

Ninth Circuit Requires Search Protocols for Electronic Evidence

FOR PRACTITIONERS, THE seizure of electronic information is perhaps the most nerve-racking type of search undertaken by the government. The likelihood of “overseizure” is almost unavoidable when the government, after having convinced a magistrate that there is probable cause that a certain offense has been committed, seizes one or more computers along with their hard drives and other stored data. Once in the government’s possession, it is possible that, during its review, federal officials will search for and discover evidence of other offenses for which there was no probable cause prior to its review.

Even though taint teams, special masters, and the latest forensic search tools have been used to limit overly expansive government searches, the Ninth Circuit recently attempted to take the issue of overseizure head-on in *United States v. Comprehensive Drug Testing Inc.*, 579 F.3d 989 (9th Cir. 2009), by directing magistrates to require adherence to certain search protocols when the government seeks a warrant to seize electronic data. In this case, federal agents conducted a search of Comprehensive Drug Testing Inc. (CDT), an independent company tasked with administering a drug testing program implemented as part of a collective bargaining agreement between the Major League Baseball Players Association (MLBPA) and Major League Baseball (MLB). The agreement provided for drug testing of all MLB players even when there was no suspicion that they were using illegal drugs. The search of CDT’s offices was prompted by an investigation of the Bay Area Lab Cooperative (BALCO), which the government suspected of providing steroids to MLB players. Although the warrant was limited to the records of 10 players, the government seized and promptly reviewed the drug testing records for hundreds of MLB players as well as individuals that were not related to MLB.

There is little doubt that the government, which had previously sought—but could not obtain—a broader warrant for *all* “drug testing records and specimens,” deliberately searched for evidence relating to more than

just the 10 players enumerated in the search warrant. The district courts’ opinions regarding the MLBPA’s motions for return of property are interesting, but it is the Ninth Circuit’s opinion that provides helpful guidance for practitioners.

Following rehearing en banc in a decision by Chief Judge Kozinski, the Ninth Circuit not only agreed with the district court’s finding that the government went too far but also noted that “law enforcement [seeking] broad authorization to examine electronic records ... creates a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant.” Moreover, because the government undoubtedly will review a substantial amount of data in search of the evidence sought by the warrant, the government may claim, as it did in *United States v. Comprehensive Drug Testing Inc.*, that its contents are in “plain view” and, if they are incriminating, the government will assert that it can keep it. Accepting the reality of the need for broad authorization, yet eschewing the convenience of the plain view doctrine to abrogate a narrowly tailored warrant, the Ninth Circuit called for “greater vigilance on the part of judicial officers” and set forth criteria for magistrates to follow to prevent the overseizure of evidence:

- Magistrates should insist that the government waive reliance on the plain view doctrine in cases involving digital evidence.
- Segregation and redaction *must* be either done by specialized personnel or by an independent third party; if the review is done by government personnel, they must agree not to disclose to investigators any information other than that which is the target of the warrant.
- Warrants and subpoenas *must* disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial forums.
- The government’s search protocol *must* be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.
- The government *must* destroy nonresponsive data or, if the recipient may lawfully possess the data, return it and keep the magistrate who issued the warrant informed about when the government has done so and what it has kept.

It is obvious that these criteria eviscerate Fourth Amendment jurisprudence approving the plain view doctrine—a fact that was not lost on the dissenting judges in the case. The life of such criteria as precedent, therefore, may be limited.

More important to the practitioner, however, is that the *Comprehensive Drug Testing* ruling provides a road map for examining potential judicial or government missteps. For example, was the government's search protocol adequately designed to uncover only information sought by the warrant? Surely, computer experts can disagree about the adequacy of the protocols. Was a narrowly tailored warrant merely a pretext for seizing computer data and searching for evidence for which there was no probable cause? In other words, assuming that the government seeks to use evidence outside the scope of the warrant, the *Comprehensive Drug Testing* decision invites us to ask what the government knew when it obtained the warrant and when did it learn it. Was the review procedure structured such that officials involved in the case were directing the review or were privy to the results? The Ninth Circuit's ruling opens the door for requests regarding the details of the government's review. Was the government candid with the magistrate regarding prior attempts to seize information and the need for a warrant rather than a subpoena for the sought-after evidence? Given the risks for overseizure found by the Ninth Circuit, the court's decision provides even greater reason for magistrates to insist on subpoenas rather than warrants for obtaining electronic data.

Several district courts have noted the “deliberate overreaching by the government” in the CDT case as a basis to conclude, in essence, that bad facts make bad law and, therefore, have sought to distinguish *Comprehensive Drug Testing* from subsequent cases. Most recently, a district court noted that the Ninth Circuit's ruling in the case does not explicitly state that the court's enumerated procedures are required by the Fourth Amendment. *United States v. King*, 2010 WL 727981 *25 (D. Haw. Feb. 24, 2010). Other courts have noted that *Comprehensive Drug Testing* is not an open invitation to voice broad criticism about a government search but have indicated that the defendant must specifically identify how the government erred and how that has violated the Fourth Amendment.

Notwithstanding these decisions, *Comprehensive Drug Testing* is instructive for the practitioner's analysis of the fruits of an electronic search. The decision serves as a checklist of potential pitfalls for the government agent. Certainly, even though the government may share with practitioners that its evidence was seized in connection with a search, unless pressed, the government's disclosures will go no further. *Comprehensive Drug Testing* counsels and equips practitioners to probe further. **TFL**

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LABOR *continued from page 17*

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Endnotes

¹29 CFR § 541.600.

²*Id.*

³29 CFR § 541.601.

⁴*Id.*

⁵29 CFR § 541.602.

⁶*Id.*; see also “Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues,” U.S. Department of Labor, July 2009.

⁷*Id.*

⁸29 CFR § 541.603.

⁹*Id.*

¹⁰29 CFR § 541.602(b).

¹¹29 CFR § 541.500.

¹²29 CFR § 541.304.

¹³*Id.*

¹⁴29 CFR § 541.303.

¹⁵29 CFR § 541.400.

¹⁶29 CFR § 541.700.

¹⁷*Id.*

¹⁸*Id.*

¹⁹29 CFR § 541.100.

²⁰29 CFR § 541.102.

²¹29 CFR §§ 541.100, 541.104.

²²*Id.*

²³29 CFR § 541.200.

²⁴29 CFR § 541.201.

²⁵29 CFR § 541.200.

²⁶29 CFR § 541.202.

²⁷29 CFR § 541.300.

²⁸29 CFR § 541.301.

²⁹*Id.*

³⁰*Id.*

³¹29 CFR § 541.302.

³²*Id.*

³³*Id.*