White Collar Bulletin

BALCO Search Warrant Case: Relief for Major League Baseball Players May Just be the Beginning of Problems for Prosecutors

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The United States Court of Appeals for the Ninth Circuit recently issued an *en banc* opinion in *United States v. Comprehensive Drug Testing, Inc.*, No. 05-10067 (9th Cir., August 26, 2009), affirming a series of lower court rulings granting motions for the return of seized property. The motions, which were filed by Comprehensive Drug Testing, Inc., a testing lab, and the Major League Baseball Players Association, attacked search warrants that were issued as part of the government's high-profile investigation into alleged steroid use by professional athletes.

In an opinion, written by Chief Judge Alex Kozinski, the Court found that the federal agents investigating ten Major League Baseball players exceeded the scope of the search warrants when they seized, and in turn, examined drug test results for hundreds of other people. As a result, the Court ordered the return of the seized property and suppression of the evidence. While the decision is a victory for athletes whose drug tests were improperly seized, the far more important aspect of the opinion is the Court's guidance to magistrate judges who may be called on to evaluate and authorize search warrants applications for the seizure of computer records in the future.

In light of the opinion, federal prosecutors will face substantial new hurdles in both obtaining and administering search warrants for computer records. The Court held that "[w]hen the government wishes to obtain a warrant to examine a computer hard drive or electronic storage medium in searching for certain incriminating files, or when a search for evidence could result in the seizure of a computer, magistrate judges must be vigilant in observing the guidance we have set out throughout our opinion. . . ."

The Court's guidance, which amounts to a new set of rules governing electronic search warrants, requires the government to: (1) waive any possible reliance upon the plain view doctrine in digital evidence cases; (2) have all segregation and redaction done by specialized personnel or an independent third party, who will not disclose to the case agents any information other than that relating to the target of the warrant; (3) ensure that warrants and subpoenas disclose the actual as opposed to speculative risks of destruction of targeted information; (4) employ a search protocol designed to uncover only the information for which there is probable cause, and ensuring that only that information is examined by the case agents; and (5) destroy or, where appropriate, return non-responsive data, keeping the magistrate judge informed about the status of this process and about information that it has kept.

While the application of the ruling is limited to federal search warrants issued in the states that make up the Ninth Circuit,[1] the Court's decision will give rise to increased litigation in cases across the country that involve search warrants for computerized records. It is also likely to force the U.S. Department of Justice to reevaluate its policies for the search and seizure of computer evidence.

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[1] Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington