d 236, 241.
[24] 736 F.3d 509, 515 (D.C. Cir. 2013).

### *C. Even without a Fourth Amendment violation, the evidence should be suppressed because the searches prejudiced Mr. Barber.*

A court must still suppress evidence garnered by virtue of a Rule 41 violation if the violation prejudiced the defendant.[25] A defendant suffers prejudice from a Rule 41(b)(1) violation "when the Government seeks and obtains a search warrant from a federal magistrate judge who lacks warrant issuing authority under Rule 41… ."[26] The inquiry turns on whether "the issuing federal magistrate judge could have complied with the Rule."[27] All a defendant must prove is that the challenged "search might not have occurred because the Government would not have obtained" the challenged warrant "had Rule 41(b)(1) been followed."[28]

The first two searches might not have occurred if that Rule had been followed here. *Krueger* applies directly to these facts. The magistrate judge in *Kruger* sat in Kansas but issued a warrant for property in Oklahoma. The magistrate judge here sat in Maryland but issued warrants for property in California. As the *Krueger* court found, the Kansas magistrate judge "clearly lacked Rule 41 authority to issue a

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[25] *Pennington*, 635 F.2d at 1390.
[26] *Krueger*, *5.
[27] *Id.*
[28] *Id.*

warrant for property" in Oklahoma.[29] Had "the magistrate judge recognized that clear and obvious fact, he surely would not have issued" the warrant.[30] And without the warrant, the search would not have occurred.[31] The same logic holds here. Had the Maryland magistrate judge recognized the "clear and obvious" fact that it lacked the authority to issue a warrant for property in California, it would never have issued these warrants. Without them, the searches would not have occurred.

## II. The fruits of the Maryland warrants should be suppressed because the magistrate judge lacked statutory jurisdiction to issue them.

### *A. The Maryland warrants were issued in violation of Title 28 Section 636.*

Congress has limited the power of magistrate judges. Title 28 Section 636(a) gives magistrate judges authority "within the district in which sessions are held by the court that appointed the magistrate judge…." Congress "enacted the Federal Magistrates Act against the background of accepted practice[]" that warrants signed by those magistrates "can only have effect within" their territorial jurisdiction.[32]

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[29] *Krueger*, *5.
[30] *Id.*
[31] *Id.*
[32] *United States v. Strother*, 578 F.2d 397, 400 (D.C. Cir. 1978).

Accordingly, a Maryland magistrate judge lacks statutory authority to issue warrants for property located in California.

### *B. A non-constitutional statutory violation triggers a harmless error analysis.*

Congress has directed the courts to evaluate the government's "statutory missteps" with a harmless-error analysis.[33] Specifically, the statute tells the courts to ignore "errors or defects which do not affect the substantial rights of the parties."[34] The Tenth Circuit has interpreted this statute to mean "the government ordinarily has the burden of proving that a non-constitutional error was harmless.[35] Accordingly, even if the Court is not persuaded that the violation here implicates the Fourth Amendment, or that it prejudiced Mr. Barber, it must still suppress the fruits of the searches unless the government can prove the violation was harmless.

### *C. The violation cannot be harmless because jurisdictional violations are* per se *harmful.*

But jurisdictional-statute violations are always harmful. And Section 636(a) is a jurisdictional statute. As the Supreme Court has said, statutes that deal with the "power to adjudicate" are jurisdictional in

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[33] *Krueger*, *10 (Gorsuch, J. concurring)(citing 28 U.S.C. § 2111).
[34] 28 U.S.C. § 2111.
[35] *United States v. Rivera*, 900 F.2d 1462, 1469 n. 4 (10th Cir. 1990).

nature.[36] Other courts have held that Section 636(a)'s limits in particular demarcate jurisdictional boundaries.[37]

Noncompliance with a jurisdictional statute can never be harmless. Our Supreme Court has said as much on numerous occasions. For instance, in *Torres v. Oakland Scavenger Co.*, it decreed that "a litigant's failure to clear a jurisdictional hurdle can never be harmless…."[38] And the Tenth Circuit has followed suit, refusing to use harmless-error analysis on jurisdictional errors.[39]

The Maryland warrants were issued in violation of the statute. Even if the Court were to deem that violation a non-constitutional one, the government must still prove it harmless. But violations of jurisdictional statutes can never be harmless, and the statute violated was a jurisdictional one. Accordingly, the government cannot prove the violation harmless, so the Court should suppress the resulting evidence.

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[36] *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89 (1998).
[37] *See, e.g., N.L.R.B. v. A–Plus Roofing, Inc.,* 39 F.3d 1410, 1415 (9th Cir.1994).
[38] 487 U.S. 312, 317 n.3 (1998).
[39] *See, e.g., In re Woosley*, 855 F.2d 687, 688 (10th Cir. 1988)(harmless-error argument "misunderstands the nature of a jurisdictional requirement"); *United States v. Flowers*, 464 F.3d 1127, 1130 n.1 (10th Cir. 2006)(refusing to apply harmless error to government's jurisdictional failure to serve § 851 notice on defendant).

## III. The fruits of the third warrant should be suppressed because the probable cause that justified it came from two unlawful searches.

If a warrant rests on evidence obtained through unlawful means, the court asks "whether the search warrant was issued upon probable cause as supported by facts untainted by the prior illegality."[40] An affidavit that "contains no untainted statements" lacks the "substantial basis for concluding that probable cause" existed for the warrant.[41]

All of the facts supporting the third warrant are tainted. While the affidavit numbers 18 pages, only pages 14 through 17 deal specifically with Mr. Barber.[42] Within those pages, the agent describes how the search of jesusweptone@gmail.com (Warrant 1) uncovered evidence that led to a search of Mr. Barber's account (Warrant 2), which uncovered more evidence. Since these two searches were unlawful, the evidence derived from them must be excised from the affidavit. Specifically, paragraphs 26 through 35 all contain evidence derived from the Maryland searches.[43]

After removing that evidence from the affidavit, the Kansas magistrate judge lacked a substantial basis to issue the search warrant

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[40] *United States v. Anderson*, 981 F.2d 1560, 1568 (10th Cir. 1992).
[41] *Id* at 1569.
[42] *Sealed Exhibit*, 14-17.
[43] *Id*.

for Mr. Barber's home. Accordingly, the fruits of that warrant — both the evidence collected and the statements given — should be suppressed.

## CONCLUSION

The Maryland warrants were issued in violation of the Federal Rules of Criminal Procedure. This violation was constitutional because the issuing court lacked authority to issue the warrants at all, rendering the warrants void at inception and the searches unlawful. If the Court declines to find a constitutional violation of the Rule, then it should still suppress the evidence because Mr. Barber was prejudiced as a result of the violation. Had the issuing magistrate judge recognized that he lacked the authority to issue the warrants, the searches would not have occurred.

If the Court finds that the Rule was not violated, or that the violation lacks either constitutional dimensions or prejudicial effects, the Court should still suppress the evidence because the warrants were issued in violation of statutory authority. Not all such violations are error; the government may prove a non-constitutional violation harmless. But the statute violated here was one of jurisdiction, and running afoul of a jurisdictional statute can never be harmless. Accordingly, the Court should suppress the fruits of the Maryland

warrants because they were issued in violation of statutory authority, and the violation was harmful.

If the Court suppresses the evidence from the Maryland warrants, it must also suppress the evidence garnered from the Kansas warrant. The probable cause from that warrant came from the fruits of the Maryland searches. Since those searches were unlawful, evidence derived from them must be excised from the probable-cause affidavit. Once removed, the affidavit in support of the Kansas warrant fails to provide a substantial basis to conclude that probable cause existed to search Mr. Barber's home.

Respectfully submitted,

s/ Branden A. Bell
Branden A. Bell, #22618
Assistant Federal Public Defender
117 SW 6th Avenue, Suite 200
Topeka, KS 66603-3840
Phone: 785-232-9828
Fax: 785-232-9886
Email: branden_bell@fd.org

**CERTIFICATE OF SERVICE**

I certify that I electronically filed the foregoing with the Clerk of the Court on December 28, 2015, by using the CM/ECF system, which will send a notice of electronic filing to the following:

Christine Kenney
Assistant United States Attorney
christine.kenney@usdoj.gov

s/ Branden A. Bell
Branden A. Bell