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*This summary constitutes no part of the opinion of the court.
It has been prepared by court staff for the convenience of the reader.*

United States v. Comprehensive Drug Testing, Inc., 05-10067
Major League Baseball Players Association v. United States, 05-15006
In re: Search Warrants Executed on April 8, 2004 at CDT, Inc., 05-55354

Decision Date: August 26, 2009

En Banc Majority Opinion: Kozinski (author), joined by Kleinfeld, Graber, Wardlaw, W. Fletcher, Paez, Berzon, Bea, M. Smith

Concurring in Part & Dissenting in Part: Bea

Concurring in Part & Dissenting in Part: Callahan, joined by Ikuta

Dissenting: Ikuta, joined by Callahan

The en banc court issued an opinion in three appeals arising out of a federal investigation into steroid use by professional baseball players.

The en banc court dismissed as untimely the government's appeal, 05-55354, from District Judge Cooper's order (1) finding that the government failed to comply with the procedures specified in a warrant to search the facilities of Comprehensive Drug Testing, Inc. ("CDT") for the records of ten players who had tested positive for steroids and (2) ordering the property seized there returned.

The en banc court in 05-15006 upheld District Judge Mahan's determination that the government callously disregarded the affected players' constitutional rights and unreasonably refused to follow the procedures set forth in *United States v. Tamura*, 649 F.2d 591 (9th Cir. 1982), upon learning that drug-testing records for

the ten athletes named in the original warrants executed at the Nevada facilities of Quest Diagnostics, Inc. and at CDT were intermingled in a computer directory with records for other athletes not named in the warrants. The en banc court then affirmed Judge Mahan's Order pursuant to Fed. R. Crim. P. 41(g) that the government return the property it had seized, with the exception of materials pertaining to the ten identified players.

In light of Judge Mahan's well-reasoned order, the en banc court in 05-10067 affirmed Judge Illston's quashal of the government's final subpoena of the same materials.

The en banc court took the opportunity to guide the district and magistrate judges in the proper administration of search warrants and grand jury subpoenas for electronically stored information, so as to strike the proper balance between the government's legitimate interest in law enforcement and the people's right to privacy and property in their papers and effects, as guaranteed by the Fourth Amendment. The en banc court wrote that when 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:

1. Magistrates should insist that the government waive reliance upon the plain view doctrine.
2. Segregation and redaction must be either done by specialized governmental personnel not otherwise involved in the investigation or by an independent third party.
3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.
4. 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 case agents.
5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.

Judge Bea agreed with the affirmance of the district courts' orders, but wrote

separately because he could not concur in the proposed guidelines established by the majority opinion.

Judge Callahan (joined by Judge Ikuta) agreed with the majority that the government's appeal from Judge Cooper's order was untimely, but would reverse Judge Mahan's order on the merits and would vacate and remand Judge Illston's quashal.

Judge Ikuta (joined by Judge Callahan) wrote separately to underline Judge Callahan's concern that the return of property pursuant to Rule 41(g) is not necessarily the appropriate relief in this case.

Next Possible Procedural Steps: The parties may seek rehearing before the limited en banc court or full court rehearing en banc, and they may file a petition for writ of certiorari with the United States Supreme Court.

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