

“INEQUALITY IN THE GAME” VS. “INEQUALITY IN THE
LEGAL SYSTEM”: THE CONSTITUTIONALITY OF
SEARCHES AND SEIZURES IN *UNITED STATES*
V. *COMPREHENSIVE DRUG TESTING*¹

“Perhaps baseball has become consumed by a ‘Game of Shadows,’ but that is no reason for the government to engage in a ‘Prosecution of Shadows.’”²

I. INTRODUCTION: PLAY BALL!

“When I go to Little League opening games these days, kids aren’t just talking about their favorite teams’ chances in the pennant race, they’re talking about which pro players are on the ‘juice.’”³ Steroid use in professional sports has broadly impacted society, particularly in the arena of high school sports.⁴ In an effort to decrease the number of high school athletes using steroids, Congress has investigated steroid use in professional baseball.⁵

In 2002, the United States government initiated a grand jury investigation into illegal steroid use by professional athletes, particularly athletes involved with the Bay Area Laboratory Co-Operative

1. 473 F.3d 915, 979 (9th Cir. 2006) (Thomas, J., concurring in part and dissenting in part).

2. *Id.*

3. *Restoring Faith in America’s Pastime: Evaluating Major League Baseball’s Efforts to Eradicate Steroid Use. Hearing Before the H. Comm. on Government Reform*, 109th Cong. 6 (2005) [hereinafter *Hearings*] (statement of Rep. Tom Davis, Chairman, House Comm. on Government Reform), available at http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=109_house_hearings&docid=20323.wais.

4. See Mark Fainaru-Wada & Lance Williams, *Steroids Scandal: The BALCO Legacy From Children to Pros, the Heat is on to Stop Use of Performance Enhancers*, S.F. CHRON., Dec. 24, 2006, at A1 [hereinafter *Steroids Scandal*] (noting effect of publicized use of steroids by professional athletes on high school athletes). Reports indicate that between three and eleven percent of American teen athletes have used steroids. See *id.*

5. See *Hearings*, *supra* note 3, at 11 (statement of Rep. Henry Waxman, California) (focusing on “steroid use in professional baseball, its impact on steroid use by teenagers and the implications for Federal policy”). Rep. Waxman addressed the congressional hearing:

Now America is asking baseball for integrity, an unequivocal statement against cheating, an unimpeachable policy and a reason for all of us to have faith in that sport again. At the end of the day, the most important thing Congress can do is find as many of the facts as we can and do our part to change the culture of steroids that has become part of baseball and too many other sports.

Id.

("BALCO").⁶ The BALCO investigation is the central issue in *United States v. Comprehensive Drug Testing, Inc.*⁷ The Ninth Circuit Court of Appeals ruled in favor of the government, allowing it to utilize the names and specimens of approximately one hundred Major League Baseball ("MLB") players who tested positive for steroids.⁸ The holding in *United States v. Comprehensive Drug Testing* extends beyond the regulation of steroid use in baseball; it has broad Fourth Amendment implications regarding valid searches and seizures.⁹

This Note examines whether the government violated the Fourth Amendment when it seized evidence that did not pertain to the ten BALCO players specified in the warrant.¹⁰ Section II discusses the facts surrounding the warrant execution, the seizure of evidence, and the alleged violations.¹¹ Section III discusses the requirements for a valid search and seizure under the Fourth Amend-

6. See *Steroids Scandal*, *supra* note 4 (reporting investigation into BALCO). A federal investigation began in 2002 into whether BALCO was distributing steroids. See *id.* In 2003, the grand jury subpoenaed athletes to testify before it, including the San Francisco Giants' Barry Bonds, the New York Yankees' Jason Giambi, Olympian Marion Jones, and thirty other professional athletes. See *id.*

7. See 473 F.3d at 919 (outlining issue in case). The Ninth Circuit had to determine "whether the United States may retain evidence it seized from Major League Baseball's drug testing administrator . . . as part of an ongoing grand jury investigation into illegal steroid use by professional athletes." *Id.*

8. See ESPN - Court: Feds Get MLB Data - MLB, <http://sports.espn.go.com/mlb/news/story?id=2709496> (last visited Nov. 12, 2007) [hereinafter Feds Get MLB Data] (reporting effect of Ninth Circuit's decision). Players who tested positive for performance enhancing drugs may be called to testify before a grand jury and compelled to reveal their drug source. See *id.* The information was used to build a perjury case against Barry Bonds, who testified before the grand jury that he never took performance-enhancing drugs. See Lance Williams & Mark Fainaru-Wada, *The Perjury Evidence Against Bonds*, S.F. CHRON., Apr. 16, 2006, at A1 (reporting possibility of perjury indictment against Bonds). Although Bonds testified under oath that he had "never knowingly taken banned drugs," evidence collected by federal investigators, including "statements of confessed steroid dealers and athletes caught up in the BALCO case, the testimony of a former Bonds girlfriend, and some 30,000 pages of documents seized from BALCO" indicated that he used steroids. See *id.* Barry Bonds was indicted on November 15, 2007 for perjury and obstruction of justice. See Duff Wilson & Michael S. Schmidt, *Bonds Charged With Perjury in Steroids Case*, N.Y. TIMES, Nov. 16, 2007, at A1 (reporting indictment of Bonds in connection to his testimony before federal grand jury).

9. See *Comprehensive Drug Testing*, 473 F.3d at 924-25 (detailing issues on appeal). The court did not decide the legality of steroids in Major League Baseball, but whether there had been any Fourth Amendment violations regarding the items seized that did not pertain to the ten players connected with BALCO. See *id.*

10. See *id.* at 929 (addressing argument that government "acted in callous disregard of the Fourth Amendment rights of the Players' Association, the MLB Players, and CDT").

11. For a further discussion of the search and seizure in *Comprehensive Drug Testing*, see *infra* notes 18-55 and accompanying text.

ment;¹² misconduct in searches, particularly targeting evidence which is not specified in a warrant;¹³ and the proper procedure for seizing intermingled evidence for off-site review, particularly electronic data.¹⁴ Section IV addresses whether the government's seizure of electronic data complied with the procedural protections detailed in *United States v. Tamura*, or whether the seizure violated the Fourth Amendment.¹⁵ Section V analyzes the majority's interpretation of *Tamura*.¹⁶ Section VI discusses the Fourth Amendment

12. For a further discussion of the requirements for a valid search and seizure, see *infra* notes 56-60 and accompanying text; see also Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 927-28 (1997) (discussing valid search and seizures). Courts have established two different models for applying the Fourth Amendment:

Under the first model, the Reasonableness Clause mandates a universal rule that all searches and seizures be reasonable. If the police obtain a warrant, the Warrant Clause contains certain safeguards to ensure the validity of the warrant. If the police do not obtain a warrant, the search need only be "reasonable." The second model—known as the "warrant preference rule"—requires that the safeguards of the Warrant Clause define the reasonableness of a given search or seizure. This model posits that the police must ordinarily obtain a warrant prior to an intrusion, unless compelling reasons exist for proceeding without one.

Id.

13. See *Marron v. United States*, 275 U.S. 192, 196 (1927) (disallowing general warrants). "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what may be taken, nothing is left to the discretion of the officer executing the warrant." *Id.*; see also *United States v. Gawrysiak*, 972 F. Supp. 853, 860-61 (D.N.J. 1997) (holding warrant, although broad in subject, was not general due to significant limitations placed on officers). For a further discussion of the scope of searches, see *infra* notes 61-64 and accompanying text.

14. See *United States v. Tamura*, 694 F.2d 591, 595-96 (9th Cir. 1982) (implementing procedure for seizure of intermingled documents). Intermingled files may be investigated during a search, but the seizure of parts of the files that are not described in the warrant is a violation of the Fourth Amendment. See *id.* at 595. For a further discussion of intermingled evidence, see *infra* notes 65-71 and accompanying text.

15. See Donald Resseguie, Note, *Computer Searches and Seizure*, 48 CLEV. ST. L. REV. 185, 205 (2000) (discussing problem of intermingled electronic documents). Searches and seizures of computers result in the following Fourth Amendment problems:

The problem of over broad searches and seizures arise when executing warrants to search the contents of computer storage devices. The hard drives of computers frequently store information of various types and many people use their computers as repositories for both business and personal information. The problem arises when information related to criminal activity and subject to lawful search and seizure is intermingled with personal information not subject to seizure that is likely to be the case with computer storage.

Id. For a further discussion of the seizure of electronic data, see *infra* notes 72-75 and accompanying text.

16. See *Comprehensive Drug Testing*, 473 F.3d at 939 (holding magistrate review of seized evidence is necessary upon "proper post-seizure motion by the aggrieved

implications of the majority's decision and the impact it will have on MLB players.¹⁷

II. FACTS: STRIKE ONE! SEARCH AND SEIZURE GOES BEYOND SPECIFIED PLAYERS

BALCO is a company which specialized in supplying nutritional supplements to elite athletes.¹⁸ BALCO's clientele consisted of professional athletes in the areas of track and field, professional football, and Major League Baseball.¹⁹ In 2002, BALCO became the object of a federal grand jury investigation.²⁰ In September 2003, a search of the BALCO offices produced vials of anabolic steroids.²¹

In the Fall of 2003, many athletes testified in the grand jury investigation against BALCO.²² Athletes who testified before the

parties"). *But see Tamura*, 694 F.2d at 595-96 (holding evidence should be sealed and held pending magistrate review). For a further discussion analyzing *Tamura*, see *infra* notes 135-150 and accompanying text.

17. See T.J. Quinn & Teri Thompson, *Union Makes Appeal*, N.Y. DAILY NEWS, Feb. 13, 2007, at 70 (reporting effect holding will have on players' privacy); see also Jacob Sullum, *Home Run for Drug Data Grab*, WASH. TIMES, Jan. 7, 2007 (on file with author) (describing court's decision as replacing "particularized warrant based on probable cause with a fishing license."). For a further discussion of the decision's impact, see *infra* notes 153-75 and accompanying text.

18. See Mark Fainaru-Wada, *Grand Jury Probes Nutrient Company Burlingame Firm Boasts of Ties to Star Athletes*, S.F. CHRON., Oct. 14, 2003, at A1 (reporting investigation of BALCO). BALCO's primary business involved testing the blood and urine of athletes for any mineral deficiencies. See *id.* BALCO's well-known product was a zinc and magnesium supplement called ZMA. See *id.* ZMA was described as an "anabolic mineral support formula that enhances muscle strength, endurance, healing and growth." *Id.*

19. See Mark Fainaru-Wada, *Raid Uncovered Suspected Steroids: Burlingame Lab Works With Noted Athletes*, S.F. CHRON., Oct. 19, 2003, at A1 [hereinafter *Raid Uncovered Suspected Steroids*] (reporting on high-profile athletes who were clients of BALCO). BALCO's clients included Raiders linebacker Bill Romanowski, track stars Marion Jones, Tim Montgomery and Kelli White, and Major League Baseball player Barry Bonds. See *id.*

20. See *id.* (detailing federal investigation into BALCO's involvement with steroids). The investigation was triggered by an anonymous tip to the U.S. Anti-Doping Agency (USADA). See *id.* A track and field coach notified the USADA that BALCO supplied several athletes with an "undetectable" steroid. See *id.* A syringe was offered as proof. See *id.*

21. See *id.* (reporting results of federal raid of BALCO offices). Federal authorities discovered "vials and containers with labels indicating they were anabolic steroids, human growth hormone and testosterone." *Id.*

22. See BALCO Investigation Timeline – USATODAY.com, <http://www.usatoday.com/sports/balco-timeline.htm> (last visited Nov. 12, 2007) (detailing chronology of events surrounding BALCO investigation). Athletes who testified included "track and field athletes Marion Jones, Kevin Toth, Regina Jacobs, Chryste Gaines, and Tim Montgomery; baseball players Barry Bonds, Jason Giambi, Gary Sheffield, and Benito Santiago; football players Bill Romanowski and Barret Robbins; swimmer Amy Van Dyken; and boxer Shane Mosley." *Id.*; see also *Raid Uncovered Sus-*

grand jury were offered immunity from prosecution for any illegal drug use.²³ These athletes testified that Victor Conte, BALCO's owner, supplied them with steroids called "the cream" and "the clear."²⁴ Major League Baseball player Jason Giambi testified about his steroid use.²⁵ Former New York Yankees' player Gary Sheffield testified that he was given "the cream" and "the clear" by Barry Bonds' trainer, Greg Anderson.²⁶ Despite his involvement with BALCO, Bonds consistently denied any steroid use.²⁷

The federal investigation of BALCO produced probable cause that BALCO supplied at least ten major league baseball players with illegal steroids from BALCO.²⁸ In November 2003, as a means of investigating BALCO, the government served a subpoena on MLB requesting relevant drug testing information for the ten players in-

pected Steroids, supra note 19 at A1 (noting focus of investigation was not athletes' drug use, but their involvement with Victor Conte, owner of BALCO).

23. See Lance Williams & Mark Fainaru-Wade, *Simple Case Turned Catalyst BALCO Unwittingly Triggered Sweeping Anti-Doping Movement*, S.F. CHRON., Dec. 29, 2004, at A1 (detailing government's efforts to prosecute Conte as owner of BALCO). Athletes whose testimony was truthful would be immune from prosecution, but if the government could prove that the athletes lied, perjury indictments would most likely be brought against them. See *id.*

24. See Mark Fainaru-Wada, Lance Williams, & Seth Rosenfeld, *Sports and Drugs: Bonds to Go Before BALCO Grand Jury Giants Star Schedules to Testify Thursday*, S.F. CHRON., Dec. 3, 2003, at A1 (explaining different types of steroids Conte supplied). "'The cream' was a testosterone lotion that was rubbed onto the body, and 'the clear' was the designer steroid tetrahydrogestrinone (THG)." *Id.*; see also *Raid Uncovered Suspected Steroids, supra* note 19 at A1 (describing designer steroids). Designer steroids are known steroids that have been modified so that normal steroid testing methods cannot detect them. See *id.*

25. See Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, S.F. CHRON., Dec. 2, 2004, at A1 (reporting Giambi's admittance of steroid use). Giambi admitted that "he had taken 'undetectable steroids' known as 'the clear' and 'the cream' — one a liquid administered by placing a few drops under the tongue, the other a testosterone-based balm rubbed onto the body." *Id.*

26. See Lance Williams & Mark Fainaru-Wada, *Sheffield's Side Slugger Testified Bonds Told Him to Use 'The Cream,' and 'The Clear,' Saying, 'Don't Ask Any Questions, Just Trust Me'*, S.F. CHRON., Dec. 3, 2004, at A19 (reporting Sheffield's testimony in steroid scandal). Sheffield testified that "Anderson had told him 'the cream' would ease the pain from his arthritic knees, while 'the clear' and the 'beans' were a part of a regimen of special nutritional supplements that would leave him injury-free." *Id.* The "beans" were Mexican steroid pills. See *id.*

27. See Mark Fainaru-Wada & Lance Williams, *Bonds Unyielding Before Grand Jury During BALCO Steroid Investigation*, S.F. CHRON., Mar. 12, 2006, at A1 (reporting Bonds' denial that his trainer provided him with steroids). Barry Bonds' personal trainer, Greg Anderson, was also part of the federal investigation of BALCO. See *id.* Bonds testified that Anderson provided him with flax seed oil and arthritis cream, not "the clear" or "the cream." See *id.*

28. See *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915, 920 (explaining facts leading up to issue before court).

volved with BALCO.²⁹ When MLB responded that they did not have access to the requested information, the government concluded that Comprehensive Drug Testing, Inc. in Long Beach, California (“CDT”) and Quest Diagnostics, Inc. in Las Vegas, Nevada (“Quest”) had the information.³⁰ Quest and CDT tested MLB players’ urine samples in 2003.³¹ MLB implemented a mandatory drug testing program in 2003 to determine whether a stricter drug-testing policy was needed.³² The government issued subpoenas to both

29. *See id.* (describing first subpoena); *see also* *Feds May Use Drug Testing Data*, *supra* note 8 (identifying players whose test results government requested in subpoena). Federal investigators wanted to see the 2003 test results for Barry Bonds, Gary Sheffield, Jason Giambi, and seven other players. *See id.*

30. *See Comprehensive Drug Testing*, 473 F.3d at 920 (discussing involvement of CDT and Quest in government investigation); *see also* Comprehensive Drug Testing - About Us, http://www.cdtsolutions.com/about_us.html (last visited Nov. 12, 2007) (explaining CDT’s services). CDT describes their services:

For over 20 years, CDT has been assisting organizations manage drug and alcohol testing programs, which meet industry and government regulations. Our staff is knowledgeable, not only on the administrative issues of the regulations, but also on the technical issues, including laboratory and collection site procedures. Our company includes top experts in pharmacology, forensic toxicology, laboratory management, medical review, legal, and administrative compliance.

Id. *See also* Quest Diagnostics – Diagnostic Testing & Services, http://www.questdiagnostics.com/brand/business/b_bus_lab_index.html (last visited Nov. 12, 2007) (noting proficiency in toxicology testing). Quest Diagnostics specializes in toxicology, including “drugs of abuse testing.” *See id.* “[T]oxicology labs provide accurate and rapid results on blood lead and heavy metals.” *Id.*

31. *See Comprehensive Drug Testing*, 473 F.3d at 920 (reasoning that CDT and Quest would have samples and testing records); *see also* Jack Curry & Jere Longman, *Results of Steroid Testing Spur Baseball to Set Tougher Rules*, N.Y. TIMES, Nov. 14, 2003, at A1 (reporting new MLB steroid testing rules). As part of the collective bargaining agreement reached on September 30, 2002, baseball players and the Players’ Union agreed to anonymous testing for steroids. *See id.* The tests occurred in two phases: “1,198 players on the 40-man major league rosters [were] tested at unscheduled times beginning in spring training and continuing throughout the season. In addition, 240 players were randomly selected and tested a second time.” *Id.* The testing program was more lenient than “year-round, random, unannounced testing” used by Olympic sports. *Id.*

32. *See Feds Get MLB Data*, *supra* note 8 (reporting reason behind MLB’s drug testing). The goal of the drug testing was to evaluate overall steroid use, not to announce players’ illegal acts; therefore, test results were to remain confidential. *See id.* To maintain confidentiality each sample was identified with a code number that corresponded with a player’s name. *See id.* After the drug testing in 2003 produced results positive for steroids in more than five percent of players, a policy of drug testing with penalties for steroids began in 2004. *See id.*; *see also* Curry & Longman, *supra* note 31 at A1 (reporting stricter penalties for positive steroid testing). In 2004, the following penalties were implemented for testing positive for steroids:

[T]he first time a player tests positive he will receive treatment and education about the substance that was abused and be subject to further testing. A second positive will result in the player’s being identified publicly and include a 15-day suspension or up to a \$10,000 fine. The penalties

CDT and Quest for all drug testing information relating to the ten MLB players.³³

CDT and Quest refused to provide the government with the requested information despite the subpoenas.³⁴ In an effort to obtain the desired information, the government decided to issue new subpoenas on March 3, 2004 with narrower requests.³⁵ On April 6, 2004, the Major League Baseball Players' Association advised the government that it would file a motion to quash the subpoenas.³⁶ Prior to filing the motion to quash, the government obtained search warrants to search CDT's office and Quest's laboratory.³⁷ The search warrants permitted seizure of all drug-related records for the ten baseball players involved with BALCO.³⁸ The warrants also extended to the search of computer equipment.³⁹

escalate to a one-year suspension or up to a \$100,000 fine for the fifth positive test. Suspensions will be without pay.

Id.

33. *See Comprehensive Drug Testing*, 473 F.3d at 920 (reissuing subpoenas to CDT and Quest). The subpoenas were originally due on February 5, 2004, but the government allowed them to be returned on March 4, 2004 with promises from both CDT and Quest not to destroy or alter any of the requested evidence. *See id.*

34. *See id.* (declining to turn over relevant information). CDT and Quest stated "they would fight production of even a single drug test all the way to the Supreme Court." *Id.*

35. *See id.* at 920-21 (noting new subpoenas to CDT and Quest seeking documents relating to baseball players with BALCO connections). The subpoenas were originally directed at information related to eleven players, but on April 27, 2004 it was reduced to ten players. *See id.* at 921 n.7. The subpoenaed documents were to be returned to the government by April 8, 2004. *See id.* at 921.

36. *See id.* at 921 (stating intention to file motion to quash subpoenas). CDT and the Players' Association filed a motion to quash in the Northern District of California on April 7, 2004. *See id.*

37. *See id.* (filing simultaneous applications for search warrants). A search warrant for CDT's office was issued in the Central District of California and a warrant for Quest's laboratory was issued in the District of Nevada. *See id.* Affidavits in support of the warrant informed the magistrate that the requested information was also the subject of grand jury subpoenas and an impending motion to quash. *See id.*

38. *See Comprehensive Drug Testing*, 473 F.3d at 921 (detailing authorization of subpoenas). In addition to the drug test records for the ten BALCO players, the warrants authorized the seizure of "'all manuals, pamphlets, booklets, contracts, agreements and any other manuals detailing or explaining' CDT's or Quest's 'administration of Major League Baseball's drug testing program.'" *Id.*

39. *See id.* (explaining seizure of electronic information). The warrants authorized "the search of computer equipment, computer storage devices, and – where an on-site search would be impracticable – seizure of either a copy of all data or the computer equipment itself." *Id.* Law enforcement officers, who were specially trained in searching computer data, were permitted to decide the proper method of seizing electronic data. *See id.* If electronic equipment and data needed to be seized, "'appropriately trained personnel' would review the data, retaining the evidence authorized by the warrant and designating the remainder for return." *Id.*

The government, through Special Agent Jeff Novitzky, executed the search warrant for CDT on April 8, 2004.⁴⁰ CDT's directors refused to assist federal agents in locating the relevant documents.⁴¹ Searching without the guidance of CDT, federal agents located a document listing "the names and identifying numbers for all MLB players, including some of the ten named BALCO players."⁴² Despite the document not being the one alluded to by CDT's legal counsel, Agent Novitzky faxed the document for use in preparing a new search warrant to seize specimens from Quest according to the identifying numbers.⁴³

A CDT director showed federal agents the Tracey Directory, "the computer directory containing all of the electronic data for CDT's sports drug testing programs."⁴⁴ Due to the vast number of files, the Computer Investigative Specialist suggested copying the entire directory for off-site analysis.⁴⁵ Agent Novitzky reviewed all of the seized evidence with CDT directors before leaving the prem-

40. *See id.* at 921-22 (reporting details of search of CDT offices). Eleven other federal agents assisted Special Agent Novitzky with the search. *See id.*

41. *See id.* (noting CDT's directors told agents to "do what they needed to do"). CDT's attorney informed Agent Novitzky that CDT possessed "only one hardcopy document eligible for seizure." *Id.* During a conference call between CDT's legal counsel and Agent Novitzky, CDT representatives informed Novitzky that there were two computers that contained the information requested in the search warrant. *See id.*

42. *Id.* (finding document not designated as "only document eligible for seizure").

43. *See Comprehensive Drug Testing*, 473 F.3d at 922 (describing how seized documents were used to obtain new search warrant). Federal agents conducted a simultaneous search of Quest's laboratories, but were unsuccessful in locating the relevant specimens because they were identified only by number. *See id.* at 922 n.13. The document seized from CDT contained the identifying numbers needed to identify the specimens at Quest. *See id.* Agents used the list from CDT to obtain a third warrant for the BALCO players' specimens and their corresponding identifying number. *See id.* Upset upon noticing that the document was being faxed, a CDT director provided federal agents with the "only document eligible for seizure" which contained the drug-testing results for the ten BALCO players. *Id.* at 922.

44. *Id.* (locating relevant computer data). CDT's sports drug testing files were located in the computer directory labeled "Tracey Directory." *See id.* The Tracey Directory contained over 2,900 files relating not only to MLB but also to "thirteen other sports organizations, two business entities, and three sports competitions." *Id.* at 963 (Thomas, J., concurring in part and dissenting in part).

45. *See id.* at 922 (majority opinion) (noting that on-site analysis would be difficult due to time and intrusiveness). The federal agents copied the entire directory despite the fact that the warrant required them to review the data with a computer analyst. *See id.* at 922-23.

ises.⁴⁶ On April 26, 2004, the Players' Association filed 41(g)⁴⁷ motions seeking the return of the property seized, particularly the master file of positive drug test results.⁴⁸ On May 5, 2004, the government used information obtained from the Tracey Directory to apply for new search warrants to seize drug-testing records for over one hundred MLB players who were not involved in the BALCO scandal.⁴⁹ The warrants were granted and executed on May 6, 2004, and, once again, the Players' Association filed a 41(g) motion for the property to be returned.⁵⁰ District courts in both Nevada and California granted the Players' Association's 41(g) motions and ordered the return of all evidence unrelated to the initial ten BALCO players.⁵¹ The government appealed the orders to return the property in both districts.⁵²

Quest and CDT were served subpoenas on May 6, 2004, ordering them to produce all positive steroid drug tests for over one hundred MLB players.⁵³ The Players' Association filed a motion to

46. *See id.* at 923 (reporting documents seized from CDT). The evidence seized included "a twenty-five-page master list of all MLB players tested during the 2003 season and a thirty-four-page list of positive drug testing results for eight of the ten named BALCO players, intermingled with positive results for twenty-six other players." *Id.*

47. *See* FED. R. CRIM. P. 41(g) (motioning for return of property). 41(g) states: "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." *Id.*

48. *See Comprehensive Drug Testing*, 473 F.3d at 923 (filing motions for return of property).

49. *See id.* at 923-24 (discussing investigation of non-BALCO related MLB players). The government applied for a fifth search warrant for authorization to seize: [A]ll electronic data "regarding drug specimens, drug testing, specimen identification numbers, athlete identification numbers, and drug test results retained by [CDT] . . . pertaining to the drug testing of Major League Baseball players, located within the copy of a CDT computer subdirectory currently in the possession of the [Internal Revenue Service ("IRS")] in San Jose, California, identified as the 'Tracey' subdirectory, bearing the following computer file group names: (1) 'MAJOR LEAGUE GROUP' (2) 'MLB BILLING' (3) 'MLB Drug Subcommittee' (4) 'MLB Follow UP' (5) 'MLB IOC.'" *Id.* at n.16.

50. *See id.* at 924 (granting motions requested by May 5, 2004 applications).

51. *See id.* (granting motion for return of property seized). The judge in the District of Nevada held that "[t]he government callously disregarded the affected players' constitutional rights" and did not follow the proper procedures for handling intermingled records. *Id.* Similarly, the judge in the Central District of California granted the 41(g) motion and ordered the return of all property not connected to the ten BALCO players. *See id.*

52. *See id.* (noting government's appeals to return seized evidence).

53. *See Comprehensive Drug Testing*, 473 F.3d at 924 (detailing grand jury subpoenas beyond ten players with BALCO connections). The Ninth Circuit states: Recognizing that the documents they seized from CDT pursuant to the April 7 search warrant might not have included all documents relevant to

quash the new subpoenas on September 13, 2004.⁵⁴ The court granted the motion to quash, which the government subsequently appealed.⁵⁵

III. BACKGROUND: STRIKE TWO! PROCEDURES FOR SEARCHES AND SEIZURES

A. Searches and Seizures

1. *Warrant Requirement*

The Fourth Amendment prohibits conducting unreasonable searches and seizures.⁵⁶ A warrant is required for a search to protect individuals from intrusive police behavior.⁵⁷ Warrants must

the investigation . . . and deciding that the positive test results uncovered for MLB players beyond the ten with BALCO connections could be valuable to the investigation, the government asked for a broader warrant
Id. at 925 n.22.

54. *See id.* at 925 (objecting to issuance of new subpoenas). Quest complied with the subpoenas and turned over documents to the government. *See id.* Nevertheless, CDT refused to provide the requested information until the warrant litigation was resolved. *See id.* The day before the deadline to comply with the subpoenas, the Players' Association filed the motion to quash. *See id.*

55. *See id.* (granting motions to quash subpoenas). The judge held that "the government's conduct was unreasonable and constituted harassment." *Id.*

56. *See* U.S. CONST. amend. IV (regulating search and seizure). The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.; *see also* *Mapp v. Ohio*, 367 U.S. 643, 656-57 (1961) (holding Fourth Amendment right against unreasonable searches and seizures applied to States and exclusionary rule prohibited introduction into evidence of material seized in violation of Fourth Amendment).

57. *See* *Maclin*, *supra* note 12, at 938 (finding warrant requirement promotes "the norm that the police should not decide for themselves when to search or seize."); *see also* *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (stating justification for search warrant). Justice Jackson theorized the reason behind the Fourth Amendment:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

specifically describe the particular items to be seized to eliminate the possibility of unconstitutional searches and seizures.⁵⁸ A general warrant is “one that does not specify the items to be searched for or the persons to be arrested and is not supported by a showing of probable cause that any particular crime has been committed.”⁵⁹ Warrants broad in description will be held unconstitutional under the Fourth Amendment.⁶⁰

2. *Scope of the Search*

Just as the breadth of the warrant may render a search “unreasonable,” the manner of execution can also lead to a Fourth Amendment violation.⁶¹ The factors used to determine whether or not a search is confined to its lawful scope are (1) the purpose stated in the warrant application and (2) the manner of its execution.⁶² A legal search pursuant to a warrant must be confined to

Id.

58. *See* *Marron v. United States* 275 U.S. 192, 193 (1927) (holding seizure of ledger and bills was illegal because warrant only authorized seizure of “intoxicating liquors and articles for their manufacture”); *see also* *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) (holding “plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges”); *Chimel v. California*, 395 U.S. 752, 768 (1969) (holding scope of search was “unreasonable” under Fourth Amendment since search went beyond defendant’s person and area from which he could obtain weapon); *Stanford v. Texas*, 379 U.S. 476, 479-80 (1965) (holding warrant authorizing seizure of “books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas” was unconstitutional general warrant); *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (noting importance of Warrant Clause).

59. *State v. Crabtree*, 487 S.E.2d 575, 578 (N.C. Ct. App. 1997) (citing *State v. Richards*, 242 S.E.2d 844, 855 (1978)). The court held:

Where an officer who is executing a valid search for one item seizes a different item, the courts must be sensitive to the danger that officers may enlarge their specific authorization furnished by a warrant or an exigency into the equivalent of a general warrant to rummage and seize at will.

Id. (citing *State v. Beveridge*, 436 S.E.2d 912, 916 (1993), *aff’d*, 444 S.E.2d 223 (1994)).

60. *See* *Marcus v. Search Warrants of Property*, 367 U.S. 717, 732-33 (1961) (holding evidence inadmissible as product of general warrant). A warrant authorizing the seizure of “obscene, lewd, licentious, indecent or lascivious books” was a general warrant because it gave the executing officers broad discretion to determine what was “obscene.” *See id.* at 721 n.2, 732.

61. *See* *VonderAhe v. Howland*, 508 F.2d 364, 370 (9th Cir. 1974) (noting manner of execution is what causes “prohibited invasion”); *see also* *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988) (holding unconstitutional search and seizure because officers acted with “flagrant disregard” for terms of warrant).

62. *See, e.g.,* *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (noting search must be confined to particular objects described in warrant). In applying for a search warrant to seize evidence to support the charge of possession of marijuana, the officers did not inform the magistrate of a denial of a search warrant for

the warrant's terms.⁶³ Nevertheless, seizure of an item outside the scope of the warrant does not always cause the entire search to be invalid.⁶⁴

3. "Intermingled" Evidence

a. *United States v. Beusch*

The rule against general searches and seizures is not violated where files and ledgers are seized, when only some of the objects were particularly described in the warrant.⁶⁵ The defendants in *United States v. Beusch* argued that because the items were easily identifiable and separable, the officers' seizure of the files and ledgers in their entirety constituted an illegal general search.⁶⁶ The court held that because the three items contained information authorized under the terms of the warrant, there was no Fourth

cocaine the previous day or the intent to search for evidence of cocaine. *See id.* at 420. "By failing to advise the judge of all the material facts, including the purpose of the search and its intended scope, the officers deprived him of the opportunity to exercise meaningful supervision over their conduct and to define the proper limits of the warrant." *Id.* at 422.

63. *See id.* at 423 (explaining search must be limited to what is authorized). "[T]he search must be one directed in good faith toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged had been committed. It must not be a general exploratory search . . ." *Id.* (quoting *Gurleski v. United States*, 405 F.2d 253, 258 (5th Cir. 1968)). The court held that the executing officers did not confine their search to the scope of the warrant, because although the warrant only authorized seizure of evidence of marijuana, the officers also searched for evidence of cocaine smuggling. *See id.* at 422. Thus, "the warrant became an instrument for conducting a general search." *Id.* at 423. All evidence seized during the search was suppressed because the scope of the warrant was exceeded. *See id.*

64. *See United States v. Scott-Emuakpor*, No. 1:99-CR-138, 2000 WL 288443, at *5 (W. D. Mich. Jan. 25, 2000) (noting exceptions to invalid seizures).

65. *See United States v. Beusch*, 596 F.2d 871, 876 (9th Cir. 1979) (holding objects seized were covered by terms of warrant). The warrant authorized officers to search Deak's office for evidence pertaining to transactions between Deak and Gimenez. *See id.* During the search, the officers seized items which did not pertain to Gimenez. *See id.* The unrelated items were used as evidence to charge the defendants with misdemeanor counts relating to similar unreported shipments. *See id.* The unrelated items seized included the following items: "(1) a ledger containing all records of 'sales and purchases' for a 12-month period beginning on April 1, 1974; (2) a file containing all '1973 incoming cables'; and (3) a ledger containing records on foreign customers." *Id.*

66. *See id.* (arguing files were easily identifiable because they were organized either chronologically or alphabetically). The defendants conceded that all three items contain evidence regarding Gimenez, which was specified in the warrant. *See id.* The defendants objected to the officers taking the files and ledgers in their entirety instead of seizing only those portions relating specifically to Gimenez. *See id.*

Amendment violation in seizing the entire contents of the files and ledgers.⁶⁷

b. *United States v. Tamura*

In *United States v. Tamura*, the court held that during a search, when documents are so intermingled that it would be too time-consuming to sort on-site, seizing the documents and continuing the search upon approval by a magistrate is not a violation of the Fourth Amendment.⁶⁸ However, in *Tamura*, the court did not uphold the government's seizure of the records for later review.⁶⁹ The wholesale removal must be monitored by a neutral and detached magistrate to prevent Fourth Amendment violations.⁷⁰ Al-

67. *See id.* at 876-77 (finding no Fourth Amendment violation). The court found no authority for the argument that only those pages actually containing incriminating information could be seized. *See id.* at 876. A rule requiring officers to separate the evidence would increase the length and intrusiveness of the search. *See id.* It would also require the assistance of auditors, bookkeepers and accountants when documents were involved. *See id.* The court specified that the holding only applied to single files and single ledgers. *See id.* at 877. The court acknowledged that the rule may not apply to sets of ledgers or files, but because it was inapplicable to the case, did not elaborate. *See id.*

68. *See* 694 F.2d 591, 595-96 (9th Cir. 1982) (designating system for seizure of intermingled documents). To find the three categories of records authorized by the warrant, officers had to perform three steps: "(1) review a computer printout; (2) locate the voucher that corresponded to a particular payment recorded on the printout; and (3) find the check that corresponded to the voucher." *Id.* at 594-95. Because the procedure was time-consuming, and the employees refused to help, the FBI seized all of the accounting records for the years in question. *See id.* at 595. The FBI agents seized "11 cardboard boxes of computer printouts, which were bound in 2000-page volumes; 34 file drawers of vouchers, also bound in 2000-page volumes; and 17 drawers of cancelled checks, which were bundled into files." *Id.*

69. *See id.* (finding search procedure did not comply with Fourth Amendment). "[T]he wholesale seizure for later detailed examination of records not described in a warrant is significantly more intrusive, and has been characterized as 'the kind of investigatory dragnet that the fourth amendment was designed to prevent.'" *Id.* (quoting *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980)).

70. *See id.* at 596 (noting crucial element for valid wholesale removal). Because the seizure was not monitored by a magistrate, the court held that the seizure, "even though convenient under the circumstances, was unreasonable." *Id.* The court provided a procedure for seizure of "intermingled documents":

If the documents to be seized cannot be searched for or identified without examining the contents of other documents, or if they constitute items or entries in account books, diaries, or other documents containing matter not specified in the warrant, the executing officer shall not examine the documents but shall either impound them under the appropriate protection where found, or seal and remove them for safekeeping pending further proceedings

Id. at n.3.

though the documents were illegally seized and retained, the court did not hold that the evidence should be suppressed.⁷¹

B. Searches and Seizures of Computers

Applying the Fourth Amendment to searches and seizures of computers and computer data is a recent issue facing the courts.⁷² Because computer data is intermingled and can be easily transferred for off-site review, many courts have applied the *Tamura* rule to the search and seizure of computers.⁷³ Yet several courts have also imposed limits on what types of computer files can be opened pursuant to a search warrant because computers contain a vast

71. *See id.* at 597 (holding reversal is not necessary). The evidence was not suppressed because “the Government’s wholesale seizures were motivated by considerations of practicality rather than by a desire to engage in indiscriminate ‘fishing;’ we cannot say, . . . that the officers so abused the warrant’s authority that the otherwise valid warrant was transformed into a general one.” *Id.*; *see also* *Marvin v. United States*, 732 F.2d 669, 674 (8th Cir. 1984) (“Unlawful seizure of items outside a warrant does not alone render the whole search invalid and require suppression and return of all documents seized, including those lawfully taken pursuant to the warrant.”).

72. *See* David J. S. Ziff, Note, *Fourth Amendment Limitations on the Execution of Computer Searches Conducted Pursuant to a Warrant*, 105 COLUM. L. REV. 841, 845 (2005) (analyzing application of Fourth Amendment to computers). Computer searches are a new constitutional issue because:

[t]he Framers could not possibly have envisioned the eventual existence of computers With over half of all households storing information on personal computers, it has become necessary for courts to develop Fourth Amendment doctrine to deal with the inevitable increase in government searches and seizures of computer data.

Id.

73. *See* Resseguie, *supra* note 15, at 206-09 (noting applicability of *Tamura* rule to computer searches and seizures); *see also* *United States v. Upham*, 168 F.3d 532, 535-36 (1st Cir. 1999) (allowing computer and all disks to be seized for off-site review); *United States v. Sissler*, No. 1:90-CR-12, 1991 WL 239000, at *4, (W.D. Mich. Aug. 30, 1991) (holding seizure of five hundred computer disks and one personal computer for off-site review permissible so security expert could “crack” security measures); *United States v. Abram*, 830 F. Supp. 551, 556 (D. Kan. 1993) (finding Fourth Amendment violation when documents seized in “flagrant disregard” of warrant terms); *United States v. Hill*, 322 F. Supp. 2d 1081, 1090 (C.D. Cal. 2004) (applying *Tamura* to seizure of pornographic images found on computer).

amount of information.⁷⁴ The files searched must be limited to the scope of the warrant.⁷⁵

C. Motions for Return of Property

1. *Ramsden Factors*

Motions to return property seized by the government are considered “civil equitable proceedings and, therefore, a district court must exercise ‘caution and restraint’ before assuming jurisdiction.”⁷⁶ Circuit courts have limited the use of equitable jurisdiction by implementing criteria that must be met before the district court can reach the merits on a motion to return property.⁷⁷ The first factor is “whether the government displayed a callous disregard for the constitutional rights of the movant.”⁷⁸ The second factor is

74. See Ziff, *supra* note 72, at 846-48 (analyzing Tenth Circuit’s limitation on computer searches in *United States v. Carey*); see also *United States v. Carey*, 172 F.3d 1268, 1270 (10th Cir. 1999) (holding file containing child pornography was outside scope of warrant). The warrant in *Carey* authorized police to search the defendant’s computers for “names, telephone numbers, ledgers, receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances.” *Id.* at 1272-73. The officer used a key-word search for files containing relevant words. See *id.* at 1271. The officer found file names he was unfamiliar with and opened them to find images of child pornography. See *id.* The government argued:

[A] computer search such as the one undertaken in this case is tantamount to looking for documents in a file cabinet, pursuant to a valid search warrant, and instead finding child pornography [A]ny file might well have contained information relating to drug crimes and the fact that some files might have appeared to have been graphics files would not necessarily preclude them from containing such information.

Id. at 1272 (citing *Erickson v. Comm’r of Internal Revenue*, 937 F.2d 1548, 1554 (10th Cir. 1991)).

75. See *Carey*, 172 F.3d at 1276 (suppressing child pornography evidence because it exceeded scope of warrant which related to distribution of illegal drugs). But see Ziff, *supra* note 72, at 850 (detailing expansion of computer searches in Tenth Circuit); see also *United States v. Campos*, 221 F.3d 1143, 1148 (10th Cir. 2000) (holding evidence was within scope of warrant). In *Campos*, the agents had a warrant to search for two images of child pornography that had been transmitted by the defendant, but in their search found six additional images of child pornography. See *id.* at 1146. The court held the seizure of the additional images was not an expansion of the scope of the warrant. See *id.* at 1148; see also *United States v. Walser*, 275 F.3d 981, 987 (10th Cir. 2001) (holding opening “bstfit.avi” file did not constitute impermissible broadening of warrant).

76. *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993) (citing *Kitty’s East v. United States*, 905 F.2d 1367, 1370 (10th Cir. 1990)).

77. See *id.* (limiting discretion of district court).

78. *Id.* at 324-25 (citing *Richey v. Smith*, 515 F.2d 1239, 1243-44 (5th Cir. 1975)). Applying this factor, the court held that the government displayed “callous disregard” for Ramsden’s rights because it was a warrantless search with no applicable exception to the warrant requirement. See *id.* at 325. The court also relied on government’s failure to obtain a warrant despite ample time to satisfy the Fourth Amendment requirement. See *id.*

“whether the movant has an individual interest in and need for the property he wants returned.”⁷⁹ The third factor is “whether the movant would be irreparably injured by denying return of the property.”⁸⁰ The final factor is “whether the movant has an adequate remedy at law for the redress of his grievance.”⁸¹ The *Ramsden* court held that, while not all four factors must be met, every factor should be weighed in determining whether the district court has jurisdiction over the motion to return property.⁸²

2. Search Warrant v. Subpoena

Search warrants and subpoenas may seek the same information, but they are not functional equivalents.⁸³ “A search warrant allows the officer to enter the person’s premises, and to examine for himself the person’s belongings.”⁸⁴ Unlike a search warrant, a subpoena does not give an officer access to the individual’s prem-

79. *Id.* at 325. The court held that Ramsden had an interest in the return of the property since the documents were critical to running his business. *See id.*

80. *Id.* Ramsden provided two ways he would be injured if the seized documents were not returned to him: his inability to support his family and prosecution in England. *See id.* at 325-26. He claimed that without the documents he could not run his business, which would lead him to be unable to support his family. *See id.* at 325. The court rejected this argument because Ramsden failed to prove that copies of the documents would be insufficient for business purposes. *See id.* at 325-26. The court also rejected his second argument, holding that “the mere threat of prosecution is not sufficient to constitute irreparable harm.” *Id.* at 326.

81. *Id.* at 325. The court held Ramsden did not have an adequate remedy at law available because he was not going to be prosecuted; therefore, he would not have an opportunity to challenge items seized and request their return. *See id.* at 326.

82. *See Ramsden*, 2 F.3d at 326 (holding court had jurisdiction despite one factor not being met). Ramsden had met three of the four factors: callous disregard for his constitutional rights, need for the property, and no adequate remedy at law for his grievance. *See id.* “While he is unable to demonstrate that he will suffer irreparable harm if the documents are not returned, we hold that the balance of equities tilt in favor of reaching the merits on Ramsden’s Rule 41(e) claim.” *Id.*

83. *See In re Grand Jury Subpoenas Dated Dec. 10, 1987 v. United States*, 926 F.2d 847, 854 (9th Cir. 1991) (distinguishing search warrants and subpoenas). The objectives of the warrants and subpoenas were the same: “documents containing references to Doe One or any of twenty-one other individuals or business entities which the Government suspected of being involved in the money laundering scheme.” *Id.* at 851. The defendant argued the subpoenas were the “functional equivalents” of the search warrants since they were served simultaneously. *See id.* at 854. The court held that “subpoenas are not search warrants.” *Id.*

84. *Id.* The officer can decide what to seize pursuant to the warrant. *See id.* The officer can also seize evidence which is not listed on the warrant if it is in plain view. *See id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 326 (1987)).

ises, nor can he decide what evidence to seize.⁸⁵ Additionally, multiple subpoenas seeking similar information may constitute harassment.⁸⁶ Service of warrants and subpoenas on the same day does not make them “functional equivalents.”⁸⁷

IV. NARRATIVE ANALYSIS: GOVERNMENT HITS HOMERUN

The Ninth Circuit in *Comprehensive Drug Testing* held that the government’s seizures did not violate the Fourth Amendment; therefore, the district court erred in ruling that the government was required to return all property which was unrelated to the ten specifically named BALCO players.⁸⁸ The court remanded the case to district courts to allow magistrates to sort through the seized, intermingled evidence.⁸⁹ Finally, the court concluded that the district court for the Northern District of California abused its discretion in quashing the subpoenas because “the subpoenas were not unreasonable and did not constitute harassment.”⁹⁰

The first issue the court analyzed was whether the Players’ Association lacked standing to file motions.⁹¹ The court held that the Players’ Association had standing to assert a Fourth Amendment violation on behalf of its members.⁹² The court concluded there was standing because (1) the Association represented all MLB play-

85. *See id.* (describing function of subpoena). “[T]he person served determines whether he will surrender the items identified in the subpoena or challenge the validity of the subpoena prior to compliance.” *Id.*

86. *See United States v. Am. Honda Motor Co.*, 273 F. Supp. 810, 819-20 (N.D. Ill. 1967) (holding simultaneous subpoenas seeking similar information constituted harassment).

87. *See In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d at 854. (denying assertion that service on same day makes them equivalent). The court reasoned that the subpoenas were not enforced on the same day that the search warrant was executed since the defendant was given a month to comply with the subpoenas. *See id.*

88. *See United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915, 943 (9th Cir. 2006) (finding no Fourth Amendment violations and reversing in part and remanding in part orders of district courts).

89. *See id.* (limiting government’s right to retain intermingled evidence inspected off-site without magistrate supervision).

90. *Id.*

91. *See id.* at 925 (discussing jurisdictional issue). The government argued that the Players’ Association did not have standing to file motions “because it lacked access, control, and ownership over the records and specimens seized from Quest.” *Id.*

92. *See id.* at 926 (holding Players’ Association meets criteria for standing). “An association has standing to sue on behalf of its members when they would otherwise have independent standing to sue, the interests sought to be protected are germane to the organization’s purpose, and the claim asserted does not require the participation of individual members of the lawsuit.” *Id.* (citing *Pennell v. City of San Jose*, 485 U.S. 1, 7 n.3 (1988)).

ers and each player had independent standing to sue; (2) “the interests sought to be protected—the players’ privacy interests in their drug testing records—are related to the organization’s sole purpose: to represent the best interests of MLB players;” and (3) the players were not required to participate in the lawsuit because the “Association sought only the return of players’ drug testing information.”⁹³

Next, the court determined that because three of the four equitable jurisdiction factors were met, the district court did not abuse its discretion by hearing the motions to return property.⁹⁴ The court applied the equitable jurisdiction factors established in *Ramsden v. United States* to determine if jurisdiction was proper.⁹⁵

Analyzing whether the government acted with callous disregard for the players’ constitutional rights, the court first determined that the simultaneous pursuit of search warrants and subpoenas did not violate the Fourth Amendment.⁹⁶ The court reaffirmed that subpoenas and search warrants are not equivalents.⁹⁷ Obtaining a search warrant did not amount to a callous disregard of the Fourth Amendment since the government complied with the requisite procedural and evidentiary processes.⁹⁸

In continuing to assess whether the government acted with callous disregard, the court determined there was no evidence of bad faith or pretext in the search and seizure.⁹⁹ The seizure of a spreadsheet, reporting positive drug test results for eight of the ten

93. *Comprehensive Drug Testing*, 473 F.3d at 926.

94. *See id.* at 929 (holding district courts had equitable jurisdiction) (citing *Ramsden v. United States*, 2 F.3d 322 (9th Cir. 1993)).

95. *See id.* at 929. (analyzing *Ramsden* factors). The court analyzed whether the government acted with callous disregard, whether the movant has an interest and need for the property to be returned and whether the movant would be injured if the property is not returned. *See id.* The fourth factor, whether the movant has an adequate remedy at law, was not considered because the government conceded that the parties had no adequate remedy at law. *See id.*

96. *See id.* at 929-30 (rejecting Players’ Association argument that “government sought search warrants in an attempt to avoid judicial review of the overbroad January 2004 subpoenas.”). The court also rejected the contention that if the January subpoenas had been quashed, the government would have been unable to obtain a search warrant. *See id.* at 930.

97. *See id.* (distinguishing search warrants from subpoenas) (citing *In re Grand Jury Subpoenas Dated Dec. 10, 1987 v. United States*, 926 F.2d 847, 854 (9th Cir. 1991)). The court differentiated search warrants from subpoenas based on the requirement of probable cause; a search warrant is only issued upon showing of probable cause while a subpoena may be issued without probable cause. *See id.*

98. *See Comprehensive Drug Testing*, 473 F.3d at 932 (concluding government’s obtaining of search warrant was not in violation of Fourth Amendment).

99. *See id.* (rejecting Players’ Association’s argument that search warrants were used as pretext to seize other evidence). There was no “egregious police misconduct.” *Id.*

named BALCO players intermingled with the results of other MLB players, was not unlawful because it was evident to the agents that the spreadsheet contained information relevant to the warrant.¹⁰⁰ The court concluded that there was no evidence to support the Players' Association's argument that the agents targeted and seized records beyond the scope of the warrant.¹⁰¹

The court further reasoned that the seizure of intermingled documents did not constitute a callous disregard for the rights guaranteed by the Fourth Amendment.¹⁰² The court asserted that the reasonableness standard was especially difficult to apply to computer searches and seizures.¹⁰³ Although there was precedent establishing a protocol for seizing intermingled documents for off-site review, the court relied on the alternative rule which established that substitute protective procedures could be specifically stated in a search warrant.¹⁰⁴ The procedure was satisfied because the search was supervised by a Computer Investigative Specialist.¹⁰⁵ While the language of the warrant required a computer specialist to oversee the search, it did not exclude other agents from helping review the data.¹⁰⁶

Additionally, the seizure of files for off-site review was not a product of callous disregard for an individual's constitutional rights, but rather an effort to lessen the disruption to CDT caused by the search.¹⁰⁷ The court rejected the argument that government

100. *See id.* (concluding spreadsheet was seized during lawful search and contained evidence within scope of warrant).

101. *See id.* (finding no evidence of pretext). The court based their conclusion on the fact that the agents only seized files containing information related to the ten specified BALCO players and seized only specimens of the named BALCO players. *See id.* In addition, "the agents copied relevant files in order to avoid an excessively long and intrusive on-site search, although duplication risked the loss of deleted documents that would only be visible on the original drives." *Id.*

102. *See id.* (concluding seizure of intermingled documents was not constitutional violation) (citing *Ramsden v. United States*, 2 F.3d 322, 325 (9th Cir. 1993)).

103. *See Comprehensive Drug Testing*, 473 F.3d. at 932 (noting "well-known 'difficulties of examining and separating electronic media at the scene.'" (quoting *United States v. Hill*, 322 F. Supp. 2d 1081, 1088 (C.D. Cal. 2004)).

104. *See id.* at 933 (finding no violation because procedures specified in warrant were met). The search warrant required computer personnel to review evidence to decide whether off-site review was appropriate. *See id.*

105. *See id.* at 934 (determining seizure was reasonable).

106. *See id.* (rejecting Players' Association argument that warrant procedure was violated by agent viewing computer data). "The warrant only required that computer personnel assess the possibility of on site search completion. It did not preclude others from assisting the computer personnel." *Id.* The agent's assistance did not violate the Fourth Amendment. *See id.*

107. *See id.* (discussing agent's intent by search). In support of this reasoning, the court acknowledged that the agents only seized copies of the Tracey Directory, which could have precluded them from obtaining evidence which may have been

agents should have been limited to key word computer searches.¹⁰⁸ Since the court found no evidence of callous disregard for the movant's constitutional rights, the first factor for equitable jurisdiction was not met.¹⁰⁹

The court held that the second criterion for equitable jurisdiction was satisfied because the Players' Association, which was supposed to represent the best interests of MLB, had an interest in the evidence seized.¹¹⁰ The third factor was also met since the MLB players would be irreparably injured if the drug test results and specimens were not returned.¹¹¹ The court determined that there was equitable jurisdiction since three of the four factors were met.¹¹²

The court held that the district court erred in ruling that the government had to return all evidence that did not pertain to the ten BALCO players specifically named in the search warrants.¹¹³ The government was justified in retaining the property since the evidence is necessary to the investigation and prosecution.¹¹⁴ There was no governing precedent in favor of sustaining the full

deleted. *See id.* "The agents took only a limited set of clearly relevant disks and a copy of the Tracey Directory, which included information on players specifically named in the search warrant." *Id.* at 934-35.

108. *See Comprehensive Drug Testing*, 473 F.3d at 935 (holding no reason for search to be confined to "key words"). A limited key word search would result in evidence being overlooked, especially since test results were saved not by key word but by identification numbers. *See id.*

109. *See id.* at 936 (concluding government acted with respect towards "privacy interests, intrusiveness, and law enforcement needs"). The court concluded that the government "displayed attentiveness both to the warrant's precautionary procedures and to the importance of avoiding unnecessary disruption of CDT's business operations." *Id.*

110. *See id.* (concluding criteria of interest in evidence seized was in favor of equitable jurisdiction). The members of the Association, MLB players, had "strong privacy interest in both their drug test results and actual specimens." *Id.* The court reasoned that since the Association represented the interests of the players, it had an interest in the drug test results and specimens. *See id.*

111. *See id.* (finding likelihood of irreparable injury). The court reasoned that "the public release of positive drug testing evidence could irreparably damage the careers of the affected players, even if the positive results were not actually caused by illegal steroid use." *Id.*

112. *See id.* at 936 (finding no abuse of discretion in district court hearing motion).

113. *See Comprehensive Drug Testing*, 473 F.3d at 938 (holding grant of motion to return property unrelated to BALCO players was erroneous). The court relied on precedent stating that denial of a motion to return property is proper if "the government's need for the property as evidence continues." *Id.* at 937 (quoting *United States v. Fitzen*, 80 F.3d 387, 388 (9th Cir. 1996)).

114. *See id.* at 937 (reasoning property should be returned "when government no longer needs the property as evidence"). "This legitimate law enforcement purpose makes return of the intermingled evidence improper" *Id.*

return of intermingled evidence.¹¹⁵ The court remanded the case to district court for a neutral magistrate to conduct a review of the seized files to determine what the government may keep.¹¹⁶

One of the final issues the court considered was the reversal of the district court's granting of the motion to quash the May 6, 2004 subpoenas, which requested all drug testing records and specimens for MLB players who had tested positive for steroids.¹¹⁷ The court reasoned that there is no rule prohibiting the government from simultaneously pursuing subpoenas and search warrants requesting the same information.¹¹⁸ The issuance of subpoenas and execution of search warrants was not unreasonable under the Fourth Amendment.¹¹⁹ Similarly, seeking search warrants in three separate districts was also not a violation.¹²⁰

115. *See id.* (relying on *Beusch* and *Tamura* courts' emphasis on "effective criminal law enforcement"). The court reasoned:

[T]he government has made clear that it desires to use only information related to the ten named BALCO players and to other players who tested positive – and who therefore may have become targets of an expanded grand jury investigation – as a result of intermingled information we have determined was seized lawfully under the warrant.

Id. at 937-38. The court further reasoned that some of the retained evidence was outside of the warrant's scope but the court did not "believe a return of the lawfully seized intermingled evidence properly remedies that wrong." *Id.* at 938.

116. *See id.* at 938 (concluding government did not act in accordance with procedure for off-site review of intermingled files). "After the magistrate determines which sealed items fall within the search warrant, the government may retain and use such items; all others must be returned to the person or entity searched." *Id.* at 940.

117. *See id.* at 940-41 (reversing motion order of district court).

118. *See Comprehensive Drug Testing*, 473 F.3d at 941 (rejecting district court's reasoning). The Ninth Circuit concluded that the district erroneously applied *United States v. Am. Honda Motor Co.*, 273 F. Supp. 810 (N.D. Ill. 1967), because seeking substantially similar subpoenas is not the same as pursuing contemporaneous issuance of subpoenas and search warrants. *See id.*

119. *See id.* at 941 ("The subpoenas were not returnable on the same day that the search warrants were executed."). The district court "failed to recognize the different purposes and requirements of the warrant as compared to the subpoena and the legitimate concern that production of relevant evidence to the grand jury would be unduly delayed." *Id.* at 941-42 (citing *In re Grand Jury Subpoenas Dated Dec. 10, 1987 v. United States*, 926 F.2d 847, 854 (9th Cir. 1991)).

120. *See id.* at 942 (rejecting argument that seeking warrants in three separate districts was attempt to avoid ruling on motion to quash). The court concluded that "granting the motion to quash would not have prevented the government from seeking the search warrants . . ." because the government had probable cause. *Id.*

V. CRITICAL ANALYSIS: WAS IT A FOUL BALL?

A. Scope of the Warrant

The Supreme Court has consistently held that the Warrant Clause of the Fourth Amendment prohibits general searches by requiring warrants to specifically describe the place to be searched and the persons or things to be seized.¹²¹ The seizure of evidence which is not within the scope of the warrant violates the Fourth Amendment.¹²² The Ninth Circuit, in *Comprehensive Drug Testing*, recognized that some of the information seized may have fallen outside the scope the warrant, but did not require the return of the lawfully seized evidence.¹²³ The general rule is to only suppress items that were seized outside the scope of the warrant.¹²⁴ However, suppression of all evidence seized, including items specified in the search warrant, is required when a search warrant is executed with a “flagrant disregard” for the limitations of the warrant.¹²⁵

121. See *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (defining scope of lawful search); see also *Marron v. United States*, 275 U.S. 192, 196 (1927) (holding warrants must specifically describe things to be seized to be lawful); *Stanford v. Texas*, 379 U.S. 476, 480-81 (1965) (finding general warrant since warrant did not particularly describe things to be seized).

122. See *U.S. v. Scott-Emuakpor*, No. 1:99-CR-138, 2000 WL 288443, at *4-5 (W. D. Mich. Jan. 25, 2000) (noting Warrant Requirement). “If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . the subsequent seizure is unconstitutional without more.” *Id.* (quoting *Horton v. California*, 496 U.S. 128, 140 (1990)).

123. See *Comprehensive Drug Testing*, 475 F.3d at 938 (concluding evidence within scope of warrant did not have to be returned). The court reasoned: “[w]hile we agree that some information still retained by the government, at least in duplicate, may fall outside the scope of the warrant, we do not believe a return of the lawfully seized intermingled evidence properly remedies the wrong.” *Id.*

124. See *United States v. Abram*, 830 F. Supp. 551, 554 (D. Kan. 1993) (citing *United States v. Medlin*, 798 F.2d 407, 411 (10th Cir. 1986)) (holding seizure of evidence outside scope does not require suppression of *all* items seized, but only items not mentioned in warrant); see also *United States v. Shilling*, 826 F.2d 1365, 1369 (4th Cir. 1987) (holding suppression of seized items not required). The *Shilling* court concluded that “[t]he exclusionary rule does not compel suppression of evidence properly covered by a warrant merely because other material not covered by the warrant was taken during the same search, especially where . . . such other materials were not received into evidence against the defendant.” *Id.*

125. *Abram*, 830 F. Supp. at 555 (citing *Medlin*, 798 F.2d at 411) (explaining when “blanket exclusion rule” applies). The *Abram* court concluded that the agents’ wholesale seizure of file cabinets and file boxes was a “flagrant disregard” for the terms of the search warrant. *Id.* at 556. The court reasoned that “merely reviewing the labels on file folders would have revealed whether or not documents covered by the terms of the warrant were contained therein.” *Id.* at 556. *But see United States v. Sissler*, No. 1:90-CR-12, 1991 WL 239000, at *4, (W.D. Mich. Aug. 30, 1991) (holding wholesale seizure was not “flagrant disregard” for search warrant limitations). The court reasoned that “the police were not obligated to give deference to the descriptive labels Otherwise, records of illicit activity could

The court held the government did not use the search warrants for the ten BALCO players as a pretext to seize information related to other MLB players, and thus found no “egregious police misconduct.”¹²⁶ The court distinguished the police conduct from that in *United States v. Rettig* and concluded that the evidence did not have to be suppressed.¹²⁷ There was no support for pretext because the agents narrowed their search to evidence related to the ten BALCO players.¹²⁸

The court held that the seized evidence fell within the scope of the warrant.¹²⁹ It reasoned that the seizure for off-site review was motivated by practicality, a factor considered in other circuits.¹³⁰ Other circuits have held that the wholesale seizure of intermingled files does not constitute the egregious misconduct needed to find a

be shielded from seizure by simply placing an innocuous label on the computer disk containing them.” *Id.*

126. *See Comprehensive Drug Testing*, 475 F.3d at 932 (finding nothing in record to support pretext argument).

127. *See id.* (rejecting Players’ Association’s argument that *Rettig* was governing precedent). The court differentiated *Rettig* by the agent’s statement: “tell us where [the cocaine] is so we don’t have to mess up your house.” *Id.* (quoting *United States v. Rettig*, 589 F.2d 418, 422 n.1 (9th Cir. 1978)). The agents did not act unlawfully since the spreadsheet seized contained information within the scope of the warrant. *See id.* *But see Rettig*, 589 F.2d at 422 (concluding agents used search warrant for marijuana as pretext to search for cocaine). The agents failed to disclose to the magistrate that they had been denied a search warrant for cocaine the previous day. *See id.* at 421. By not informing the magistrate about the denied warrant, “the officers deprived him of the opportunity to exercise meaningful supervision over their conduct and to define the proper limits of the warrant.” *Id.* at 422.

128. *See Comprehensive Drug Testing*, 473 F.3d at 932 (finding no evidence that agents were targeting evidence related to all MLB players). The dissent concluded that the government’s actions were pretextual. *See id.* at 961 (Thomas, J., concurring in part and dissenting in part). The government originally subpoenaed information on all MLB players, but opposition from the Players’ Association and CDT resulted in a subpoena being pursued only against players with BALCO associations. *See id.* The dissent argued that “the government was attempting to obtain all medical data about all Major League Baseball players, and using the search warrants for the limited number of players as a pretext for doing so.” *Id.*

129. *See id.* at 932 (majority opinion) (holding agents seized only files related to named BALCO players). *But see United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988) (holding seizure of 667 items not specified in warrant constituted general search). “When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant.” *Id.*

130. *See Comprehensive Drug Testing*, 473 F.3d at 932 (reasoning off-site review was necessary to “avoid an excessively long and intrusive on-site search”); *see also United States v. Shilling*, 826 F.2d 1365, 1369-70 (4th Cir. 1987) (rejecting motion for suppression because seizure of records was for practical purposes); *United States v. Sissler*, No. 1:90-CR-12, 1991 WL 239000, at *4 (W.D. Mich. Aug. 30, 1991) (holding seizure of documents was justified by practical considerations).

callous disregard for an individual's constitutional rights.¹³¹ The court correctly held that the wholesale seizure of intermingled documents was neither a callous disregard for the Fourth Amendment nor the execution a general search.¹³²

B. Search and Seizures of Intermingled Documents

1. *The Beusch Rule*

The court properly recognized the limitation on the *Beusch* holding, specifying that the rule only applied to "single files and single items i.e., single items which, though theoretically separable, in fact constitute one volume or file folder."¹³³ *Beusch* may not apply to the wholesale seizure of the Tracey Directory, but it would apply to the seizure of the spreadsheet.¹³⁴

2. *The Tamura Rule*

The court correctly applied the *Tamura* rule to the wholesale seizure of intermingled computer evidence.¹³⁵ The Ninth Circuit

131. See *Sissler*, 1991 WL 239000, at *4 (distinguishing misconduct needed for flagrant disregard of warrant). Wholesale seizure cannot be compared to the outrageous police conduct in *United States v. Medlin* and *United States v. Rettig*. See *id.* For a complete discussion of *United States v. Rettig*, see *supra* notes 62-63 and accompanying text.

132. See *Comprehensive Drug Testing*, 473 F.3d at 936 (finding no bad faith or "callous disregard"); see also *Marvin v. United States*, 732 F.2d 669, 675 (8th Cir. 1984) (finding seizure was within scope of warrant). The court did not find a flagrant disregard for the limitations of the search warrant because "[t]he record shows that the agents attempted to stay within the boundaries of the warrant and that the extensive seizure of documents was prompted largely by practical considerations and time constraints." *Id.*

133. See *Comprehensive Drug Testing*, 473 F.3d at 932-33 (quoting *United States v. Beusch*, 596 F.2d 871, 877 (9th Cir. 1979) (acknowledging limitation on holding)).

134. See *Beusch*, 596 F.2d at 877 (concluding that single files can be seized). The court determined that "[a]s long as an item appears, at the time of the search, to contain evidence reasonably related to the purposes of the search, there is no reason absent some other Fourth Amendment violation to suppress it." *Id.* (citing *Warden v. Hayden*, 387 U.S. 294, 307 (1967)). But see *Comprehensive Drug Testing* 473 F.3d at 963 (Thomas J., concurring in part and dissenting in part) (finding majority incorrectly applied *Beusch*). The dissent disagreed with the majority's application:

To apply *Beusch* to the computer context in the way the majority suggests would permit the government to seize all the documents on a given computer only if one document therein was responsive to the warrant. This is precisely what *Beusch* explicitly said it did not intend to permit in the paper documents context.

Id.

135. See *Comprehensive Drug Testing*, 473 F.3d at 938 (applying *Tamura* rule "to ensure that the seizure of intermingled computer records remains reasonable"). The court held that it would be unreasonable to allow the government to retain all

applied *Tamura* in the computer context despite some circuits rejecting its relevance.¹³⁶ Nonetheless, other jurisdictions have recognized the similarities between intermingled documents and computerized files.¹³⁷ Recognizing the complexity involved in computer searches and the Fourth Amendment, the court emphasized that the principles established in *Tamura* were relevant in the computer context.¹³⁸ Applying the *Tamura* procedure to intermingled computer evidence protects against “unreasonable retention of property.”¹³⁹ The court supported applying the procedure because “the government has little to lose by following this precaution.”¹⁴⁰

The *Tamura* rule has been regarded as applicable to searches and seizures of computerized data.¹⁴¹ It is relevant since the nature

of the evidence falling outside the scope of the warrant, despite the assurance to the Players’ Association and CDT that it would not use the files. *See id.* The court concluded that “precedents and the general reasonableness mandate of the Fourth Amendment require the supervision of a magistrate.” *Id.*

136. *See id.* at 938-39 (acknowledging procedure has not been accepted by all circuits); *see also* United States v. Scott-Emuakpor, No. 1:99-CR-138, 2000 WL 288443, at *7 (W.D. Mich. Jan. 25, 2000) (rejecting application of *Tamura* to computer files). The *Scott-Emuakpor* court did not apply *Tamura* because “*Tamura* did not involve computer files and therefore did not consider the specific problems associated with conducting a search for computerized records.” *Id.* Although it rejected the relevance of *Tamura*, the court stated “[t]his is not to suggest that seizure of all computer disks is permissible whenever the warrant authorizes the seizure of computer records.” *Id.*

137. *See* United States v. Sissler, No. 1:90-CR-12, 1991 WL 239000, at *4 (W.D. Mich. Aug. 30, 1991) (applying *Tamura* to seizure of computer hardware and software); *see also* United States v. Abram, 830 F. Supp. 551, 556 (D. Kan. 1993) (relying on *Tamura* to justify off-site review of computer equipment).

138. *See Comprehensive Drug Testing*, 473 F.3d at 939 (recognizing relevance of *Tamura* in computer data). “Although indeed written over two decades ago, the *Tamura* court appreciated the same dual – and sometimes conflicting – interests of minimizing the intrusiveness of searches and containing the breadth of seizures.” *Id.*

139. *Id.* Without the procedure, the government would be permitted to seize intermingled computer data for off-site review and would not be regulated as to the “standards for review and retention thereof.” *Id.* at 938.

140. *Id.* at 940 n.44 (supporting application of precautionary rule). The court reasoned:

A magistrate will allocate to the government whatever property it may legitimately retain under the warrant. Yet if agents rely on their own judgment, they may err on the side of retaining items outside the search warrant or err on the side of returning evidence our precedents would permit them to retain.

Id.

141. *See* Raphael Winick, *Searches and Seizures of Computer and Computer Data*, 8 HARV. J.L. & TECH. 75, 111 (1994) (analogizing data stored on computer to intermingled tangible objects). The *Tamura* rule for intermingled documents is applicable to computer data because officers “still have the ability to look through computer files that there is some reason to believe contain relevant information, and to execute key word searches to examine all files stored in a computer.” *Id.*

of computer data inherently involves intermingled data.¹⁴² However, the *Tamura* procedure has also been criticized in its applications to computer searches and seizures.¹⁴³ The approach has been criticized when it is applied to computer searches because the *Tamura* court only analyzed overbroad seizures.¹⁴⁴

Supporting the government's wholesale seizure of computerized data, the court concluded that the government did not have to limit its search to "key words."¹⁴⁵ Other jurisdictions have also rejected the argument that agents must implement a "search method-

Yet, the doctrine protects an individual's privacy interests in unrelated stored computer information. *See id.*

142. *See id.* at 105 (commenting on high volume and diversity of information that can be stored on computers). "Since it is not possible to physically separate information stored on a computer disk, searches of computers will almost inevitably involve the seizure of irrelevant information along with the relevant information." *Id.*

143. *See Resseguie, supra* note 15, at 209 (noting problems with applying *Tamura* to computer data). Wholesale seizure of computer files and equipment has been criticized:

While there have been a limited number of cases involving computer search and seizure that follow *Tamura*, it appears all too easy for police to show "practical considerations" to justify wholesale seizure and later off-site sorting for relevant information. Taken together, *Sissler* and *Upham* indicate that courts accept the assertion of "practical considerations" all too readily.

Id. For a further discussion of *Sissler*, see *supra* notes 125, 131, and 137 and accompanying text.

144. *See Ziff, supra* note 72, at 858 (discussing why *Tamura* is inapplicable to computer searches). The defendant in *Tamura* only challenged the validity of the seizure, not the warrant or search. *See id.* at 859. Since the court was addressing the lawfulness of the seizure, "the *Tamura* approach is unhelpful in addressing the question that should have been asked by the Tenth Circuit in *Carey*: Did the search warrant authorize the officer to open a given file?" *Id.*

145. *See Comprehensive Drug Testing*, 473 F.3d at 935 (reasoning that government was not restricted to "key words" search). The court concluded that the agents were not required to search the computer files using only "key words" such as baseball players' names. *See id.* Confining the search to "key words" could easily result in the failure to notice relevant documents, particularly since testing results were labeled by identification numbers, not players' names. *See id.*

ology.”¹⁴⁶ Yet, key word searches have been advocated because of their limited intrusion.¹⁴⁷

The Ninth Circuit slightly veered from the rule established in *Tamura* by holding that the procedural safeguard would only be implemented “upon a proper post-seizure motion by the aggrieved parties.”¹⁴⁸ Justice Thomas, in his dissenting opinion, criticized the new rule for its implementation only upon the filing of a motion.¹⁴⁹ The majority’s approach recognizes the need to limit the government’s ability to retain intermingled computer evidence, while appreciating the need for restrictions not to make the process unreasonable.¹⁵⁰

146. See *United States v. Hill*, 322 F. Supp. 2d 1081, 1090 (C.D. Cal. 2004) (holding “search methodology” requirement is unreasonable). The defendant argued that the agents should have limited their child pornography search to files containing the word “sex” and other similar key words. See *id.* The court declined to impose a key word restriction on agents because:

Forcing police to limit their searches to files that they suspect has been labeled in a particular way would be much like saying police may not seize a plastic bag containing a powdery white substance if it is labeled “flour” or “talcum powder.” There is no way to know what is in a file without examining its contents, just as there is no sure way of separating talcum from cocaine except by testing it.

Id. at 1090-91.

147. See Winick, *supra* note 141, at 108 (encouraging key word searches whenever possible). Key word searches should be used to locate files which are within the scope of the warrant. See *id.* Key word searches are an effective tool for protecting privacy. See *id.* at 107.

148. *Comprehensive Drug Testing*, 473 F.3d at 939. But see *United States v. Tamura*, 694 F.2d 591, 595-96 (9th Cir. 1982) (holding evidence should be sealed pending magistrate approval).

149. See *Comprehensive Drug Testing*, 473 F.3d at 974 (Thomas J., concurring in part and dissenting in part) (criticizing majority’s revised *Tamura* procedure). The dissent opposes the view that a motion must be filed before a neutral and detached magistrate will review the seized evidence. See *id.* Without filing a motion, the government could retain computerized data regardless of the warrant’s scope. See *id.*

150. See *id.* at 939-40 (majority opinion) (disputing stringent limits dissent wants to impose on searches and seizures of computerized data). The majority found faults with the dissent’s approach which would restrict the seizure of intermingled computer evidence until the agents returned with a new warrant. See *id.* The court reasoned this process would be more burdensome to both the government and parties being searched. See *id.* The court acknowledged some limitations on the procedure:

This approach does not permit the government to seize computer files “wholesale,” without any effort to limit the documents seized. Nothing we suggest lifts the Fourth Amendment’s bar on “unreasonable searches and seizures.” . . . Case-by-case evaluation remains essential, because our Founding Fathers chose a general prohibition on unreasonable searches; they did not create a rigid rule that could at times prove too permissive and at times too strict.

Id. at 940 n.46.

C. Motion to Quash

The court correctly reversed the decision to quash the subpoenas because subpoenas and search warrants are different, and simultaneously pursuing each of them does not amount to a Fourth Amendment violation.¹⁵¹ Contrary to other cases, pursuing subpoenas and search warrants at the same time does not rise to the level of harassment.¹⁵²

VI. IMPACT: WHO WILL WIN THE WORLD SERIES?

A. Intermingled Computer Data

By holding that intermingled computer seized for off-site review will be subject to magistrate review only upon proper objections, the court weakened the *Tamura* safeguard.¹⁵³ While many courts have ordered intermingled evidence falling outside the scope of the warrant to be suppressed, the Ninth Circuit directed the magistrate to consider whether suppression would “distort the character of the original document.”¹⁵⁴ This new analysis could al-

151. See *In re Grand Jury Subpoenas Dated Dec. 10, 1987 v. United States*, 926 F.2d 847, 854 (9th Cir. 1991) (holding subpoenas are not equivalent to search warrants). The search warrants and subpoenas were upheld despite seeking the same objects. See *id.* at 854-55. It was irrelevant that the search warrants and subpoenas were served on the same day. See *id.* at 854. The subpoenas were not due on the date that the search warrants were executed. See *id.*

152. See *United States v. American Honda Motor Co.*, 273 F. Supp. 810, 819-20 (N.D. Ill. 1967) (finding simultaneous subpoenas resulted in “precisely the sort of harassment which fundamental fairness and the due process clause prohibit.”). The first subpoenas issued in Los Angeles resulted in the production of over 6,000 pages of documents dealing with transactions in San Francisco, Chicago and Columbus. See *id.* at 819. After the indictment was returned in Los Angeles, subpoenas were issued in San Francisco seeking the production of the same San Francisco documents which had already been produced via the Los Angeles subpoenas. See *id.* Subsequent subpoenas followed for Columbus and Chicago. See *id.*

153. See *Comprehensive Drug Testing*, 473 F.3d at 940 (requiring magistrate review upon “proper objections”). But see *id.* at 974 (Thomas, J., concurring in part and dissenting in part) (criticizing majority’s remedy). Under the majority’s holding, the government can search the seized evidence *before* the magistrate approves the search. See *id.* The dissent condemned the majority’s revision of the *Tamura* procedure: “[t]he protections of requiring a ‘neutral and detached magistrate’ to make ‘informed and deliberate determinations’ concerning probable cause are lost when the magistrate’s review comes after the material has been seized and searched.” *Id.*

154. *Id.* at 940 n.45 (majority opinion). In deciding retention of evidence, the court advised the magistrate to consider: (1) whether unrelated evidence can be separated from lawful evidence “by copying or moving files, but without creating new documents”; (2) whether the seized file would be the equivalent of a “typical paper ledger” if printed; and (3) “whether exclusion of the unrelated portions of the document would distort the character of the original document.” *Id.* For further discussion of suppression of evidence outside the scope of the warrant, see *supra* notes 61-64 and accompanying text.

low the government to circumvent the probable cause requirement.¹⁵⁵

In *Comprehensive Drug Testing*, the government had probable cause to believe ten MLB players received illegal steroids from BALCO, allowing them to obtain a search warrant for drug testing information related to the specified players.¹⁵⁶ However, during the warrant execution, the government seized the Tracey Directory and used information from it to apply for new search warrants.¹⁵⁷ The new warrants were used to seize drug testing information on over one hundred players who had tested positive for steroids but who the government lacked probable cause to believe were related to the BALCO investigation.¹⁵⁸

Oddly enough, the majority's holding will affect the innocent citizen more adversely than individuals suspected of committing a crime.¹⁵⁹ The key factor is notice: how will innocent citizens know if their confidential medical records were seized by the government in order to allow them to file a post-seizure motion?¹⁶⁰ Data was

155. *See id.* at 975 (Thomas, J., concurring in part and dissenting in part) (criticizing majority's recommendation that government be allowed to retain intermingled evidence so as not to change character of original document). The dissent disagreed with the majority's theory that the government should be allowed to retain "whole databases of confidential electronic information on the theory that some data relevant to the warrant is 'co-mingled.'" *Id.* The dissent criticized the majority's opinion:

The logic is circulate and the result is completely predictable. The government is entitled to seize property without a warrant only if it is "co-mingled" and can not be segregated. Then, if a party objects to the seizure, the data must be presented to a magistrate judge who must release it back to the government intact if the magistrate judge determines that the irrelevant data is "co-mingled" and cannot be segregated. The exercise is purely illusory and can only lead to an intellectual cul-de-sac. The Fourth Amendment's probable cause requirement is neatly and entirely eliminated.

Id. at 976.

156. *See id.* at 919-20 (majority opinion) (establishing basis for original warrant).

157. *See id.* at 923-24 (discussing how Tracey Directory was utilized).

158. *See Comprehensive Drug Testing*, 473 F.3d at 923-24 (noting use of Tracey Directory for new, broader search warrants). *But see id.* at 946-47 (Thomas, J., concurring in part and dissenting in part) (discussing large number of files on Tracey Directory unrelated to MLB). The Tracey Directory contained 2,911 files which were not relevant to MLB. *See id.* at 947. Also in the search warrant application, the government "conceded that there was no specific evidence linking these players to BALCO." *Id.* at 949.

159. *See id.* at 974-75 (Thomas, J., concurring in part and dissenting in part) (describing affect of majority's holding).

160. *See id.* (reasoning innocent party would have not have notice of illegal seizures). The dissent reasoned:

The search warrant is not directed to the innocent party; it is served on the data repository. In the case at bar, the parties knew of the seizure of

seized relating to thirteen other major sports organizations, three unaffiliated business entities and three sports competitions; yet because none of the parties had notice of the government's seizure, no objections were filed.¹⁶¹ Even if innocent parties have notice of the seizure, they bear the burden of showing the government illegally seized their property.¹⁶² The majority rule could impact any individual whose medical records are stored in a master file along with those of a person whose information is subject to a search warrant.¹⁶³

B. Players' Expectations of Privacy

The baseball players subjected to random drug testing had a reasonable expectation that the results would not be disclosed.¹⁶⁴ The players' expectations of privacy were amplified by the collective bargaining agreement between the Players' Association and MLB.¹⁶⁵ The court's ruling that agents can use the positive test re-

data pursuant to the search warrant because they were litigating (or at least thought they were litigating) the production of material pursuant to a grand jury subpoena. However, at least until this opinion has been issued, no one in the National Hockey League knew that the government had seized medical records pertaining to its players without a warrant. Indeed, in the normal case, when a search warrant is directed to a third party, the innocent citizen whose privacy interests are at stake will have no notice whatsoever that his privacy interests have been compromised.

Id. at 974.

161. *See id.* at 976 (commenting on vast amounts of data which will not be subject to review by neutral magistrates because no objections were filed). Since no objections were filed on behalf of the organizations, the government will be allowed to retain the evidence under the majority's holding. *See id.*

162. *See id.* at 975 (concluding innocent aggrieved party bears burden of proof under majority's rule). The dissent criticized the affect of the majority's holding because it requires the innocent aggrieved party "to hire an attorney and make a 'proper post-seizure motion' to require the government to do what the Fourth Amendment required it to do in the first instance." *Id.*

163. *See Comprehensive Drug Testing*, 473 F.3d at 963-64 (Thomas, J., concurring in part and dissenting in part) (noting broad implications of intermingled document holding). The dissent argued:

Such a rule would entitle government to seize the medical records of anyone who had the misfortune of visiting a hospital or belonging to a health care provider that kept patient records in any sort of master file which also contained the data of a person whose information was subject to a search warrant.

Id. at 963-64.

164. *See id.* at 969-70 (noting legitimate expectation of privacy in test results); *see also* Quinn & Thompson, *supra* note 17 (reporting affects of court's ruling). Players were advised that the testing would be anonymous, the results would remain private, and laboratories would destroy the samples. *See id.*

165. *See Comprehensive Drug Testing*, 473 F.3d at 972 (Thomas, J., concurring in part and dissenting in part) (highlighting pertinent provisions of collective bargaining agreement). The collective bargaining agreement emphasized the impor-

sults for 104 players, could result in their names being leaked and the players being forced to testify before a grand jury.¹⁶⁶ The positive test results were used to indict Barry Bonds on charges of perjury and obstruction of justice on November 15, 2007.¹⁶⁷ The broad implications this ruling could have on MLB have led to speculation that the Players' Association may be less likely to submit to voluntary drug testing in the future.¹⁶⁸

C. Conclusion: Players' Association May Have Lost Game One, but Wants Re-Match

The Supreme Court has consistently held that warrants are required to describe with particularity the places to be searched and the items to be seized.¹⁶⁹ Courts have addressed the issue of intermingled documents and have held that wholesale seizure is not unconstitutional if the seized evidence is reviewed by a neutral magistrate.¹⁷⁰ Computer data, which by its nature is intermingled, has forced courts to reexamine the proper procedure for seizing

tance of confidentiality. *See id.* The agreement also contained the following provision: “[a]t the conclusion of any Survey Test, and after the results of all tests have been calculated, all test results, including any identifying characteristics, will be destroyed in a process jointly supervised by the Office of the Commissioner and the Association.” *Id.*

166. *See* Dan Connolly, *Steroid Test Data Freed Ruling Allows Use of Failed Results*, BALT. SUN, Dec. 28, 2006, at 1D (reporting possible affect on players); *see also* Mike Fish, *Bonds' Attorney Downplays Significance of Court Ruling*, ESPN.COM, Dec. 27, 2006, <http://sports.espn.go.com/mlb/news/story?id=2709916> (last visited Nov. 12, 2007) (describing possible leak of players' names). The court ruled the names of the players with positive steroid test results would remain sealed, yet the names of the athletes involved in the BALCO scandal were ultimately leaked. *See id.*

167. *See* Wilson & Schmidt, *supra* note 8, at A1 (reporting recent indictment of Bonds). Bonds was indicted on four counts of perjury and one count of obstruction of justice “for testifying before a grand jury in 2003 that he never used anabolic steroids or human growth hormone.” *Id.* The indictment states that the government “can prove that a positive blood test result seized in connection with an investigation of Bay Area Laboratory Co-Operative belonged to Mr. Bonds.” *Id.* Bonds is scheduled to appear in court on December 7, 2007. *See id.* For a further discussion of Barry Bonds' involvement with steroids and charges of perjury, see *supra* notes 8 and 27 and accompanying text.

168. *See* Connolly, *supra* note 166 at 1D (concluding possibility of results being leaked may deter players from participating in voluntary drug testing). Without players' cooperation in voluntary drug testing, sports leagues' “future attempt to crack down on illicit drug use” will be severely hindered. *Id.*

169. *See* *Marron v. United States*, 275 U.S. 192, 196 (1927) (requiring specificity of warrants). For a further discussion on the Fourth Amendment's warrant requirement, see *supra* notes 56-60 and accompanying text.

170. *See* *United States v. Tamura*, 694 F.2d 591, 595-96 (recognizing intrusiveness nature of wholesale seizures requires magistrate review to be lawful). For a further discussion of intermingled data, see *supra* notes 65-69 and accompanying text.

intermingled computer data.¹⁷¹ Nevertheless, the Ninth Circuit chose not to require a magistrate to review intermingled computer data until after the aggrieved party has filed a motion.¹⁷²

The Players' Association asserted that the seizure of test results and specimens "violated the players' Fourth Amendment rights, their right to privacy, and their right not to be victims of illegal search and seizure."¹⁷³ The Players' Association argued it was unconstitutional to seize data on 1,200 baseball players and approximately 3,000 files unrelated to the issue of MLB drug testing, when the warrant only authorized the seizure of records on ten particular MLB players with suspected ties to steroids and BALCO.¹⁷⁴ While this case is aimed at steroid use, the holding will affect every individual's right to privacy, particularly with respect to private computer records.¹⁷⁵

The dissent criticized the majority's holding, arguing that the emphasis is on steroid use in baseball and not on an individual's Fourth Amendment constitutional rights.¹⁷⁶ The Players' Association has recently appealed the Ninth Circuit's 2-1 ruling.¹⁷⁷

*Elizabeth Rocco**

171. See Winick, *supra* note 141, at 111 (applying *Tamura* rule to computer context). For a further discussion of searches and seizures of computer data, see *supra* notes 72-75, 141-47 and accompanying text.

172. See *Comprehensive Drug Testing*, 473 F.3d at 939 (stating when magistrate review is required). For further discussion of the Ninth Circuit's application of *Tamura*, see *supra* notes 135-48 and accompanying text.

173. Murray Chass, *Steroids Ruling Erases Players' Victories*, N.Y. TIMES, Dec. 28, 2006, at D6.

174. See Sullum, *supra* note 17 (discussing illegality of search).

175. See *Comprehensive Drug Testing*, 473 F.3d at 963 (Thomas, J., concurring in part and dissenting in part) (arguing "Americans' most basic privacy interests [are] in jeopardy" because of majority's conclusion). For further discussion of the broad implications of this holding, see *supra* notes 153-63 and accompanying text.

176. See *Comprehensive Drug Testing*, 473 F.3d at 979 (Thomas, J., concurring in part and dissenting in part) (discussing role of steroids in ruling). The dissent emphasized: "[i]n discussions of the alleged use of steroids by baseball players, much is made about the 'integrity of the game.' Even more important is the integrity of our legal system." See *id.*; see also Connolly, *supra* note 166, at 1D (focusing on "politics involved with steroids and sports"). Mike Straubel, director of Valparaiso University School of Law Sports Law Clinic was quoted as saying "[f]or a while, a lot of people turned their backs on it because sports were benefiting from it. Now, the pendulum has swung the other way where we're going after anyone and everything." *Id.*

177. See Quinn & Thompson, *supra* note 17 (reporting filing of appeal). On February 12, 2007, the Players' Association filed an appeal to the 2-1 ruling and would like all fifteen circuit judges to review the case. See *id.*

* J.D. Candidate, Villanova University School of Law, 2008; B.A., Boston College, 2000.