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 DEFENDANT'S SUPPLEMENTAL 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 Defendant's Supplemental Motion to Suppress. (Doc. 44.) The government incorporates by reference and reasserts all arguments and authorities set forth in its previous pleadings (Docs. 35 and Doc. 41), and raised during the hearing on February 16, 2016. Based upon the entire record, the government requests this Court to overrule and deny the motion to suppress.

I. Testimony at the suppression hearing

The government presented the testimony of Special Agent Daniel O'Donnell, FBI. Agent O'Donnell's testimony covered the initial investigation through the referral of investigation to the Kansas City office.

Agent O'Donnell testified that in 2012, he was assigned to the FBI unit tasked with investigating on-line child exploitation crimes. Agent O'Donnell explained his training and

experience in these investigations. In approximately mid-2012, he was on temporary assignment to the Queensland Police Service ("QPS") in Australia. While there, Agent O'Donnell learned that the QPS had obtained numerous emails containing images of child pornography that had been sent from or to an Australia citizen. Approximately 100 of the email users appeared to be operating in the United States.

At the conclusion of his temporary assignment, Agent O'Donnell returned to his regular duty station located in the District of Maryland with the list of email accounts possibly associated with the United States, and emails obtained by QPS. At the time he opened his investigation, Agent O'Donnell did not know the physical location of any of the email account users.

Agent O'Donnell began by narrowing the list of possible targets to the potentially worst offenders. Because Agent O'Donnell did not know the location of any of the email accounts users, he began by seeking search warrants issued by magistrate judges in the District of Maryland to a select number of target email accounts. Based upon the results of those search warrants, Agent O'Donnell obtained search warrants in Maryland for additional email accounts. Subsequent to the initial search warrants, Agent O'Donnell issued subpoenas and engaged in undercover communications from his location in Maryland with some of the possible targets. Agent O'Donnell also testified that some of the possible targets were located in Maryland, but he identified those after he began issuing search warrants. Finally, Agent O'Donnell testified that the search warrant issued to "jesusweptone@gmail.com" – the results of which led to the investigation into "bigw1991@gmail.com" – was not one of the initial search warrants obtained as part of his investigation.

Agent O'Donnell also testified that he worked with an attorney assigned to the Department of Justice Child Exploitation and Obscenity Section ("CEOS") who reviewed his affidavits in support of search warrants before they were submitted to the issuing magistrate. CEOS specializes in the investigation and prosecution of child exploitation crimes. Agent O'Donnell testified that he submitted affidavits in support of several search warrants. These search warrant requests were not all reviewed by the same magistrate. In fact, the two search warrants at issue in the instant case were authorized by different magistrates. (Ex. 1, Ex. 3.)

Special Agent Michael Daniels, FBI, testified that based upon the referral from Agent O'Donnell, he obtained a search warrant in the District of Kansas authorizing the search of the defendant's residence in Kansas. Agent Daniels said that he had a summary of the investigation prepared by Agent O'Donnell, but not the search warrants issued in the District of Maryland. Agent Daniels also testified that generally when he seeks authorization for a search warrant, either the target or the victim is in his jurisdiction.

II. Good Faith

During closing arguments, counsel suggested an opportunity for further briefing if the Court were inclined to consider whether the good faith exception applied to the facts of the instant case. Counsel further clarified at the close of the hearing that the parties' focus should be whether good faith applies to an officer's mistaken interpretation of a statute. Based upon the evidence and law, the Court should find that, all other arguments aside, the good faith exception applies in this case.

1. The interpretation of jurisdiction in §2703(d) has not been settled by the courts, and in any event not sufficiently as to negate the good faith exception to the agent's actions.

The defendant concludes that there was a mistake of law, and that "jurisdiction" necessarily means "territorial jurisdiction." However, the statute itself does not specify territorial jurisdiction, as does the wiretap statute, *see* 18 U.S.C. § 2518(3), and the government does not concede that defendant has correctly interpreted that jurisdiction. In addition, the government could find no court to have reached this issue. Therefore, the government contends that the Maryland warrants were validly issued. Regardless, the status of the law is not so settled that it was objectively unreasonable for Agent O'Donnell to rely on the validity of those warrants.

The Stored Communications Act ("SCA") specifically allows a judge to issue a search warrant outside that court's territorial jurisdiction. 18 U.S.C. §§ 2703(c) and 2711(3)(A). In addition, Rule 41 allows a judge to issue a search warrant outside that court's territorial jurisdiction under certain circumstances. Fed. R. Crim. P. 41(b). Thus, it is not a stretch to conclude that jurisdiction is not strictly defined as territorial. It further is not unreasonable for a non-lawyer to assume the Maryland warrants at issue in the instant case were validly authorized.

Moreover, although there are cases where courts have refused to find good faith reliance on a Rule 41 warrant because it was issued by a judge without authority to do so, there are no such cases pertaining to § 2703 warrants. Clearly, a warrant authorizing the search of an individual's residence is more intrusive than a warrant authorizing the search of an email account in the possession of a third party. *See United States v. Berkos*, 543 f.3d 392, FN 6 (7th Cir. 2008) (§ 2703 warrants "do not directly infringe upon the personal privacy of an individual, but instead compel a service provider to divulge records maintained by provider for the subscriber"); *Hubbard*

v. MySpace, Inc., 788 F.Supp.2d 319325 (S.D. NY 2011) (§ 2703 amended to "authorize the court with jurisdiction over the investigation to issue the warrant directly, without requiring the intervention of its counterpart in the district where the ISP is located"); *United States v. Moreno-Magana*, No. 15-CR-40058-DDC, 2016 WL 409227, at *14 (D. Kan. Feb. 3, 2016), distinguishing *United States v. Krueger*, 998 F. Supp. 2d 1032 (D. Kan. 2014), aff'd, 809 F.3d 1109 (10th Cir. 2015) (finding material difference in the facts where, at the time the warrant authorizing pinging was issued, neither the investigating officer nor the issuing judge knew the property's location).

The remedy for warrants found to be insufficient varies with the law that authorizes the warrant. For example, 18 U.S.C. § 2510 *et. seq.*, pertains to the interception of wire or oral communications. Reading § 2515 and § 2518(3) together, the D.C. Circuit found that "[s]uppression is the mandatory remedy when evidence is obtained pursuant to a facially insufficient warrant." *United States v. Glover*, 736 F.3d 509, 513 (D.C. Cir. 2013). In such circumstances, the statute explicitly provides that the jurisdictional language of Title III dictates that the interception can only be authorized by a judge for "communications within the territorial jurisdiction of the court in which the judge is sitting." *Id*. at 514. The wiretap statute specifically refers to "territorial jurisdiction," and the mandatory remedy of suppression. The SCA does not.

The SCA does provide a remedy for non-constitutional violations, 18 U.S.C. § 2708, but as noted by several courts in the context of Rule 41, suppression is not automatic for non-constitutional violations. See, *United States v. Rome*, 809 F.2d 665, 669 (10th Cir. 1987) citing *United States v. Stefanson*, 648 F.2d 1231 (9th Cir.1980). In light of the distinction between the facts in *Krueger* (both the magistrate and the officer knew the property was located in another

jurisdiction), from the facts in *Banks* (neither the judge nor the officer knew the property's physical location), it is not a foregone conclusion that the defendant in the instant case can show prejudice or deliberate disregard of the provision of the statute.

The procedures involving § 2703 warrants is complicated even for individuals trained in the law. *United States v. Warshak*, 631 F.3d 266, 288 – 89 (6th Cir. 2010). As a law enforcement officer not trained in the law, Agent O'Donnell's actions were objectively reasonable. *United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir.1985) ("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").

2. It was objectively reasonable for Agent O'Donnell to rely on the advice of counsel, and on the warrants issued by the magistrates.

In *Herring v. United States*, 555 U.S. 135 (2009), the Supreme Court found that the exclusionary rule did not apply to a search incident to arrest of an individually unlawfully arrested based upon incorrect information of an outstanding arrest warrant. The Court tethered this decision to several important principles: 1) "the exclusionary rule is not an individual right, and applies only where it results in appreciable deterrence," *Id*. at 140 – 41 (quotations and citation omitted); 2) "the benefits of deterrence must outweigh the costs," *Id*. (quotations and citation omitted); 3) "the extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct," *Id*. at 143 (quotations and citation omitted); 4) "the pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers," *Id*. at 145 (quotations and citation omitted); and 5) "when police mistakes are the result of negligence such as that described here, rather than systemic

error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way," *Id*. at 147 – 48 (quotations and citation omitted).

If the warrants issued by the Maryland magistrates were defective, that was not through any fault of Agent O'Donnell, so no deterrence would be achieved by suppression. In fact, when a warrant is issued by a neutral and detached magistrate, and the investigating officer "sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate," there is further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause. *Messerschmidt v. Millender*, 132 S.Ct. 1235, 1249 (2012); *and see*, *Arizona v. Evans*, 514 U.S. 1 (1995) (exclusionary rule does not require suppression of evidence seized during arrest on recalled warrant where the erroneous information resulted from clerical errors of court employees); *Malley v. Briggs*, 475 U.S. 335, 346 (1986) ("It is a sound presumption that the magistrate is more qualified than the police officer to make a probable cause determination.").

Agent O'Donnell "took every step that could reasonably be expected" of him in obtaining the Maryland search warrants; therefore, it was objectively reasonable for him to rely on the warrants issued by the Maryland magistrates. *See Massachusetts v. Sheppard*, 468 U.S. 981, 989 (1984) (finding an objectively reasonable basis for officer's mistaken belief in validity of warrant). If there was a mistake in law, that mistake was made by a third party, not by an officer relying on the expertise of that third party.

3. If there was a mistake of law, it was a mistaken understanding of criminal procedure law, as distinguished from a mistaken understanding of law leading to stop or arrest.

As noted above, law enforcement officers are "not to be judged by the standards applicable to lawyers," *Cardall*, 773 F.2d at 1133, but are assumed to "have a reasonable knowledge of what the law prohibits." *United States v. Leary*, 846 F.2d 592, 607 (10th Cir. 1988) quoting *Leon*, 468 U.S. at 919, FN 20. This standard is key to weighing the decisions of other courts that addressed an officer's mistake of law.

For example, in *United States v. Lopez-Soto*, 205 F.3d, 1101 (9th Cir. 2000), the court addressed an officer's mistake of law in making a traffic stop that led to an arrest on drug charges. In that case, the officer incorrectly believed that the registration sticker was improperly affixed to the vehicle in violation of Baja California law. The Ninth Circuit found that the officer's mistake was not objectively reasonable, and to create such an exception would "remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *Id*. at 1106. *See also*, *United States v. Herrera*, 444 F.3d 1238 (10th Cir. 2006) (state trooper's mistake that vehicle was a commercial vehicle subject to warrantless random stop was not objectively reasonable); *United States v. Chanthasouxat*, 342 F.3d 1271, 1277 – 78 (11th Cir. 2003) (officer's mistake of law underlying traffic stop was not objectively reasonable, particularly in light of court's holding in a case ten years earlier); *United States v. McDonald*, 453 F.3d 958, 961 (7th Cir. 2006) (officer's justification for traffic stop not objectively reasonable where acts leading to stop were not prohibited by law); *but see*, *Herring*, 555 U.S. 135 (exclusionary rule did not apply to search incident to arrest based upon clerical error that the arrest warrant was still active); *Heien v. North Carolina*, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014) (finding officer's

mistaken understanding of traffic law pertaining to brake light objectively reasonable); *United States v. Cunningham*, 215 WL 7444847 (10th Cir. Nov. 24, 2015) (unpublished, finding officer's interpretation of Colorado traffic law objectively reasonable).

If there was a mistake of law in this case, it was the mistake of someone other than the investigating agent, and it was a mistake of procedural law as opposed to a law the agent was entrusted to enforce. Therefore, it was objectively reasonable for Agent O'Donnell to rely on the Maryland warrants.

CONCLUSION

For the reasons set forth in prior pleadings, there is no Fourth Amendment violation as it pertains to the three warrants at issue in the instant case. The warrants were issued by neutral and detached magistrates, were supported by probable cause, and satisfied the particularity requirement.

There have been numerous challenges raised as to why the warrants were invalid, and why the agents' beliefs in the validity of the warrants could not be objectively reasonable. However, based upon the above, and the arguments previously set forth by the government, the Court should overrule and deny the defendant's motion and supplemental motion to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2016, I electronically filed the foregoing 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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