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.

DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO MOTION TO SUPPRESS

INTRODUCTION

In his motion, William Barber argues that the Fourth Amendment to the United States Constitution, the Federal Magistrate's Act, and Federal Rule of Criminal Procedure 41(b) prohibit a Maryland magistrate from issuing search warrants for property located in California. Specifically, Mr. Barber contends that a Maryland magistrate lacks jurisdiction to authorize the seizure of the contents of email accounts, when those contents are held by Google, Inc. in California. And since the evidence obtained by virtue of the email warrants produced the probable cause for the warrant to search his home, the latter warrant must be suppressed as well.

The government counters in three ways. First, it claims that the Maryland warrants were issued under the Stored Communications Act, which gives magistrates the ability to issue warrants outside their territorial jurisdiction, as long as the magistrate has jurisdiction over the offense being investigated. Second, it argues that the Stored Communications Act only permits suppression as a remedy for constitutional violations of the Act. Third, it challenges whether Mr. Barber has standing to challenge the first email warrant, which did not target Mr. Barber's own email account, but revealed emails Mr. Barber had sent to that email account. Finally, it argues that the good-faith exception to the exclusionary rule precludes the latter's application in this case.

The government's arguments are unpersuasive. First, there is scant evidence that the Maryland warrants were issued under the SCA. The affidavits in support of the warrants do not cite the SCA as statutory authority for issuing the warrants, and the warrants themselves erroneously state that the property to be seized lies within the District of Maryland. Second, even if the warrants were issued under the SCA, that law still requires the magistrate to have territorial jurisdiction over the offense being investigated. Yet there is no evidence in the supporting affidavits that the officer was investigating an offense

that occurred in Maryland. Third, Mr. Barber does have standing to challenge the seizure of emails he sent to another person, as he has a reasonable expectation of privacy in those sent emails. Finally, the government may not rely on the good-faith exception to the exclusionary rule because no well-trained officer would rely on a warrant issued by a magistrate who lacked territorial jurisdiction over the offense being investigated or the property to be seized.

ARGUMENTS & AUTHORITIES

I. The Maryland warrants were not issued under the SCA because they failed to cite it as statutory authority and erroneously listed the property to be seized as being located in Maryland.

Federal Rule of Criminal Procedure 41 generally governs the issuance of search warrants, but it "does not modify any statute regulating search or seizure… ."[1] Accordingly, in any conflict between Rule 41's provisions and those of a statute, the statutory language triumphs. Seizing onto this principle, the government designates the language of the SCA as its champion over Rule 41.

The government chooses poorly. Found at 18 U.S.C. § 2703(a), the SCA permits the government to compel a provider of an "electronic communications service" to disclose the contents of an "electronic

[1] Fed. R. Crim. P. 41(a)(1).

communication…only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure… ."[2] Since Rule 41(b) contains a substantive provision, it does not qualify as a "procedure described" in the Rules. So, the argument goes, Rule 41(b) does not limit a warrant issued under the SCA.

But the Maryland warrants were not issued under the SCA. Though both affidavits in support of the warrants contain a section titled "Statutory Authority," neither one cites the SCA.[3] Nor are the terms used in the SCA — such as "electronic communications" or "electronic communications service" found anywhere in either affidavit. The warrants themselves — which merely incorporate attachments to the affidavit — similarly lack any citation or reference to the SCA. In fact, the warrants misleadingly claim that the "application…requests the search of the following person or property located in the…District of Maryland."[4]

A warrant issued under the SCA is special because, among other things, it dispenses with Rule 41(b)'s territorial limitation. Before we can say that a magistrate issued a warrant under the SCA, there must be

[2] 18 U.S.C. § 2703(a).
[3] Gov.'s Hrng. Ex. 2 at 3; Gov.'s Hrng. Ex. 4 at 3.
[4] Gov.'s Hrng. Ex. 1, 2.

some evidence that the magistrate relied on the SCA to issue the warrant. The warrants in this case do not cite to the SCA or use any of the terms found in the SCA. If anything, the warrants themselves suggest that the Maryland magistrate did *not* issue them under the SCA because they state that the property to be searched was in the District of Maryland — a fact which, if true, would make the SCA wholly unnecessary to the issuance of the warrant.

Simply put, there is no evidence that the Maryland magistrate relied on the SCA to issue the warrants. Accordingly, they remain subject to Rule 41(b)'s territorial restriction — a restriction they violate. The government does not argue that Mr. Barber was not prejudiced by this violation, so the proper remedy is suppression.

II. The SCA did not authorize the Maryland court to issue the warrants because it lacked territorial jurisdiction over the offenses being investigated.

Even if the Maryland warrants were issued under the SCA, they still fell short of its requirements. The government argues that the SCA permitted the Maryland court to issue the warrants because the Act allows such warrants to be issued by a "court of competent jurisdiction."[5] Such a court is defined as one that "has jurisdiction over the offense

[5] 18 U.S.C. § 2703(a).

being investigated."[6] The government implies, but never states, that the District of Maryland court was such a court.

The government's failure to explicitly make this claim is understandable because it would be wrong. The statute itself does not specify what type of "jurisdiction" the issuing court must have over the offense being investigated. While the Tenth Circuit has yet to interpret the provision, district courts have unanimously held that it refers to territorial jurisdiction. For instance, in *United States v. Lopez-Acosta*, the District of Nebraska relied on the fact that "[t]he investigation at issue was initiated based on events occurring in Nebraska" to hold that it properly issued an SCA warrant.[7] The District of Arizona held similarly in 2007: "when Congress amended Section 2703(a)…to add the phrase 'a court with jurisdiction over the offense,' Congress intended to authorize the federal district court located in the district *where the alleged crime occurred* to issue out-of-district warrants for the seizure of electronically-stored communications."[8] And the Middle District of

[6] 18 U.S.C. § 2711(3)(A)(i).
[7] No. 13-CR-275, 2014 WL 3828225 at *3 (D.Neb. Aug. 4, 2014).
[8] *In re Search of Yahoo, Inc.*, 07-3194-MB, 2007 WL 1530071 at *5 (D.Ariz. May 21, 2007)(emphasis added).

Florida reached the same conclusion in a 2005 case titled *In Re Search Warrant*.[9]

In fact, the authorities relied on by the government make this exact point. The Seventh Circuit justified its opinion in *United States v. Berkos* on the premise that the "Northern District of Illinois was the authority with jurisdiction over the offense" because the defendant was ordered to pay child support in Illinois and failed to do so in Illinois.[10] Likewise, the Third Circuit identified the District of Pennsylvania as having jurisdiction over the offense in *United States v. Bansal* because the defendant supervised a controlled-substance conspiracy while in Philadelphia.[11] Mr. Barber has been unable to locate any authority to the contrary.

But there is no evidence that the offenses underlying the Maryland warrants actually occurred in Maryland. The affidavits in support of the warrants allege violations of 18 U.S.C. §§ 2251 and 2252A.[12] The first statute prohibits a person from making or publishing a notice seeking or offering to receive a visual depiction of a minor

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[9] 05-MC-168-Orl-31-JGG, 2005 WL 3844032 at *5 (M.D. Fl. Feb. 13, 2006).
[10] 543 F.3d 392, 397 (7th Cir. 2008).
[11] 663 F.3d 634, 641 (3d. Cir. 2011).
[12] Gov. Hrng. Ex. 2 at 3; Gov. Hrng. Ex. 4 at 3.

engaging in explicit conduct.[13] The second prohibits a person from transporting, possessing, or accessing such a depiction.[14] Yet the affidavits do not allege that a person did any of these things in the District of Maryland. Or aided or abetted any of these acts in the District of Maryland. Indeed, the affidavits fail to mention any geographic tie to the District of Maryland at all.

In short, the SCA permits a court with territorial jurisdiction over the offenses being investigated to issue a warrant to seize materials lying outside of that court's territorial jurisdiction. But the Maryland court had no evidence to conclude that it had territorial jurisdiction over the alleged offenses. So the SCA would not permit it to issue the warrants it did in this case.

III. The violations were constitutional because the Fourth Amendment recognizes a court's territorial limitation as a constitutional protection.

The government argues that the SCA "does not provide exclusion as a remedy" for a violation of its terms.[15] This is not entirely true. The SCA states that fines and prosecution are the only remedies "for *nonconstitutional* violations of this chapter."[16] Accordingly, the

[13] 18 U.S.C. § 2251.
[14] 18 U.S.C. § 2252A.
[15] Gov. Resp. in Opp. to Mtn. to Supp. at 7 (Jan. 11, 2016).
[16] 18 U.S.C. § 2708 (emphasis added).

government's contention that the warrants "were authorized by a statute that does not provide the remedy of exclusion" is incorrect. Instead, the SCA implies that suppression remains an available remedy for a constitutional violation of its terms.

Mr. Barber spilled considerable ink in his original motion arguing that the violation in this case *was* constitutional. Without repeating those arguments verbatim, suffice it to say that Mr. Barber contends that the Fourth Amendment recognizes territorial limitation as a protection afforded to citizens. While those arguments dealt with a court issuing a warrant for property lying outside its jurisdiction, they apply with equal force to a court issuing a warrant to investigate a crime lying outside its jurisdiction.

IV. Mr. Barber has standing to challenge the seizure of his emails because he has a reasonable expectation of privacy in them.

A. Mr. Barber has standing to contest the seizure of his emails in general.

The government does not take on this argument directly. Instead, it cites two cases, *United States v. Payner*[17] and *United States v. Moffett*[18] for the proposition that the Court may not suppress evidence unlawfully seized from a third party. But both of those holdings were

[17] 447 U.S. 727, 734 (1980).
[18] 84 F.3d 1291, 1924 (10th Cir. 1996).

premised on a different issue: that a defendant lacked standing to object to the illegal seizure of a third party's business records.[19] The government did not seize bank records or a train manifest in this case — it seized Mr. Barber's emails.

And those emails enjoy constitutional protection. The landmark case in this area is the Sixth Circuit's decision in *United States v. Warshak*, which held that "a subscriber enjoys a reasonable expectation of privacy in the contents of emails that are stored with, or sent or received through," an email provider.[20] Judges in this District have relied on *Warshak* a number of times to hold that the Fourth Amendment requires a warrant based on probable cause before email contents may be seized.[21] While the Tenth Circuit has yet to weigh in on the issue, the United States Supreme Court has assumed without deciding that people have a reasonable expectation of privacy in text messages[22] — a much less formal means of communication than an

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[19] 447 U.S. at 732 ("a depositor has no expectation of privacy" in bank records); 84 F.3d at 1293 (defendant had "no reasonable expectation of privacy in the information on the train manifest — a business record of Amtrak.").

[20] 631 F.3d 266, 288 (6th Cir. 2010).

[21] *E.g.*, *In re Apps. for Search Warrants for Info. Assoc. with Target Email Accounts/Skype Accounts*, No. 13-MJ-8163, 2013 WL 4647554, at *3 (D.Kan. Aug. 27, 2013).

[22] *City of Ontario, Cal v. Quon*, 560 U.S. 746, 760 (2010).

email. It also cited a mobile phone's ability to store the equivalent of "every piece of mail they have received for the past several months" as a justification for requiring a warrant before searching such a phone.[23]

B. Mr. Barber has standing to contest the seizure of his emails found in another's email account.

When it seized the contents of one email account, it found emails that Mr. Barber had sent to that account. The government argues that Mr. Barber has no standing to contest the seizure of his emails found in another's email account because "he claims no ownership or other interest in that particular email account[.]"[24]

But Mr. Barber does not need an ownership interest in another's email account, just a reasonable expectation that the emails he sent would remain private. This was the precise issue in *Warshak*: a person has a "reasonable expectation of privacy in the contents of emails that are stored with, or sent or received through, a commercial ISP."[25] It does not matter whether the person's emails are found in the person's own email account or someone else's — the expectation remains the same. Judge Waxse echoed this sentiment in *In re Application for Search Warrants and Information Associated with Target Email Address*, citing

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[23] *Riley v. California*, 134 S.Ct. 2473, 2489 (2014).
[24] Gov. Resp. at 4.
[25] 631 F.3d at 288 (citations and quotations omitted).

Warshak to conclude that "an individual has a reasonable expectation of privacy in emails…stored with, sent to, or received through an electronic communications service provider." [26]

That description fits the emails seized under the first Maryland warrant. Among those emails were those that Mr. Barber had "sent to" the owner of the email account that had been searched. Mr. Barber retains a reasonable expectation of privacy in those emails. That expectation grants him standing to object to their seizure.

V. The Maryland warrants violated the Fourth Amendment's particularity requirement by compelling the disclosure of the entire contents of the email accounts.[27]

The Fourth Amendment requires that search warrants "particularly" describe the items to be seized.[28] The Framers inserted this requirement into the Bill of Rights to protect against the "general warrant, abhorred by the colonists… ."[29] The Fourth Amendment

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[26] 12-MJ-8119-DWJ and 12-MJ-8191-DJW, 2012 WL 4383917 at *5 (D.Kan. Sep. 21, 2012).

[27] Mr. Barber recognizes that this argument should have been raised in his original motion. Unfortunately, and through no fault of the government, Mr. Barber did not have the warrants or applications at the time his original motion was due, so he was not aware of the warrants' breadth. Mr. Barber acknowledges that the government is entitled to respond to the particularity argument, and will not object should it seek leave to do so.

[28] U.S. Cont. amend. IV.

[29] *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)(citations and quotations omitted).

operates on the premise that "any intrusion in the way of search or seizure is an evil," so the particularity requirement seeks to insure that even necessary searches and seizures "be as limited as possible."[30]

The Maryland warrants sweep too broadly. Both warrants make a distinction between "Information to be disclosed by Google, Inc." and "Information to be seized by the government." Under the former category, the warrants require Google to disclose "[t]he contents of all e-mails stored in the account" without temporal limitation.[31] Under the latter category, the government narrows its request to information "that constitutes fruits, evidence, and instrumentalities of violations of Title 18, U.S.C. §§ 2251 and 2252A… ."[32] In sum, the warrants permit the government to search through all of the emails ever received, sent, or drafted in the email accounts, and then seize those that are evidence of a crime.

The Fourth Amendment does not permit such a fishing expedition. The particularity requirement applies to both searches and seizures. Yet there is no particularity in what Google must disclose: *every* email *ever* sent or received by the accounts. The warrants require no connection

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[30] *Id.*
[31] Gov. Hrng. Ex. 2 at 12; Gov. Hrng. Ex. 4 at 9.
[32] Gov. Hrng. Ex. 2 at 13; Gov. Hrng. Ex. 4 at 11.

between the violations being investigated and the emails to be produced. Nor do they focus on any specific timeframe during which the accounts were used for the offenses being investigated.

The precedent within this Circuit and this District reach the same conclusion. The Tenth Circuit recognized the danger that the modern computer posed to the Fourth Amendment's particularity requirement in a 2009 case titled *United States v. Otero*: a computer's ability "to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging *search* into a person's private affairs, and accordingly makes the particularity requirement that much more important."[33] Because of this danger, the *Otero* court reminded its readers that "our case law requires that warrants for computer searches must *affirmatively limit* the search to evidence of specific federal crimes or specific types of material."[34]

Here, the warrants authorize an unlimited search with a limited seizure. But *Otero* did not bless this half-measure. Instead, it spoke in no uncertain terms about limiting the *search* of the computer. The Maryland warrants have no such restriction, and thus run afoul of the particularity requirement.

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[33] 563 F.3d 1127, 1132 (emphasis added).
[34] *Id* (citations and quotations omitted)(emphasis in original).

Judge Waxse has relied on *Otero* to deny warrants identical to these. In 2012, he denied the government's request for a search warrant that sought to compel Yahoo! to initially disclose the contents of "every email" sent from an email account.[35] He did the same thing in 2013 — overruling the government's request for a warrant that would have permitted it to search, among others, the entire contents of email accounts at Google and Yahoo![36] In both cases, the government had delineated the warrants with an unlimited search and a narrower seizure, just like the Maryland warrants did. And in both cases, Judge Waxse found the delineation insufficient. Analogizing an email provider to the post office, he found that the warrants asked "the post office to provide copies of all mail ever sent by or delivered to a certain address so that the government can open and read all the mail to find out whether it constitutes fruits, evidence, or instrumentality of a crime. The Fourth Amendment would not permit such a warrant," he continued, "and should therefore not permit a similarly overly broad warrant just

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[35] *In re Application for Search Warrants for Information Associated with Target Email Address*, Nos. 12-MJ-8119-DJW, 12-MJ-8191-DJW, 2012 WL 4383917 at *9 (Sep. 21, 2012).

[36] *In re Application for Search Warrants for Information Associated with Target Email Accounts/Skype Accounts*, Nos. 13–MJ–8163–JPO, 13–MJ–8164–DJW, 13–MJ–8165–DJW, 13–MJ–8166–JPO, 13–MJ–8167–DJW, 2013 WL 4647554 (Aug. 27, 2013).

because the information sought is in electronic form rather than on paper."[37]

Judge Waxse's analogy is apt. The allegations in this case concern the emailing of explicit photographs of minors. To be sent by email, those photographs would be attached to the email. Moreover, electronic photographs come in a finite number of file formats, such as .jpg. The government could have narrowed its search to emails that only contained photographic attachments. Or only to emails that contained attachments at all. Such a limitation would have been a commonsense way to heed *Otero*'s requirement of an affirmative limitation on the search. Yet the government included no limitation on its request.

The Fourth Amendment's particularity clause requires affirmative limitations while searching through computer data. The Maryland warrants permitted the government to rifle through every email ever sent or received by the accounts without limitation. Accordingly, the Maryland warrants were overbroad, and this Court should suppress the fruits garnered from them.

[37] *Id.* at *8.

VI. The good-faith exception does not apply to these warrants because no reasonably trained officer would believe that the Maryland courts had the power to issue them.

As a way to avoid application of the exclusionary rule, the government relies on the good-faith exception. The government argues that, even if the Court finds a Fourth Amendment violation, the officers were entitled to rely on the SCA as authority to issue the warrants. And that the officers could rely on the facially valid warrants — both from Maryland and Kansas — to perform the searches they did.

The good-faith exception does not mean "that exclusion is always inappropriate where an officer has obtained a warrant and abided by its terms… ."[38] Instead, in some circumstances, "the officer will have no reasonable grounds for believing that the warrant was properly issued."[39] The good-faith exception assumes that an officer has "a reasonable knowledge of what the law prohibits."[40]

A. The good-faith exception does not apply because warrants issued in violation of territorial jurisdictions are not warrants at all.

The good-faith exception to the exclusionary rule saves the fruits of warrants issued without probable cause or bearing some other defect. But does it apply to warrants that are issued without jurisdiction and

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[38] *United States v. Leon*, 468 U.S. 897, 921 (1984).
[39] *Id* at 922 (citations omitted).
[40] *Id* at 919 n.20 (citations omitted).

thus void at inception? The closest that the Tenth Circuit came to answering this question was in *United States v. Baker*, a 1990 case in which a state court issued a search warrant for property on Indian Territory, something it lacked statutory authority to do.[41] The *Baker* court recognized the paucity of authority on the issue, citing a single case from Kentucky that found the good-faith exception inapplicable to invalid warrants.[42] The Tenth Circuit opted not to resolve the issue, assuming that the exception applied to invalid warrants but finding that the police's actions did not fit the exception's requirements.[43]

Eleven years later, the Sixth Circuit generated law on the subject in a case titled *United States v. Scott*.[44] A warrant was signed by a state court that lacked authority, under state law, to do so. When the government invoked the good-faith exception, the court brushed it aside: "we are confident that *Leon* did not contemplate a situation where a warrant is issued by a person lacking the requisite legal authority."[45]

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[41] 894 F.2d 1144 (10th Cir. 1990).
[42] *Id* at 1147-48 (citing *Commonwealth v. Shelton*, 766 S.W.2d 628, 629-30 (Ky. 1989)).
[43] *Id*.
[44] 260 F.3d 512 (6th Cir. 2001).
[45] *Id*. at 515.

The Sixth Circuit has since adopted an approach that, while not overruling *Scott*, examines the actions of the officers.[46]

Judge Gorsuch recently raised the issue again in his concurrence in *Krueger*. "Time and time again state and circuit courts have explained that…a warrant issued in defiance of positive law's restrictions on the territorial reach of the issuing authority will not qualify as a warrant for Fourth Amendment purposes."[47] He then cited *Baker* to hold that "this court had no trouble holding that the state court's warrant was no warrant at all for Fourth Amendment purposes."[48]

The Maryland warrants were void at inception because they were issued in violation of the court's jurisdiction. The Maryland court lacked territorial jurisdiction over the property to be searched and the offense to be investigated. Without a valid warrant, the Fourth Amendment violation occurs irrespective of the police's good faith because an unwarranted search has occurred.

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[46] *See United States v. Master*, 614 F.3d 236 (6th Cir. 2010).
[47] *Krueger* at *11 (Gorsuch J., concurring)(citing *State v. Kirkland,* 212 Ga.App. 672, 442 S.E.2d 491, 491–92 (1994); *State v. Jacob,* 185 Ohio App.3d 408, 924 N.E.2d 410, 415–16 (2009); *Sanchez v. State,* 365 S.W.3d 681, 684–86 (Tex.Crim.App.2012); *United States v. Master,* 614 F.3d 236, 241 (6th Cir.2010); *Weinberg v. United States,* 126 F.2d 1004, 1006–07 (2d Cir.1942)).
[48] *Id* at *12.

B. The good-faith exception does not apply because the officers did not rely on the SCA to issue the Maryland warrants.

Even if the good-faith exception did apply to these non-warrants, they were not issued under the SCA, so the government's attempted reliance on its provisions are unavailing. As argued above, neither the warrants nor their underlying affidavits cited the SCA or any of its terms. In fact, the warrants erroneously listed the District of Maryland as the geographical location in which the property to be searched was located. There is no evidence that the agents in this case reasonably relied on the SCA to execute the Maryland warrants, so they may not now invoke them to avoid the exclusionary rule.

Even if the agents had relied on the SCA, the Maryland warrants still violate its terms. Under the SCA, either the property to be searched or the offense being investigated must lie within the court's territorial jurisdiction.[49] The government concedes that the property to be searched was outside of the District of Maryland. And it does not explain how the District of Maryland had territorial jurisdiction over the offenses being investigated. Nor would one find such an explanation within the applications for the warrants themselves. The police simply cannot

[49] 18 U.S.C. § 2711(3)(A)(i).

reasonably rely on a statute that contains express limitations to justify ignoring those limitations.

Judge Belot held similarly in *United States v. Krueger*.[50] In that case, the government obtained a search warrant from a Kansas magistrate for property located in Oklahoma. The government argued, as it does here, that the agents were entitled to rely on the warrant in good faith. Judge Belot responded by quoting the D.C. Circuit's opinion in *United States v. Glover*: "[I]t is quite a stretch to label the government's actions in seeking a warrant so clearly in violation of Rule 41 as motivated by 'good faith.'"[51] The government did not challenge this portion of Judge Belot's opinion on appeal.[52]

Though the jurisdictional rule in this case might be different — Section 2711 instead of Rule 41 — the analysis is the same. Seeking a warrant for property outside the district, for an offense without a tie to the district, was a clear violation of the SCA's jurisdictional requirements. Accordingly, it cannot be called the result of good faith.

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[50] 998 F.Supp.2d 1032 (D.Kan. Feb. 7, 2014).
[51] *Id.* at 1036 (quoting 736 F.3d 509, 516 (D.C. Cir. 2013)).
[52] *United States v. Krueger*, ___ F.3d ___, 2015 WL 7783682 at *2, n. 5 (Nov. 10, 2015).

C. The fruits of the Kansas warrant cannot be saved by the good-faith exception because no reasonable officer would believe that the Maryland warrants were properly issued.

The probable cause underlying the warrant for the search of Mr. Barber's home came exclusively from the evidence obtained from the two Maryland warrants.[53] If the Court finds that an objectively reasonable officer would not rely on the Maryland warrants, then it follows that such an officer would not rely on the Kansas warrant because the latter was based on the evidence produced from the former. Put another way: if a reasonably trained officer would recognize that the Maryland court lacked jurisdiction to issue the Maryland warrants, that same officer would recognize that she could not use evidence obtained from the Maryland warrants to obtain a Kansas warrant.

D. A reasonably well-trained officer would have known that the Maryland warrants were overbroad and would not have relied on them for the Kansas warrant.

Judge Waxse has twice rejected applications for search warrants that were functionally identical to the Maryland warrants.[54] Judge Waxse's reasons for rejecting those applications apply to the Maryland

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[53] Gov. Hrng. Ex. 5 at 14-16.

[54] *In re Application for Search Warrants for Information Associated with Target Email Address*, Nos. 12-MJ-8119-DJW, 12-MJ-8191-DJW, 2012 WL 4383917 at *9 (Sep. 21, 2012); *In re Apps. for Search Warrants for Info. Assoc. with Target Email Accounts/Skype Accounts*, No. 13-MJ-8163, 2013 WL 4647554, at *3 (D.Kan. Aug. 27, 2013).

warrants: they permit an overbroad search of the entire contents of an email account. The United States Supreme Court extended the good-faith exception to situations in which police rely "on binding precedent" in a 2011 case titled *Davis v. United States*.[55]

But that proposition cuts both ways. If officers rely on binding precedent to excuse their actions from the deterrent effects of the exclusionary rule, they cannot close their eyes to precedent that would not excuse their actions. While Judge Waxse's opinions were less than binding, they were still law in the district. Accordingly, an objectively well-trained officer should have been aware of them, and known that the Maryland warrants would likely have not passed muster in Kansas.

CONCLUSION

Search warrants are generally governed by Rule 41, which limits their reach to property located within the territorial jurisdiction of the issuing court. The government claims that the Maryland warrants were issued under the SCA, which acts as an exception to Rule 41's limitation. Mr. Barber disagrees because the warrants did not cite the SCA as authority and fail to comply with the SCA's own territorial restrictions. If the Court agrees, then it should apply Rule 41 and find that the Maryland warrants violated that Rule, that Mr. Barber suffered

[55] 131 S.Ct. 2419, 2429.

prejudice or a constitutional violation as a result, and accordingly suppress the fruits of those warrants.

If the Court finds that the warrants were issued under the SCA, it may still find that they were issued in violation of the SCA's requirement that the issuing court have territorial jurisdiction over the offense being investigated. If it agrees, the Court should find that the violation was constitutional in nature, and suppress the fruits of the Maryland warrants.

If the Court finds that the warrants were issued under the SCA and did not violate the SCA's own terms, the Court may still find that the warrants were overbroad. If so, the Court should suppress the fruits of the Maryland warrants.

If the Court finds any of the violations outlined above, it should suppress the evidence from the Maryland and Kansas searches unless it finds that the government has satisfied the good-faith exception to the exclusionary rule. The Court should overrule this request, because no reasonably well-trained officer would ignore the SCA's requirement that the issuing court have territorial jurisdiction over the offense being investigated. Furthermore, no such officer would conclude that the Maryland warrants were valid in light of Judge Waxse's rulings in identical circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court on January 25, 2016, by using the CM/ECF system, which will send a notice of electronic filing to the following:

Christine Kenney
Assistant United States Attorney
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s/ Branden A. Bell
Branden A. Bell