FINANCIAL FRAUD LAW REPORT

VOLUME 2 NUMBER 10 NOVEMBER/DECEMBER 2010

The FINANCIAL FRAUD LAW REPORT is published 10 times per year by A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207,
POSTMASTER: Send address changes to the Financial Fraud Law Report, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207. *ISSN 1936-5586*

Ninth Circuit *En Banc* Panel Raises Bar for Governmental Seizure of Electronic Data

BRIAN C. ROCCA

In a recent decision, the Ninth Circuit Court of Appeals considered the power of the federal government to seize commingled electronic data pursuant to a court-issued search warrant. The opinion, which the author discusses in this article, could have far-reaching impact on federal law enforcement officers and the subjects of their criminal investigations.

As the prevalence and volume of electronic data continues to increase, the American court system has struggled to keep up. The challenges and skyrocketing cost of electronic discovery in civil litigation has been well documented, and the courts, with mixed results, have fashioned discovery rules to balance the need for information with the burden of producing it. In the criminal context, where liberty interests are at stake, there is a clear tension between law enforcement's need to search for electronic evidence of criminal activity and the privacy rights of search warrant subjects and third parties. In *United States v. Comprehensive Drug Testing, Inc.*,[1] the Ninth Circuit Court of Appeals, sitting *en banc*, addressed this tension head-on and considered the power of the federal government to seize commingled electronic data pursuant to a court-issued search warrant. The opinion, which amends and supersedes the court's initial *en banc* opinion, could have far-reaching impact on federal law enforcement officers and the subjects of their criminal investigations.

Brian C. Rocca, counsel in the Antitrust and Trade Regulation group in the San Francisco office of Bingham McCutchen LLP, can be reached at brian.rocca@bingham.com.

Published in the November/December 2010 issue of *The Financial Fraud Law Report*.

BACKGROUND

Comprehensive Drug Testing concerns a United States Department of Justice ("DOJ") investigation into steroid use by Major League Baseball ("MLB") players. The investigation focused on Bay Area Lab Cooperative ("BALCO"), which the government suspected of providing steroids to players. The MLB Players Association agreed to confidential steroid testing during the 2003 season. Comprehensive Drug Testing, Inc. ("CDT"), an independent business, administered the testing program and maintained the results. The government obtained a search warrant from the District Court for the Central District of California, which authorized the seizure of testing records from CDT's Long Beach facilities, for 10 players suspected of steroid use. While executing the warrant, the government obtained (and eventually reviewed) commingled electronic data which included testing records for hundreds of other players and third parties — far beyond the 10 players identified on the warrant. The government later obtained additional warrants for other records at CDT and at Quest Diagnostics, Inc., the laboratory in Las Vegas which performed the tests.

CDT and the Players Association moved the court for return of the seized data. The Central District of California granted the request, concluding the government had failed to comply with procedures specified in the warrant (the "Cooper Order"). When the same parties made a similar request in the District of Nevada, the court, on similar grounds, ordered the government to return all seized data that did not relate to the 10 identified players (the "Mahan Order").

The government appealed both orders. A divided Ninth Circuit panel reversed the Mahan Order in favor of the government and dismissed the appeal from the Cooper Order as untimely. The Ninth Circuit took the appeal *en banc* and, in August 2009, contrary to the earlier panel, affirmed the Mahan Order in favor of CDT and the Players Association. The *en banc* panel established certain procedures the government must be follow when obtaining and executing a search warrant for electronically stored information. The government then sought reconsideration of this opinion, claiming that the new search procedures mandated by the *en banc* panel "are causing grave harm to effective law enforcement."[2] The Ninth Cir-

cuit reconsidered its initial *en banc* opinion and issued a new opinion on September 13, 2010.

SEARCH WARRANTS IN THE ELECTRONIC AGE

The Cooper Order

The new *en banc* opinion affirms the dismissal of the government's appeal of the Cooper Order as untimely. This holding has "substantial consequences" on the other (timely) aspects of the government's appeal because adverse factual and legal determinations in the Cooper Order are deemed final. Judge Cooper found that:

(1) The government failed to comply with conditions of the warrant designed to segregate information as to which the government had probable cause from the other information that was swept up in the search solely because the government could not segregate it when executing the warrant;

(2) The government exhibited "callous disregard" for the rights of the third party players for whom the government did not have probable cause to seize test results; and

(3) The government failed to comply with *United States v. Tamura*,[3] a seminal Ninth Circuit case outlining procedural safeguards in the context of warrants for paper records.

The first two factual determinations above paint an unflattering picture of the government's conduct in the case and clearly influenced the *en banc* panel's ultimate decision. But the third legal determination — the court's discussion of *Tamura* — is the most important aspect of the opinion because it could have lasting impact on law enforcement activities in the Ninth Circuit. *Tamura* was decided in 1982 before "the dawn of the information age." The Ninth Circuit disapproved of the wholesale seizure of paper documents and the government's failure to return materials which were not the subject of the search. *Tamura* suggested that where documents are "so intermingled that they cannot feasibly be sorted on site,

…the Government [should] seal[ ] and hold[ ] the documents pending approval by a magistrate of a further search." If law enforcement is aware of the need for large-scale removal of paper material, it should specifically apply for this authorization before the search, and it should only be granted where on-site sorting is infeasible and there are no other practical alternatives. The court reaffirmed the *Tamura* principles, extending them from paper records to electronic information.

Mahan Order

Comprehensive Drug Testing recognizes the tension between law enforcement's need to seize electronic information and the privacy rights of search warrant subjects and third parties. While certain circumstances may justify broad authorization to examine commingled electronic information, the Ninth Circuit expressed concern "that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant."

The plain view exception to search warrants complicates the matter. It is well-settled that law enforcement officials may seize evidence they observe and immediately recognize as contraband while executing a lawful search. In the electronic context, the government by necessity must often examine commingled data repositories to find the particular files it has probable cause to retrieve. For example, while reviewing the larger directory of data, the government in *Comprehensive Drug Testing* argued the incriminating data was in plain view, and thus was subject to lawful seizure even if not specifically called for in the warrant. The Ninth Circuit rejected this argument because government "intrusions into large private databases [] have the potential to expose exceedingly sensitive information about countless individuals not implicated in any criminal activity, who might not even know that the information about them has been seized and thus can do nothing to protect their privacy."[4]

For these reasons, the court adopted Tamura's "workable framework" and updated it "to apply to the daunting realities of electronic searches." Although over-seizing is an inherent part of electronic searching, the privacy interest of innocent third parties and the risk of unreasonable seizures require "greater vigilance" on the part of judges to establish protocols to

ensure the segregation of data that is properly subject to a search warrant from data which the government has no probable cause to collect.

The court also affirmed the Mahan Order on an alternative basis which could impact future cases. The government did not follow procedures outlined in the search warrant designed to limit the scope of the search. The court concluded that in such circumstances the government should be ordered to return seized data obtained by "circumventing or willfully disregarding limitations in a search warrant" as opposed to a "technical or good faith mistake." The reason is straightforward — the government "must not be allowed to benefit from its own wrongdoing by retaining the wrongfully obtained evidence or any fruits thereof."

New Government Disclosure Requirements

The court adopted a new rule requiring law enforcement officials, when seeking a search warrant, to "fully disclose" to each judicial officer prior efforts in other judicial fora to obtain the same or related information. In so holding, the court emphasized that the government is still "free to pursue warrants, subpoenas and other investigatory tools" in appropriate courts depending on the location of the information sought. However, according to the court, the "cause of justice" will be furthered if magistrates are provided sufficient information to avoid the appearance of manipulation by government efforts to move "from district to district and judicial officer to judicial officer in pursuit of the same information, and without fully disclosing its efforts elsewhere."

THE KOZINSKI CONCURRENCE

Concurring in the result, Chief Judge Kozinski, and four other judges, offer specific guidance for magistrates, government investigators, and the subjects of search warrants:

- Magistrates should insist that the government, prior to execution of the warrant, waive reliance on the plain view doctrine when searching through digital evidence.

- Warrants and subpoenas must disclose the *actual* risks of destruction of electronic data and any prior efforts to seize it in other fora.
- The government must design its search protocol to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.
- Segregation and redaction of data should be done by specialized personnel or an independent authority, and these personnel must not disclose to investigators working on the matter any information which is not the specified target of the warrant.
- The government must return non-responsive data if the recipient may lawfully possess it. If not, the government must destroy the non-responsive data. The government must also keep the issuing magistrate informed about the status of the data.

THE CALLAHAN DISSENT

Three judges drafted separate opinions dissenting, at least in part, from the majority's *per curiam* opinion. One dissent in particular, by Judge Callahan, a former district attorney, ardently criticized the "troubling" guidelines recommended in Judge Kozinski's concurring opinion, urging that the "suggestions" by Judge Kozinski should not be confused with the legally binding *per curiam* opinion. According to Judge Callahan, the guidelines are "unreasonably restrictive of how law enforcement personnel carry out their work, and unsupported by citations to legal authority." Indeed, Judge Callahan suggests the guidelines run counter to prior Ninth Circuit decisions related to computer searches.[5] Judge Callahan also suggested that the guidelines conflict with amendments to Federal Rule of Criminal Procedure 41(f)(1)(B), which governs the execution of a search warrant. For example, Judge Callahan noted that Rule 41(f)(1)(B) now states that in cases where an officer is seizing electronic data, "[t]he officer may retain a copy of the electronically stored information that was seized or copied." Judge Callahan finds this contrary to Judge Kozinski's recommendation that "[t]he government should not retain copies of such returned data."

Judge Callahan also rejects the notion — implicitly adopted by the majority and expressly adopted by Judge Kozinski — that the plain view doctrine should not apply equally in digital evidence cases. She states:

> Instead of tailoring its analysis of the plain view doctrine to the facts of this case, the concurring opinion takes the bold, and unnecessary step of casting that doctrine aside. The more prudent course would be to allow the contours of the plain view doctrine to develop incrementally through the normal course of fact-based case adjudication. A measured approach based on the facts of a particular case is especially warranted in the case of computer-related technology, which is constantly and quickly evolving.

Judge Callahan raises various other criticisms of the *per curiam* opinion, including, among others, the majority's conclusion that the untimely appealed Cooper Order is entitled to preclusive effect and that the government's conduct was sufficiently egregious so as to require the return of the property without retaining copies for its investigatory purposes.

CONCLUDING THOUGHTS

Comprehensive Drug Testing underscores that complicated and costly electronic discovery that plagues civil litigation can have a similar effect on criminal investigations. The case followed a long and winding path through the court system, including several district court orders, three rounds of opinions by the Ninth Circuit, and various concurring or dissenting opinions along the way, which underscores the complexity and importance of the issues involved. Companies operating in industries under the investigatory microscope, particularly in the financial sector or those involved in the recent wave of price-fixing investigations, should keep apprised of this important line of cases. Search warrant subjects in the Ninth Circuit and interested third parties, such as the "innocent" players implicated in the overbroad search for testing results, should insist that the *Tamura* — and, now, *Comprehensive Drug Testing* — procedures and safeguards are followed. Fourth Amendment rights, the confidentiality of

electronic information, and the privacy rights of third parties are all at risk whenever the government attempts to seize commingled electronic data. On the government side, law enforcement officers should remain on the cutting edge of search technology, accurately disclose search procedures and risks to third parties when obtaining a warrant, and consider establishing procedures consistent with the Kozinski Concurrence where appropriate (even if not mandated by controlling court precedent).

NOTES

[1] --- F.3d ----, 2010 WL 3529247, Appeal Nos. 05-10067, 05-15006, 05-55354 (9th Cir. Sept. 13, 2010)

[2] *See* Brief For The United States in Support of Rehearing *En Banc* By The Full Court (Appeal No. 05-55354, Docket Entry 110-1) at 14.

[3] 694 F.2d 591 (9th Cir. 1982).

[4] The court noted with approval Judge Thomas' dissent from the original panel decision, in which he called the government's position a "breathtaking expansion of the 'plain view' doctrine, which clearly has no application to intermingled private electronic data."

[5] *See United Sates v. Giberson*, 527 F.3d 882, 887-88 (9th Cir. 2008) (declining to impose heightened Fourth Amendment protections in computer search cases as a result of a computer's ability to store large amounts of potentially commingled information).