IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA **Plaintiff,** **v.** **WILLIAM ELAM BARBER,** **Defendant.**	**Case No. 15-40043-CM**

GOVERNMENT'S RESPONSE IN OPPOSITION TO MOTION TO SUPPRESS

The United States of America, by and through Barry R. Grissom, United States Attorney for the District of Kansas, and Christine E. Kenney, Assistant United States Attorney for said District, submits this response in opposition to the defendant's Motion to Suppress Fruits of Illegal Searches. (Doc. 29.) Because the searches were conducted pursuant to valid warrants, the Court should overrule and deny the defendant's motion.

I. Background

Factual Background

In September 2012, FBI Special Agent Daniel O'Donnell was investigating email addresses identified as trading in, and discussing, child pornography and related material. Special Agent O'Donnell identified one email address from which messages had been sent and to which messages had been received, that contained images of child pornography. A search warrant for this email account led to the investigation of the email, "jesusweptone@gmail.com."

On November 6, 2012, Special Agent O'Donnell obtained a search warrant in the District of Maryland for information in the possession of Google Inc., a company located in the Northern District of California, for the contents of "jesusweptone@gmail.com." (Ex. 1.) Special Agent O'Donnell stated that the affidavit was made in support of a search warrant for information stored in Mountain View, California. (Ex. 2, ¶ 3.) Special Agent O'Donnell reviewed the search results and noted that "jesusweptone@gmail.com" had sent or received emails that contained child pornography. One of these email accounts, "bigw1991@gmail.com," had sent or received multiple emails in about June 2011 to or from "jesusweptone@gmail.com."

On December 12, 2012, Special Agent O'Donnell obtained a search warrant in the District of Maryland for information in the possession of Google Inc., for the contents of "bigw1991@gmail.com." (Ex. 3.) Special Agent O'Donnell stated that the affidavit was made in support of a search warrant for information stored in Mountain View, California. (Ex. 4, ¶ 3.) Special Agent O'Donnell reviewed the search results and noted that "bigw1991@gmail.com" had sent or received emails that contained child pornography or communication indicative of an interest in child pornography. Special Agent O'Donnell determined that "bigw1991@gmail.com" was associated to the defendant, William Barber, at an address in Kansas City, Kansas.

On March 27, 2013, FBI Special Agent Michael Daniels submitted an affidavit in support of a search warrant on the residence of the defendant. (Ex. 5.) That same date, the Honorable James P. O'Hara, United States Magistrate Judge for the District of Kansas, authorized a warrant for the search of the defendant's residence in Kansas. (Ex. 6.)

Legal Background

In analyzing the validity of a warrant issued for electronically stored information in the possession of a service provider, courts look not only to the Federal Rules of Criminal Procedure, but also to the Stored Communications Act. Federal Rules of Criminal Procedure 41(b) sets forth in general the authority for courts to issue search warrants, but 18 U.S.C. § 2703 applies specifically to search warrants for information in the possession of an out-of-district service provider.

Congress enacted the Stored Communications Act, 18 U.S.C. §§ 2701-2712 ("SCA"), as part of the Electronic Communications Privacy Act ("ECPA") in 1986 to create a system of statutory privacy rights for customers and subscribers of wire and electronic service providers. The SCA regulates government access to stored communications by creating a procedure that law enforcement officers must follow in order to compel disclosure of such communications. The statute provides for the issuance of a warrant as follows:

> A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued *using* the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) *by a court of competent jurisdiction*.

18 U.S.C. § 2703(a) (emphasis added). A "court of competent jurisdiction" is defined as "any district court of the United States (including a magistrate judge of such a court) or any United States court of appeals that has jurisdiction over the offense being investigated." 18 U.S.C. § 2711(3)(A)(i).

Subsequent to the events of September 11, 2001, Congress made two changes to the SCA that are significant to the instant proceeding. First, the language "pursuant to a warrant issued *under* the procedures described in the Federal Rules of Criminal Procedure," was changed to

"pursuant to a warrant issued *using* the procedures described in the Federal Rules of Criminal Procedure." (emphasis added.) Second, the warrant could be issued by a court – including a magistrate judge – with "jurisdiction over the offense being investigated." The USA PATRIOT ACT of 2001, PL 107–56, October 26, 2001, 115 Stat 272; 18 U.S.C. § 2711(3)(A)(i).

II. Discussion

The defendant relies heavily on the recent case of *United States v. Krueger*, ___ F.3d ___; 2015 WL 7783682 (10th Cir. 2015), to support his theory that the search warrants issued in the instant case are invalid. However, as set forth below, the defendant's reliance on *Krueger* is misplaced.

As a threshold issue, the government submits that the defendant has no standing to challenge the evidence seized as a result of the Maryland search warrant executed on "jesusweptone@gmail.com." The defendant claims no ownership or other interest in that particular email account, and therefore has no Fourth Amendment rights implicated in that particular search. *See Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) *citing, Alderman v. United States*, 394 U.S. 165, 174 (1969) (Fourth Amendment rights are personal rights, and "[a] person who is aggrieved by an illegal search 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.").

A. The defendant erroneously relies on *United States v. Krueger*.

Krueger is factually distinguishable from the instant case. In *Krueger*, law enforcement obtained a search warrant authorized by a magistrate judge in the District of Kansas, to search a residence located in Oklahoma. On appeal, the government conceded that the warrant violated

Rule 41(b) because the Kansas magistrate judge did not have authority to issue a warrant for property located in Oklahoma. *Krueger* at *2. The Court further noted that the district court found the warrant so facially deficient that it could not be saved by the good-faith exception. *Id.*

Rule 41(a)(1) specifically states that the "rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances." Additionally, in the concurring opinion, the Court looked to the Federal Magistrates Act to identify a magistrate judge's geographic jurisdiction. That Act provides, "[e]ach United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and *elsewhere as authorized by law*," the powers and duties enumerated therein. 28 U.S.C. § 636(a); *Krueger* at *6. In *Krueger*, there was no other statutory authority to save the search warrant. Here, there is.

Unlike *Krueger*, the warrant in the instant case was issued pursuant to § 2703(a), using the *procedures* of the federal rules. As discussed above, the warrants issued by the Maryland magistrate complied with § 2703 and are therefore, at a minimum, facially valid. Further, as discussed below, at a minimum the investigators were entitled to good-faith reliance on the facially valid warrants. The evidence seized was not fruit of the poisonous tree, and this Court should deny the defendant's motion to suppress on this basis.

B. 18 U.S.C. § 2703 controls the analysis whether the search warrants issued in the instant case are valid.

The question raised by the defendant in the instant case was carefully analyzed in 2008 by the Seventh Circuit Court of Appeals. The case of *United States v. Berkos*, 543 F.3d 392 (7th Cir. 2008), is squarely on point. In *Berkos*, investigating agents obtained a warrant from a magistrate

judge in the Northern District of Illinois, the court with jurisdiction over the offense being investigated, compelling an internet service provider located in Texas to turn over records. *Id.* at 395. The *Berkos* defendant challenged whether the Illinois magistrate judge had the authority to issue the warrant for property located in another jurisdiction. *Id.* at 396.

The *Berkos* Court began by reviewing the changes to the wording of § 2703, then discussed the relationship of this statute to the procedures set out in Rule 41. *Id.* a 397. The Court specifically noted that Rule 41(b), the provision for issuing a warrant within the district where the property is located, is a substantive provision, not a procedural one. *Id.* The Court held that § 2703 refers only to the provisions of Rule 41 "that detail the *procedures* for obtaining and issuing warrants." *Id.* at 398 (emphasis in the original). Thus, the Court determined that the procedures for issuing a warrant under Rule 41(e) apply to § 2703, but not the provisions of Rule 41(b). Finally, the Court held that § 2703(a) has its own jurisdictional provision authorizing district courts to issue warrants, and Rule 41(a)(1) specifically provides that "[t]his rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances." *Id.* The *Berkos* Court thus affirmed the district court's denial of the motions to suppress.

Berkos was cited approvingly in *United States v. Bansal*, 663 F.3d 634 (3rd Cir. 2011). In *Bansal*, magistrate judges sitting in the Eastern District of Pennsylvania authorized search warrants for the *Bansal* defendant's email accounts with service providers located in California (including at least one "gmail" account). *Id.* at 661. In affirming the district court's denial of the motion to suppress, the *Bansal* Court held that § 2703(a) sets forth the procedures that law enforcement must follow when compelling disclosure from service providers. *Id.* at 662. The

Court further rejected the argument that Rule 41(b)'s limits on a magistrate judge's jurisdiction took precedent over § 2703(a)'s broader authority. *Id.*

Thus, the search warrants issued in the instant case by the magistrate judge in Maryland are valid, and this Court should deny the defendant's argument for suppression on this basis.

C. **The exclusionary rule does not apply to the SCA.**

Courts have held that a violation of a federal statute does not justify suppression of evidence unless the statute itself specifies exclusion as a remedy. *See United States v. Cray*, 673 F. Supp. 2d 1368, 1376 (S.D. Ga. 2009), *citing cases*. The SCA only provides for civil damages, and criminal punishment, but it does not provide exclusion as a remedy. *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998). *See also, United States v. Thompson*, 936 F.2d 1249, 1251-52 (11th Cir. 1991) (evidence admissible even assuming it was obtained in violation of the pen register statute because the statute does not provide exclusion as a remedy).

Moreover, courts have restricted the exclusionary rule to situations where its remedial objectives would be most effective. *United States v. Payner*, 447 U.S. 727, 734 (1980), *citing United States v. Calandra*, 414 U.S. 338, 348 (1974). The United States Supreme Court has consistently recognized that strict application of the exclusionary rule to suppress probative but untainted evidence unacceptably impedes the truth-finding function in criminal cases. *Id.* In *Payner*, the Court also noted that a federal court is not authorized "to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court." *Id.* at 735. *See also, United States v. Moffett*, 84 F.3d 1291, 1294 (10th Cir. 1996).

Thus, exclusion of evidence is not a remedy because the search warrants issued by the Maryland magistrate were authorized by a statute that does not provide the remedy of exclusion, and this Court should deny the defendant's argument for suppression on this basis.

D. Investigators reasonably relied in good faith on the facial validity of § 2703, and the ensuing search warrants issued by the magistrate judge.

Assuming arguendo that there was a Fourth Amendment violation when investigators relied upon § 2703 in obtaining the search warrants for the content of the Google email accounts, or when investigators relied upon the results of those same search warrants as probable cause to support the search warrant authorized by Judge O'Hara, this Court should find that the "good faith exception" of *United States v. Leon*, 468 U.S. 897 (1984) applies.

The purpose of the exclusionary rule is general deterrence. *United States v. Otero*, 563 F.3d 1127, 1133-34 (10th Cir. 2009), *citing Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 699–700 (2009). "Because of this underlying purpose, evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. " *Id.*, *citing Illinois v. Krull*, 480 U.S. 340, 348–49 (1987). To trigger the exclusionary rule, an officer's misconduct must be sufficiently deliberate that suppression could deter it, and that deterrence is worth the substantial cost of exclusion. *Herring* at 703.

In *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), the Court found that government agents violated the defendant's Fourth Amendment rights by compelling a service provider to turn over emails without a warrant supported by probable cause – facts significantly different than in the instant case in that here, law enforcement relied upon probable cause warrants. The *Warshak* Court found that "because the investigators relied in good faith on the provisions of the Stored

Communications Act, the exclusionary rule does not apply." *Id.* at 274, *citing Krull*, 480 U.S. at 350.

The *Warshak* Court found that, even though the government's search violated the Fourth Amendment, exclusion was not a remedy because the investigators relied in good faith on the SCA. *Warshak*, 631 F.3d at 288 – 89. Citing *Krull*, the Court noted that "the exclusionary rule's purpose of deterring law enforcement officers from engaging in unconstitutional conduct would not be furthered by holding officers accountable for mistakes of the legislature. Thus, even if a statute is later found to be unconstitutional, an officer cannot be expected to question the judgment of the legislature." *Id*. (citations and quotations omitted.) The Court further noted that the SCA "has been in existence since 1986" and "has not been the subject of any successful Fourth Amendment challenges." *Id*. Finally, the Court noted the complicated issues it was required to analyze, and concluded it therefore would not be obvious to law enforcement that the SCA was unconstitutional. *Id*.

Even assuming a Fourth Amendment violation, investigators were entitled to rely in good faith on the validity of § 2703. Thus, this Court should deny the defendant's motion to suppress on this basis.

Further, even if this Court found that the Maryland search warrants were defective for relying on § 2703, and that defect affected the probable cause to support those warrants, this Court should find that all of the warrants – those issued by the Maryland magistrate and the one issued by Judge O'Hara – are saved by the "good faith exception" of *United States v. Leon*, 468 U.S. 897 (1984). "In *Leon*, the Supreme Court modified the Fourth amendment exclusionary rule by holding that evidence seized pursuant to a search warrant later found to be invalid need not be

suppressed if the executing officers acted in objectively reasonable, good-faith reliance on the warrant." *United States v. Rowland*, 145 F.3d 1194, 1206 (10th Cir. 1998) *citing Leon* at 922. The *Leon* Court reasoned that the exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates" and noted that purpose is ill-served by excluding evidence "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope," because in most of those cases "there is no police illegality and thus nothing to deter." *Leon*, 468 U.S. at 916, 920, 921 *See also Rowland* (refusing to exclude evidence and applying good-faith exception where search warrant not supported by probable cause); *United States v. Callwood*, 66 F.3d 1110, 1113 (10th Cir. 1995) (recognizing applicability of *Leon* good faith exception when officers reasonably relied on warrant issued by a detached and neutral magistrate, "even assuming arguendo that a constitutional violation occurred"); *United States v. Nolan*, 199 F.3d 1180 (10th Cir. 1999) (upholding search based upon the *Leon* good faith exception without deciding whether warrant was supported by probable cause).

Good faith is determined with reference to "the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 n.23. However, "it must . . . be remembered that the knowledge and understanding of law enforcement officers and their appreciation for constitutional intricacies are not to be judged by the standards applicable to lawyers." *United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir. 1985). There is a presumption, which "must carry some weight," that "when an officer relies upon a warrant, the officer is acting in good faith." *Id.* *See Leon*, 468 U.S. at 922 ("[S]earches pursuant to a warrant will rarely require any deep

inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search.") (internal quotations omitted).

As noted above, Congress enacted the SCA in 1986, and significantly amended it subsequent to the events of September 2001. Since that time, law enforcement has relied upon the provisions of the SCA to obtain warrants for the seizure of electronic communications in the custody of third party providers. Moreover, the *Warshak* Court recognized that the issues dealing with the constitutionality of the SCA were complicated, and it was not unreasonable for investigators to rely on the SCA in obtaining email content. *Warshak*, 631 F.3d at 289.

Even assuming a Fourth Amendment violation, investigators were entitled to rely in good faith on the facially valid warrant issued by the Maryland magistrate and by Judge O'Hara. There is no culpable law enforcement behavior to deter. Investigators had no reason to doubt the validity of these warrants. Thus, this Court should deny the motion to suppress the evidence seized as a result of the warrants issued by the Maryland magistrate judge and by Judge O'Hara on this basis.

CONCLUSION

Based upon the above, the United States requests that this Court overrule and deny the defendant's motion to suppress the evidence obtained pursuant to the search warrants issued during the course of the investigation that led to the filing of the Indictment in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2016, I electronically filed the foregoing response with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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