

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:17-cr-0229-AT-CMS
	)	
JARED WHEAT, JOHN	)	
BRANDON SCHOPP, and	)	
HI-TECH PHARMACEUTICALS, INC.	)	
	)	

**JARED WHEAT AND HI-TECH PHARMACEUTICALS, INC.’S  
AMENDED OBJECTIONS TO REPORT AND RECOMMENDATION  
ON DEFENDANTS’ MOTION TO SUPPRESS EMAIL SEARCHES**

Defendants Jared Wheat and Hi-Tech Pharmaceuticals, Inc. file these objections to Magistrate Judge Salinas’s First Report and Recommendation (“R & R”) denying Defendants’ motion to suppress evidence, Doc. 109, and her January 14, 2020 Order denying reconsideration, Doc. 197.

**Procedural Background**

Defendants moved to suppress evidence seized pursuant to a May 17, 2013 search warrant for Defendant Wheat’s AOL email account and an October 24, 2014 warrant for a Yahoo email account belonging to a Hi-Tech employee. Doc. 44. After the Government’s response, Doc. 66, and Defendants’ reply, Doc. 81, the Magistrate denied the motion without an evidentiary hearing. Doc. 109. That Order appears to

have accepted the Government's intimation that the two-step process<sup>1</sup> had been completed and agreed it had made a good faith effort to screen out privileged materials. *Id.* at 26, 33-36. Defendants moved for reconsideration, arguing that an evidentiary hearing was necessary because significant questions remained about the Government's step two searches and its privilege screening protocol. Doc. 138 at 2-13. After a Government response, Doc. 150, and Defendants' reply, Doc. 155, followed by Defendants' supplemental filings related to additional facts that had been discovered, Docs. 165, 176, the Magistrate ordered an evidentiary hearing. Doc. 168. Testimony at that hearing revealed that the Government had not even finished its step two execution of the warrants or its privilege review. Both parties filed simultaneous briefs and responses addressing the privilege review and the step two search of the ESI. Docs. 188, 194, 200, 201. The Magistrate ordered the Government to complete its step two review by November 30, 2018 and to provide Defendants with a copy of the ESI ultimately seized pursuant to the warrants. Doc. 203. The Magistrate denied Defendants' motion for reconsideration on January 14, 2020. Doc. 297 at 20.

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<sup>1</sup> Warrants for electronically stored information ("ESI") permit law enforcement to seize the entire contents of an email account (step one). A mandatory step two requires review of the data to identify those documents within the warrant's scope; only those documents may ultimately be seized. *See* Fed. R. Crim. P. 41(e)(2)(B).

### Statement of Facts

In his May 17, 2013 application for a warrant to seize Defendant Wheat's entire AOL email account, SA Kriplean swore that "[u]pon receipt" of the documents from AOL, "government-authorized persons will review that information to locate the items described in Section II of Attachment B." Doc. 44-2 at ¶ 27.<sup>2</sup> This step two, to identify and seize only those documents that were responsive to the warrant, was necessary to prevent the warrant authorizing a fatally overbroad general search. Doc. 109 at 24-26. This critical step in the warrants' execution was not completed until five and one-half years later, when the Magistrate ordered the Government to do so no later than November 30, 2018. Doc. 203.

Defendants challenged the warrants on two theories. First, that the warrants were facially, arguing that: they were overbroad and insufficiently particularized; they were not supported by sufficient probable cause; there was no nexus between the alleged probable cause and the alleged crime; and the underlying information

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<sup>2</sup> The same representation was made seventeen months later to obtain a search warrant for the Yahoo email account. Doc. 44-3 at ¶ 26. Based on the Government's representation that it did not ultimately seize any documents from the Yahoo account, Doc. 297 at 9, these objections will focus on the legality of the AOL warrant. Defendants do not waive any grounds presented to the Magistrate regarding the legality of the Yahoo warrant and object to those conclusions in the R & R denying those arguments. Additionally, since the Magistrate found that the Yahoo warrant was based on information acquired from the AOL data, *id.* at 9, the validity of the Yahoo warrant is necessarily dependent upon the legality of the AOL warrant.

was stale. Doc. 44 at 10-25. Defendants also argued that the Government had failed to demonstrate that *Leon*'s good faith exception applied. *United States v. Leon*, 468 U.S. 897, 923 (1984). Docs. 44 at 12-15; 155 at 14-15.

Second, Defendants argued that the Government flagrantly disregarded the terms of the warrants during their execution by: employing a private contractor to conduct step two of the AOL account's search and seizure contrary to 18 U.S.C. § 3105, Doc. 138 at 13-14; reading and using the data before the step two search and seizure was completed and unreasonably failing to complete its searches in a timely fashion, Doc. 200 at 3-24; and failing to make a good faith effort to segregate privileged materials within the email accounts, Doc. 188 at 1-20. Thus, suppression was required because the Government executed the warrants unreasonably.

The facts relating to these issues are well summarized by the R & R, Doc. 109 at 3-10, and the Magistrate's Order, Doc. 297 at 4-12. Defendants also refer the Court to their summary of facts relating to the two-step search procedures, Doc. 200 at 3-8, and events pertaining to the Government's privilege review, Doc. 188 at 2-8. Many of these facts only came to light after the Magistrate's R & R denying suppression. Doc. 109. And they belied the Government's previous claims that it had disclosed all facts necessary to justify the good faith of its privilege review and that there was no evidence of "flagrant disregard." Defendants filed a motion for

reconsideration, Doc. 138, and a supplemental motion after the Government told them it recognized no time limit on conducting step two and that it fully intended to keep the entirety of the email accounts and run additional searches on the non-privileged documents for as long as it wished, Doc. 165. The Magistrate agreed with Defendants that an evidentiary hearing was necessary. Doc. 168.

In briefing following the evidentiary hearing, Defendants argued additional testimony and evidence was necessary because the existing record did not show what emails Kriplean received from Madison and when he received them, due to the Government's refusal to furnish the attachments that contained the emails Kriplean received before the privilege review had been completed. Doc. 188 at 19-20. The Magistrate embraced Kriplean's bald denial of seeing any privileged materials, Doc. 297 at 17-18, but did so without the benefit of the emails that were necessary to resolve that question. Without these emails, it was impossible for Defendants to challenge Kriplean's testimony.

### **Standard of Review**

This Court has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews *de novo* any portion of the R & R that is the subject of a proper objection.

## **Argument and Citation of Authorities**

### **I. THE EMAIL SEARCH WARRANTS WERE INVALID BECAUSE THEY WERE UNSUPPORTED BY PROBABLE CAUSE, OVERBROAD, AND INSUFFICIENTLY PARTICULARIZED.**

In their initial motion, Defendants raised multiple challenges to the validity of the email warrants. Doc. 44 at 10-26. The Magistrate rejected each of these arguments. Doc. 109 at 16-28. Defendants respectfully object. These issues arise in the context of the rapidly evolving law concerning the seizure and subsequent searching of ESI. In its most recent Fourth Amendment decision, the Supreme Court recognized its obligation “as ‘[s]ubtler and more far-reaching means of invading privacy have become available to the Government’ – to ensure that the ‘progress of science’ does not erode Fourth Amendment protections.” *Carpenter v. United States*, 138 S.Ct. 2206, 2223 (2018) (citation omitted).

#### **A. The Email Warrants Were Not Supported by Probable Cause Because They Were Issued on the Basis of Stale Information.**

Defendants argued that because the affidavit for the AOL account relied on materials and emails created more than eighteen months prior to the issuance of the warrant, the warrants issued upon stale information. Doc. 44 at 11-15. Defendants also contended the affidavits did not allege that crimes were pervasive, long running, or protracted so as to justify a more liberal interpretation of the staleness doctrine. *Id.* at 14. The Magistrate rejected this argument. Doc. 109 at 16-20.

The Magistrate found that the criminal activity here was “protracted and continuous,” and assumed “the activity has continued beyond the last dates mentioned in the affidavit, and may still be continuing.” Doc. 109 at 17. This conclusion was without a factual basis: the affidavits never claimed that the alleged criminal activity was “protracted and continuous.” *See* Doc. 44-2 at 4-8; Doc. 44-3 at 4-11. While the Magistrate correctly noted that because digital files are maintained in a fashion such that staleness concerns are qualitatively different, Doc. 109 at 18, that does not support seizing emails subsequent to the probable cause unless the affidavit demonstrated continuing criminal activity in 2013 and beyond. *See United States v. Bervaldi*, 226 F.3d 1256, 1264 (11th Cir. 2000) (“information supporting the government’s application for a warrant must show that probable cause exists at the time the warrant issues.”).

#### **B. These Warrants Violated the Particularity Requirement.**

Defendants argued that the email warrants failed to particularly describe the items to be seized and were therefore general warrants that permitted seizing every record in the email accounts, with nearly no limitation such as subject matter, type of activity, or date range. Doc. 44 at 19-24. The Magistrate disagreed. Doc. 109 at 21-27. Defendants object on the following basis.

In finding that Defendants' particularity complaint was "unfounded," the Magistrate concluded that "[t]he universe of information that could be seized pursuant to the Warrants at issue in this case was limited to evidence of illegal activities concerning mail fraud, wire fraud, false statements, and conspiracy." Doc. 109 at 25. When, as here, a warrant cites statutes describing crimes that cover a broad range of activities, they do not provide sufficient information to fulfill the particularity requirement of the Fourth Amendment. *United States v. Leary*, 846 F.2d 592, 601(10th Cir. 1988) ("While some federal statutes may be narrow enough to meet the fourth amendment's requirement, [reference to those that] cover a broad range of activity...does not sufficiently limit the scope of the warrant."); *Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985) (reference to specific sections of the United States Code without more "does not constitute a constitutionally adequate particularization of the items to be seized."); *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982) ("'limiting' the search to only records that are evidence of the violation of a certain statute is generally not enough.").<sup>3</sup> The warrants' bare statutory reference to broad crimes such as mail and wire fraud and conspiracy does not meet

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<sup>3</sup> The Eleventh Circuit has held that in certain instances warrant references to some statutes may be sufficiently particular. These cases are distinguished in Defendants' recent filing relating to other searches in this case. *See* Doc. 278 at 16-17.

the Fourth Amendment's particularity requirement. The warrants were invalid, and the materials seized under them should be suppressed.

### **C. The Warrants Were Overbroad.**

Defendants argued that the warrants were unconstitutionally overbroad. Doc. 44 at 15-19. "Overbroad warrants authorize the seizure of things for which there is no probable cause[.]" *United States v. Rubinstein*, 2010 WL 2723186 at \*8 (S.D. Fla. June 24, 2010). The Magistrate rejected this argument, Doc. 109 at 21-28.

#### **1. Authorization to search for documents relating to Hi-Tech's compliance with FDA rules and regulations.**

First, Defendants argued that, by permitting agents to search for any communications, representations, or documents concerning "Hi-Tech's compliance with FDA rules and regulations" the warrants allowed them to seize virtually all emails in the accounts. Doc. 44 at 18-19. *See* Doc. 109 at 8. As the R & R acknowledged, Defendants asserted that this was "far broader than the statements of probable cause set out in the affidavits that related specifically to GMP certification and GMP audits." *Id.* at 21. However, the Magistrate failed to address this issue, instead relying on her finding that the warrants complied with the particularity requirement by referencing the "crimes under investigation," *id.* at 23, 26, and the Government's alleged compliance with the two-step search procedure, *id.* at 26.

This begs the question as to whether the affidavits established probable cause to seize documents relating to compliance with FDA rules and regulations. They do not. The affidavits' description of purported criminality is limited to the contention that Hi-Tech engaged in a scheme to falsify Good Manufacturing Practice (GMP) certificates. Doc. 44-2 at 4-8, ¶¶ 5-15. There is no mention of any other issues relating to non-compliance with FDA rules and regulations. *Id.* A finding of probable cause may be based on "certain common-sense conclusions about human behavior." *Illinois v. Gates*, 462 U.S. 213, 231 (1983). But concluding that probable cause of one illegality supports an inference that other law violations exist in the place to be searched cannot be made without sufficient facts to support that inference. This is particularly problematic here because, as the Magistrate found, "Hi-Tech's business is subject to extensive regulation by the U.S. Food and Drug Administration ('FDA')," Doc. 109 at 3, and the email account to be searched was that of Defendant Wheat, the owner/operator of Hi-Tech. *Id.* By authorizing the search and seizure of documents beyond the scope of the probable cause contained in the affidavit, these warrants were overbroad and violated the Fourth Amendment.

**2. Failure to limit the warrants to alleged criminal activity within a specified time period.**

Second, Defendants also argued that the warrants were invalid because they failed to limit the scope of seizure to a time frame supported by probable cause,

especially in light of the fact that ESI was involved. Doc. 44 at 21-24. The Magistrate concluded that “the lack of a time limitation does not render the searches unconstitutional[]” because the limitation to “evidence relating to wire fraud, mail fraud, false statements, and conspiracy” was constitutionally sufficient. Doc. 109 at 26-27. Defendants respectfully disagree.

Although the Fourth Amendment does not require a warrant to specify a time frame, when a warrant uses broad descriptions of things to be seized and fails to limit those descriptions by dates available to the agents, it is overbroad. *United States v. Ford*, 184 F.3d 566, 576 (6th Cir. 1999). *See also United States v. Abboud*, 438 F.3d 554, 238 F.3d 554, 576 (6th Cir. 2006) (“authorization to search for evidence irrelevant to that time frame could well be described as ‘rummaging’”) and *United States v. Blake*, 868 F.3d 960, 973 n.7 (11th Cir. 2017) (warrant permitting seizure of emails outside the time of suspected criminal activity “somewhat troubling[.]”).<sup>4</sup> Absent a showing of ongoing criminality, the Fourth Amendment simply does not permit a search unconnected to the time frame of the alleged criminal activity based on the meaningless limitation of a search for evidence of mail fraud, wire fraud, and

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<sup>4</sup> Cases subsequently cited by the Government in conjunction with pleadings relating to the October 4, 2017 searches of Hi-Tech’s premises that hold temporal limits are unnecessary under different circumstances are discussed and distinguished in Defendant’s reply brief relating to that subsequent search. *See* Doc. 293 at 15-17.

conspiracy. Moreover, because the warrant did not incorporate Kriplean's affidavit, its contents can be considered when assessing the warrant's particularity. "The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Groh v. Ramirez*, 540 U.S. 551, 557 (2004).

## **II. THE EXECUTION OF THE SEARCH WARRANTS VIOLATED THE FOURTH AMENDMENT'S REASONABLENESS REQUIREMENT.**

"[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness[.]'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). And this standard extends to a warrant's execution. *United States v. Ramirez*, 523 U.S. 65, 71 (1998). From the issuance of the initial email search warrant in 2013 until this day, the Government's actions and arguments have demonstrated an intent to ignore the requirements of the Fourth Amendment. Compliance with constitutional criteria has come only in grudging response to the Defendants' complaints, the Magistrate's orders, or its own belated admission of what the law requires.

SA Kriplean testified he would have searched the AOL emails immediately on receipt but for his lack of technical inability. Doc. 297 at 4. Despite his knowledge of Defendants' numerous civil and criminal disputes with the Government, Kriplean never intended to initiate a privilege review before searching the email database. That happened only after the Government's private contractor found numerous privileged documents in its initial search, and the supervising AUSA ordered a

privilege review necessary. *Id.* at 5.<sup>5</sup> As demonstrated in Defendants’ pleadings and the August 31, 2018 evidentiary hearing, Doc. 180, this review was both chaotic and fitful, involving many individuals at different times over more than five years. Doc. 297 at 5-11. Moreover, the Government continues to evade questions regarding the scope and timeline of Kriplean’s access to the AOL documents and whether they contained privileged communications.

Despite the affidavits’ promise to comply with the two-step ESI search procedure, the Government’s fulfillment of that promise has been only crabbed and slow. Rather than initiating the step two responsiveness search, Kriplean directed Madison to rummage through the database for “hot docs, relevant docs to the investigation,” Doc. 297 at 7, despite the fact that the privilege review was not yet complete. The Government did not complete its review of the AOL and Yahoo accounts until over five years after the execution of the AOL warrant – when the Magistrate ordered it to do so. Doc. 297 at 11.

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<sup>5</sup> Despite the fact that Madison recommended a privilege review for any subsequent email warrants, and the discovery of more than 9000 potentially privileged documents in the AOL account, Doc. 297 at 6, when the subsequent Yahoo warrant was executed Kriplean unilaterally determined that no privilege review was necessary, and immediately searched the entire account. SA Kriplean’s only defense for this action is that he did not find any documents relevant to his investigation. *Id.* at 9.

Defendants argued that these actions individually and collectively violated the Fourth Amendment's reasonableness requirement. Docs. 44, 81, 138, 155, 165, 176, 188, 200, 206. Additionally, Defendants have argued the actions are indistinguishable from a general search, and that this flagrant disregard of the Fourth Amendment's requirements justifies wholesale suppression, *United States v. Wey*, 256 F.Supp.3d 355, 410 (S.D.N.Y. 2017), *United States v. Liu*, 239 F.3d 138, 141 (2d Cir. 2000), and, precludes *Leon*'s good faith exception. The Magistrate rejected these arguments. Docs. 109, 297. Defendants object.

**A. The Execution of the AOL Search by a Private Contractor Violated 18 U.S.C. § 3105.**

Defendants contended that the Government's delegation of the step two process to a private contractor without the presence of an authorized law enforcement agent violated federal law. *See* Doc. 138 at 13-14, citing 18 U.S.C. § 3105. The former Fifth Circuit interpreted this provision in *United States v. Martin*, 600 F.2d 1175 (5th Cir. 1979), *overruled on other grounds*, *United States v. McKeever*, 905 F.2d 829, 831-32 (5th Cir. 1990):

Thus, under federal law a search warrant may be executed by (1) the person to whom the warrant is directed; (2) any officer authorized by law to execute search warrants; or (3) some other person aiding a person under (1) or (2) who is present and acting in the execution of the warrant. *Furthermore, execution by an unauthorized person would render the search illegal.*

*Id.* at 1182 (citations omitted; emphasis added). *See also United States v. Clouston*, 623 F.2d 485, 486 (6th Cir. 1980) (reversing suppression granted for violation of § 3105 because telephone company employees who aided in the execution were in the presence of officers who were acting in execution of warrant).

There is no evidence that Kriplean or any authorized officer was present when Madison conducted its searches. The Government has argued only that Kriplean “served the AOL search warrant,” Doc. 150 at 8, and cited *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991), a case involving records obtained by *subpoena* – not by a search warrant – from a correctional facility. *Id.* at 1483. The Magistrate failed to address or rule on this issue. Defendants’ objection should be sustained, and the AOL search and all fruits obtained as a result of the search should be suppressed.

**B. The Step Two Search of AOL Emails for Documents “Relevant to the Investigation” Violated the Fourth Amendment.**

In the case of ESI, Rule 41(e)(2)(B) allows the Government to seize an entire email account (or computer) provided that it thereafter conducts a second search to identify and segregate those materials that are subject to seizure under the terms of the warrant. *See, e.g., Wey*, 256 F.Supp.3d at 383. The initial over-seizure of the entire account or device has come to be referred to as the “step one search,” while the responsiveness search is referred to as “step two.” This permits the issuance of a search warrant that would otherwise be a facially overbroad, general warrant so long

as the Government conducts the step two search to confine the seizure to that authorized under the terms of the warrant. Despite Kriplean's explicit representation that he would follow this two-step procedure Doc. 44-2 at 10, he failed to even begin the step two search until the AUSA directed him to, and once it was finally started, only the Magistrate's deadline years later forced its conclusion. Doc. 297 at 11.<sup>6</sup>

Instead of narrowing the AOL seizure to the documents that he was allowed to seize under the warrant, in October 2013 Kriplean provided Madison with a list of keywords to run on the AOL dataset. This was prior to the completion of the privilege review by either Madison (in 2014) or the U.S. Attorney's office (in 2018). *Id.* at 7-11. As the Magistrate found, "[a]ccording to Special Agent Kriplean, the search terms he chose were designed to identify what he considered 'hot docs, relevant docs to the investigation.'" *Id.* at 6-7.<sup>7</sup>

The deliberate failure to conduct the requisite step two search to determine what could be seized under the terms of the warrant inculcates Kriplean and

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<sup>6</sup> Indeed, at the August 31, 2018 evidentiary hearing Kriplean testified that despite having done email searches before, he had never done a step-two search for responsiveness, and: "I have never been told that that's necessary or required or anything." Doc. 180 at 71, 72. The Magistrate expressed concern regarding the effect of this admission on the District's practice of approving warrants. *Id.*

<sup>7</sup> Kriplean's choice of keywords that were clearly outside the probable cause set out in his affidavit further demonstrates that his search was unconstrained by the scope of the search authorized by the warrant. *See* Doc. 138 at 9-10; Doc. 138-2.

evidences his blatant disregard for the Fourth Amendment's commands. *See Wey*, 456 F.Supp.3d at 406 (“affirmative choices to treat the Warrants as though they were the functional equivalent of general warrants”...can and should be deterred”). Rather than keeping his sworn promise to comply with the two-step requirement, he first conducted the very “general, exploratory rummaging in a person’s belongings,” *United States v. Wuagneux*, 683 F.2d 1343, 1348 (11th Cir. 1982), the Fourth Amendment forbids. *See also United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1177 (9th Cir. 2010) (en banc), *abrogated on other grounds*, as *recognized by Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2018). (“The process of segregating electronic data that is seizable from that which is not must not become a vehicle for the government to gain access to data which it has no probable cause to collect.”).

That the Government eventually completed the step two search is of no moment; Kriplean had already scooped up the documents that he deemed necessary for his sundry investigations years before step two was completed and he enjoyed virtually untrammelled access to most of those documents from the end of 2013.<sup>8</sup> The

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<sup>8</sup> These documents were compiled in a notebook, which the Government has refused to provide to Defendants. Docs. 180 at 210-11; 269-2 at 3; 269-3 at 3. The notebook is also a subject of Defendants’ simultaneously file objections to the denial of their Rule 17(c) subpoena.

AOL email searches should be suppressed and all documents seized in those searches and as a fruit of those seizures should be suppressed.

**C. The Government’s Failure to Complete Step Two in a Timely Fashion Renders the Search and Seizure of the AOL Emails Unreasonable.**

Defendants have argued that the Government’s failure to begin step two of its execution of the AOL warrant or to complete it until over five years after its step one seizure violates the Fourth Amendment’s reasonableness requirement. Doc. 165 at 6-10; Doc. 200 at 20-25. The Government’s initial position was that it did not even need to complete step two, and that it could continue to search the AOL emails at will for relevant documents it deemed relevant “during the pendency of this case because there is no time limitation provided in the warrants for execution.” Doc. 165-1, ¶ 3. *See also* Doc. 194 at 8-9 (contending that timing of step two is not subject to time limitation in search warrant or Rule 41(e)(2)(B), while conceding, for the first time, that the timing of the review is subject to “a general reasonableness requirement.”). The Magistrate concurred, based on her conclusion that “[t]he Email Warrants contained no deadline to complete the review.” Doc. 297 at 3 n.2. The Magistrate indicated she ultimately imposed a deadline, noting: “While it is possible that the review could have been done more quickly, it has now been completed for more than a year, and the case has still not been certified ready for trial.” *Id.*

The Fourth Amendment's reasonableness requirement specifically applies to the Government's responsibility to initiate and complete the requisite ESI two step procedure. Here, it is apparent that Kriplean had no intention of starting, let alone completing, step two as to the AOL warrant, and it is questionable whether the prosecutor intended to do so either, prior to being challenged by Defendants and ordered to do so by the Magistrate. Even under the Magistrate's compulsion, that process was not completed until five and one-half years after the initial seizure of Defendant Wheat's entire email account. No court has allowed the Government to avoid suppression in circumstances like this. *See United States v. Metter*, 860 F.Supp.2d 205, 215 (E.D.N.Y. 2008) (failure of Government to begin step two review for approximately fifteen months was "unacceptable and unreasonable" and warranted suppression of all seized data); *United States v. Debbi*, 244 F.Supp.2d 235, 237-38 (S.D.N.Y. 2003) (suppressing all nonresponsive data seized based on Government's failure to identify, segregate, and return materials not responsive to terms of search warrant within eight months).<sup>9</sup>

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<sup>9</sup> Cases cited by the Government, *United States v. Lee*, 2015 WL 5667102 (N.D. Ga. Sept. 15, 2015), and *United States v. Jarman*, 847 F.3d 259 (5th Cir. 2017), Doc. 194 at 11-15, as well as the Government's effort to distinguish *Metter* and *Debbi*, are discussed in detail by Defendants in Doc. 200 at 15-17. Additionally, since the Government did not begin its privilege review in earnest until December 2017, the Government cannot credibly explain its five-plus year delay on its putative efforts to protect Defendants' privileged documents. *See* Doc. 200 at 20-24.

SA Kriplean and the Government's course of conduct regarding step two rightly needs to be weighed in deciding whether they flagrantly disregarded the terms of the warrant and, if so, whether the Fourth Amendment requires wholesale suppression. *See Wey*, 256 F.Supp.3d at 410 (where Government's actions demonstrate "grossly negligent or reckless disregard of the strictures of the Fourth Amendment ... these are precisely the sort of circumstances, rare or not, that call for blanket suppression.").<sup>10</sup>

**D. The Continued Retention of Defendants' Property that is Unresponsive to the Search Warrants is Improper.**

Defendants have repeatedly objected to the Government's retention of the entire contents of their email accounts, including emails that are not subject to the search warrants and documents the Government has conceded are privileged. Doc. 200 at 18-20. Defendants have also filed a motion for return of this property pursuant to Rule 41(g). Doc. 166. The Magistrate denied Defendants' motion based on her conclusion that Defendants have not demonstrated that the ESI contained in the AOL

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<sup>10</sup> The Magistrate's "no harm no foul" analysis based on the fact that step two has been completed before this case is certified for trial, Doc. 297 at 3 n.2, is irrelevant. There is no prejudice requirement required to show that a particular action by executing officers was unreasonable under the Fourth Amendment. Defendants are prejudiced by the seizure of evidence in a search that violates their Fourth Amendment right to be free from unreasonable searches and seizures.

and Yahoo accounts were not “lawfully searched and seized,” and that she has ordered that the Government not to access the nonresponsive data from those searches without further court order. Doc. 295 at 4-5.

Defendants asserted that the Government has produced no evidence to justify its continued retention and have shown that in October 2017 the Government released copies of the entire email accounts, including Defendants’ privileged documents, to co-Defendant Brendon Schopp.<sup>11</sup> Doc. 200 at 18-20. Retention of nonresponsive data is contrary to the Fourth Amendment. *United States v. Roper*, 2018 WL 1465765 (S.D. Ga. Mar. 1, 2018). *See also Comprehensive Drug Testing*, 621 F.3d at 1179 (Kozinski, C.J., concurring) (Government should return or destroy nonresponsive ESI as soon as practicable).

**E. There Was No Good Faith Effort to Segregate Privileged Materials or to Respect Defendants’ Attorney-Client Privilege.**

As the Magistrate’s Order notes, “Since the inception of this case, Defendants ... have been sounding alarm bells regarding the various search warrants that the government obtained during its investigation in this case.” Doc. 297 at 1. Nowhere

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<sup>11</sup> *See Metter*, 860 F.Supp 2d at 215 (threat of release of seized ESI to codefendant without predetermination of privilege underscores Government’s “utter disregard for and relinquishment of its duty to ensure its warrants are executed properly” considered in determination of flagrant disregard of warrant).

has that statement been more accurate than regarding the handling of privileged documents contained within the AOL and Yahoo email accounts.

The facts relating to the Government's attempts at a privilege review are a tangled web. They unspooled over years, from Kriplean's incomprehensible disregard for the likelihood that the emails contained attorney-client privileged materials when he seized the AOL account in May of 2013 and his intent to access those materials with no privilege review, to the stop-and-go efforts of private contractor Madison to conduct a privilege review without any real supervision by the USAO, to the release and review of emails very likely containing privileged documents to Kriplean prior to the completion of the privilege review by both Madison (in 2013-2014) and AUSA Brian Pearce (in 2017-2018). The Magistrate's Order ably summarizes many of these facts, Doc. 297 at 4-12, but rejects Defendants' claims because they failed to establish outrageous Government conduct for intrusion into their attorney-client privilege. *Id.* 12-19.

The Magistrate's analysis is flawed in two respects. First, her analysis is founded on her unquestioning embrace of the Government's red herring, Doc. 201 at 13-20, which insisted that Defendants' arguments should be analyzed as a due process outrageous government conduct claim under the Fifth Amendment. Doc. 109 at 13-14. Although the Magistrate noted that "Defendants have not taken issue

with the Government’s legal analysis....” *Id.* at 14, this is not so. As Defendants stated to begin their reply brief, Doc. 206 at 2:

[T]he Government mischaracterizes this issue as a “winner take all” question of proof of outrageous government misconduct. In truth, the Government’s actions regarding Defendants’ privileged communications are part and parcel of whether these searches were executed reasonably, and also bear on the merit of the Government’s claim that *Leon*’s good faith exception excuses its agent’s conduct.

The second infirmity is the Magistrate’s conclusion that Kriplean credibly denied ever seeing any privileged documents, coupled with the Magistrate’s refusal to permit Defendants access to the documents necessary to test that conclusion.

When Kriplean testified at the hearing, the Government refused to disclose the AOL emails Madison sent to Kriplean from a database which later required multiple rescrubbings prompted by the identification of additional privileged material within it. The USAO finally ordered Kriplean to “stand down” from the AOL data on February 11, 2014 because of “more than 700 additional documents that needed to be reviewed [for privileged materials] within the documents Madison had sent to Special Agent Kriplean.” Doc. 297 at 8 (cites omitted). Significantly, the Government has consistently rebuffed Defendants’ multiple requests for these

emails, and they are the subject matter of the Rule 17(c) subpoena request that the Magistrate denied in her January 14, 2020 Order. Doc. 297 at 19-20.<sup>12</sup>

Even though the Magistrate concluded that “[t]he key to Defendants’ motions is Special Agent Kriplean’s potential exposure to privileged information within the documents that Madison sent to him and the Yahoo data,” Doc. 297 at 11, she found Kriplean’s bald and predictable denial of exposure to any privileged materials was credible without first having considered what materials he actually reviewed. Due to the Government’s persistent refusal to provide these materials, Defendants were unable to present evidence vital to the question of whether Kriplean’s claim could properly be believed. The Magistrate’s subsequent determination that Defendants were thus unable to show any prejudice because they failed to show Kriplean was exposed to any privileged materials is without record support, because the current record does not include information Defendants can only present upon obtaining and reviewing the emails Kriplean got from Madison to determine if they contained privileged material. If they do, this fact will lend considerable weight to Defendants’ argument that the execution of these warrants was unreasonable under the Fourth

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<sup>12</sup> Defendants’ objections to the denial of their Rule 17(c) subpoena motion are set forth in a separate objection filed simultaneously with these objections.

Amendment and that blanket suppression is justified in order to deter such conduct in the future.

### **III. THE GOVERNMENT HAS NOT MET ITS BURDEN OF DEMONSTRATING THE APPLICABILITY OF *LEON*.**

Contrary to the Government's argument, Doc. 278 at 33, it, not Defendants, bears the burden of demonstrating entitlement to *Leon*'s exception. *United States v. Robinson*, 336 F.3d 1293, 1297 (11th Cir. 2003). The Magistrate initially concluded that *Leon* applied. Doc. 109 at 30-31. This, however, preceded the revelations subsequent to that R & R, including the August 31, 2018 evidentiary hearing. Other than its thoroughly unconvincing evidence that it properly complied with the two-step search procedure and did so in a reasonably timely fashion and that it made a good faith effort to protect Defendants' privileged documents, the Government has offered no proof to meet its burden. Notably, the Magistrate did not reiterate her *Leon* ruling after the evidentiary hearing and additional briefing. Defendants respectfully submit, for all the reasons demonstrated in their prior arguments on this issue, that the Government, despite its opportunity to do so at the 2018 hearing, has not met its burden of demonstrating that *Leon*'s good faith objection applies in the unusual circumstances here presented. *See generally, Wey*, 256 at 394-409.

This 19th day of February 2020.

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\* The NACDL Fourth Amendment Center provides training and direct litigation assistance to defense lawyers in cases involving new technologies and challenges to privacy rights in the digital age. In recognition of the significant search and seizure issues raised by this case, and at the request of defense counsel, the NACDL Fourth Amendment Center has provided pro bono assistance for the limited purpose of preparing of this motion.