RECENT CASES

FOURTH AMENDMENT — PLAIN VIEW DOCTRINE — EN BANC NINTH CIRCUIT HOLDS THAT THE GOVERNMENT SHOULD WAIVE RELIANCE ON PLAIN VIEW DOCTRINE IN DIGITAL CONTEXTS. — *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009) (en banc).

In August 2002, the federal government launched an investigation of a San Francisco–area laboratory — the Bay Area Lab Cooperative (Balco) — and its alleged distribution of illegal performance-enhancing drugs to professional baseball players.[1] As part of the investigation, federal agents seized electronic data that contained the names of hundreds of Major League Baseball players and athletes from other professional sports.[2] Some of baseball's biggest names — Barry Bonds, David Ortiz, Manny Ramirez, Alex Rodriguez, and Sammy Sosa, to name only a few — were eventually leaked to the press as having tested positive for performance-enhancing drugs.[3] While much of the media frenzy has focused primarily on the players and the "Steroids Era" of baseball, the government's search raises important questions regarding the methods by which law enforcement may obtain digital evidence in investigations. Recently, in *United States v. Comprehensive Drug Testing, Inc.*,[4] the Ninth Circuit held that the government's seizure of electronic data containing hundreds of athletes' names was improper.[5] More importantly, however, the court also held that the government must follow certain procedures in order to prevent the overseizure of information in electronic discovery cases. While the court reached a fair outcome that respected the players' privacy rights in this case, its prospective directives were unnecessarily sweeping.

Major League Baseball (MLB or League) entered into a 2002 collective bargaining agreement with the Major League Baseball Players Association (MLBPA) in 2002 that provided for "suspicionless" drug testing of all players through the collection of urine samples.[6] The players were promised that the results of their drug tests would remain anonymous and confidential.[7] The League contracted with Compre-

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[1] United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1089 (9th Cir. 2008).

[2] *Id.* at 1120 (Thomas, J., concurring in part and dissenting in part).

[3] *See* Michael S. Schmidt, *Stars of Red Sox Title Years Are Linked to Doping*, N.Y. TIMES, July 31, 2009, at A1.

[4] 579 F.3d 989 (9th Cir. 2009) (en banc).

[5] *Id.* at 1006–07.

[6] *Id.* at 993.

[7] *Id.* The League intended to pursue further testing if more than five percent of players tested positive for banned substances. *Id.*

hensive Drug Testing, Inc. (CDT) to administer the program and with Quest Diagnostics, Inc. to perform the tests.[8]

In late 2003, the government served subpoenas on CDT and Quest seeking the test results for eleven MLB players.[9] The MLBPA and CDT moved to quash the subpoenas in the Northern District of California.[10] The government then applied for warrants in the Central District of California and the District of Nevada to search CDT's Long Beach facility and Quest's Las Vegas facility.[11] Those warrants "authorized the seizure of drug testing records and specimens for ten named Balco-connected players," as well as any materials relating to the administration of the drug testing program initiated by the League.[12] The warrants also authorized the search of computer equipment, with some caveats. First, designated "computer personnel" were to determine the most prudent method of obtaining the information sought.[13] If they determined that an onsite search would be impossible or impracticable, then agents were authorized to seize "either a copy of all data or the computer equipment itself."[14] Second, if such an offsite search of all data would be necessary, then the designated computer personnel would have to review the entirety of the data while "retaining the evidence authorized by the warrant and designating the remainder for return."[15]

Almost immediately upon the authorization of the warrants, federal agents executed the search on CDT's facility.[16] During the search, investigators located a computer directory labeled "Tracey," "containing all of the computer files for CDT's sports drug testing programs."[17] Agent Jeff Novitzky — not the designated computer specialist — reviewed the Tracey directory, which contained "the master file of positive drug test results."[18] Using information gleaned from the Tracey directory, the government applied for new warrants to seize records for all of the other players who had tested positive for performance-

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[8] *Id.*

[9] United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1090 (9th Cir. 2008).

[10] *Id.* at 1091.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 1092.

[14] *Id.* This type of large-scale seizure was justified under *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982), a physical evidence case in which the Ninth Circuit held that in cases in which responsive information is so intermingled with other documents that onsite segregation would be infeasible, officers may apply for authorization for large-scale removal of the documents for offsite review, which would be monitored by a magistrate. *Id.* at 595–96.

[15] *Comprehensive Drug Testing*, 513 F.3d at 1092.

[16] *Id.* at 1091–92.

[17] *Id.*

[18] *Id.* at 1092–93.

enhancing drugs.[19] On the following day, the government executed those warrants and issued grand jury subpoenas to obtain the same information.[20]

The MLBPA and CDT moved for return of seized property under Federal Rule of Criminal Procedure (FRCP) 41(g) in both the Central District of California and the District of Nevada.[21] In separate orders, Judge Cooper of the Central District of California and Judge Mahan of the District of Nevada agreed with the MLBPA and CDT that the searches were improper. Judge Cooper found that the government's searches failed to follow procedures required by circuit precedent and mandated the return of material unrelated to the ten named Balco players.[22] Judge Mahan also found that the searches failed to follow circuit precedent and that they "callously disregarded the affected players' constitutional rights."[23] The MLBPA and CDT also moved to quash the latest round of subpoenas pursuant to Rule 17(c) in the Northern District of California.[24] Judge Illston of the Northern District of California described the subpoenas as "constitut[ing] harassment"[25] and as unreasonable insurance: essentially, the government was attempting to obtain legal imprimatur for evidence that had been obtained illegally.[26]

The government appealed all three decisions to the Ninth Circuit.[27] A divided panel upheld the Cooper Order, but reversed the Mahan Order and the Illston Quashal.[28] First, Judge O'Scannlain determined that Judge Cooper did not abuse her authority in denying the government's motion on the basis of the facts presented.[29] Second, the panel

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[19] *Id.* at 1094.

[20] *Id.* at 1094–95.

[21] *Comprehensive Drug Testing*, 579 F.3d at 993–94; *see also* FED. R. CRIM. P. 41(g).

[22] *Comprehensive Drug Testing*, 513 F.3d at 1095.

[23] *Id.* at 1094.

[24] *Comprehensive Drug Testing*, 579 F.3d at 994; *see also* FED. R. CRIM. P. 17(c).

[25] *Comprehensive Drug Testing*, 513 F.3d at 1095.

[26] *See Comprehensive Drug Testing*, 579 F.3d at 1014 (Callahan, J., concurring in part and dissenting in part).

[27] The Ninth Circuit issued a decision in this case in 2006. *See* United States v. Comprehensive Drug Testing, Inc., 473 F.3d 915 (9th Cir. 2006). In 2008, the Ninth Circuit issued a substantially similar opinion, *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, which withdrew and superseded the 2006 opinion.

[28] *Comprehensive Drug Testing*, 513 F.3d at 1116. Judge Thomas concurred in part and dissented in part. He believed that the incriminating nature of players' positive test results in the Tracey directory was not sufficiently immediately apparent to justify seizure. *Id.* at 1147 (Thomas, J., concurring in part and dissenting in part). One reason was that legal over-the-counter nutritional supplements could yield false positives; another reason was that even if illegal steroid ingestion caused the positive test result, such a result was not immediately indicative of illegal *distribution* of steroids — which was the precise crime under investigation by the government. *Id.*

[29] *Id.* at 1102 (majority opinion). This issue was beyond the scope of appellate review. *Id.*

criticized Judge Mahan's finding of "callous disregard" for the players' privacy interests. "Were [the court] to accept [Judge Mahan's] reasoning," Judge O'Scannlain explained, "any seizure of confidential records would reveal callous disregard for privacy rights, even if such a seizure were expressly authorized by a lawful search warrant."[30] Further, the panel applied Ninth Circuit precedent to hold that the government's seizures were proper and that they conformed to the provisions in the warrants;[31] thus, "Judge Mahan misinterpreted" circuit precedent.[32] Third, the panel determined that the government's May 2004 subpoenas were not unreasonable merely because they were contemporaneous with other warrants;[33] Judge Illston had erred by confusing the two distinct purposes of a search warrant based on probable cause and a grand jury subpoena designed to aid in an investigation.[34]

The Ninth Circuit, sitting en banc, reversed.[35] Writing for the court, Chief Judge Kozinski qualified the panel's treatment of the Cooper Order by holding that it had preclusive effect: because the government failed to file a timely appeal, it was "bound by [Judge Cooper's] factual determinations and legal rulings."[36] The court highlighted two primary factual findings: (1) by having a case agent — and not a specialized computer agent — review the seized information, and by failing to return data extraneous to the warrant within sixty days, the government did not comply with the segregation provisions of the warrant; and (2) by seizing information relating to players for whom the government had no probable cause, and "who could suffer dire personal and professional consequences from a disclosure," the government's actions did constitute a callous disregard for the players' privacy interests.[37] In upholding the Mahan Order, Chief Judge Kozinski rejected the government's argument that it had no obligation to return materials pertaining to the non-Balco players under the plain view doctrine, dubbing such a view "a mockery" of circuit precedent.[38] Finally, he upheld the Illston Quashal by explaining that "the presence of substantial government misconduct and unlawful seizure of evidence . . . is quite properly taken into account when determining whether a subpoena is unreasonable."[39]

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[30] *Id.* at 1103.

[31] *See id.* at 1110–13.

[32] *Id.* at 1112.

[33] *See id.* at 1114.

[34] *Id.* at 1114–15.

[35] *Comprehensive Drug Testing*, 579 F.3d at 1007.

[36] *Id.* at 997.

[37] *Id.* at 995.

[38] *Id.* at 998. Further, the court reemphasized that FRCP Rule 41(g) is an appropriate method for returning improperly seized property. *Id.* at 1001.

[39] *Id.* at 1003. Chief Judge Kozinski did not offer any affirmative support for this proposition.

The remainder of the en banc decision highlighted the risks of overreaching searches in digital evidence cases and outlined five prescriptions for future cases: (1) magistrates should require the government to waive reliance on the plain view doctrine; (2) segregation of data must be done by specialists or independent third parties who will not disclose to investigators any information that is beyond the scope of the warrant; (3) warrants and subpoenas must disclose the risk that the information sought may be destroyed, as well as describe prior attempts to obtain the information in other judicial fora; (4) the search protocol chosen by the government 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"; and (5) the government must destroy or return nonresponsive data and must keep the issuing magistrate abreast of which information it has destroyed, returned, or kept.[40]

Judge Bea concurred in part and dissented in part.[41] He agreed with the majority's analysis but took issue with the proposed requirement that the government waive the plain view doctrine altogether. First, Judge Bea interpreted the reach of the plain view doctrine to extend only to the segregated data pertaining to the test results of the ten named Balco players.[42] Because the segregated results would not have yielded any evidence of "immediately apparent" illegality, he argued that the plain view doctrine should not apply.[43] Second, Judge Bea expressed reluctance to adopt a rule where the Supreme Court has not yet drawn a distinction.[44]

Chief Judge Kozinski's opinion succeeded in protecting the privacy rights of the players implicated in the government's search, but it was unnecessarily broad.[45] His prescriptions that "[m]agistrates should insist that the government waive reliance upon the plain view doctrine" and that segregation and redaction be performed by "specialized [com-

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[40] *Id.* at 1006.

[41] *Id.* at 1015 (Bea, J., concurring in part and dissenting in part). Judges Callahan and Ikuta also wrote separate opinions, each joining the other. Judge Callahan agreed that the government's untimely appeal from the Cooper Order should be dismissed but disagreed with the majority's view that the Cooper Order had preclusive effect on the Mahan Order. *Id.* at 1007 (Callahan, J., concurring in part and dissenting in part). Judge Ikuta focused on the notion that "[e]ven if the government had violated the plaintiffs' Fourth Amendment rights," *id.* at 1020 (Ikuta, J., dissenting), precedent dictated that a Rule 41(g) motion could not provide a remedy. *Id.* at 1020–24.

[42] *Id.* at 1016 (Bea, J., concurring in part and dissenting in part).

[43] *Id.* (citing Horton v. California, 496 U.S. 128, 139–40 (1990)).

[44] *Id.* at 1017.

[45] As Chief Judge Kozinski suggested, one key issue in this case was that agents failed to comply with the warrant. *See id.* at 995 (majority opinion). As a prospective matter, however, the more likely subject of future debate and contest is the question of whether or how to apply the plain view doctrine in electronic discovery cases.

puter] personnel or an independent third party" who "will not disclose to the investigators any information other than that which is the target of the warrant"[46] would both have the same effect: law enforcement would not be able to use any evidence of immediately apparent illegality that was outside the scope of a warrant, even if that information were contained in the same electronic document or spreadsheet as responsive material. This proposed ex ante requirement, which was present in the warrant in this case, would guarantee that nonresponsive data *could not* be turned over to case agents. In effect, this requirement would eliminate the plain view doctrine in electronic discovery cases. Such broad prescriptions are both unnecessary to the court's decision and detrimental to what would otherwise be legitimate searches by law enforcement agents.[47]

With respect to traditional physical evidence, "[t]he rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy."[48] The underlying principle is that "the Fourth Amendment does not require law enforcement officers to shield their eyes in order to avoid observing something" from such a lawful position.[49] Understandably, such a conception of the plain view doctrine is difficult to analogize to a search of a nonphysical space, such as a computer hard drive. It is possible that Chief Judge Kozinski feared that all electronic discovery would fall under what Professor Orin Kerr calls a "physical device approach," in which the relevant unit of an electronic search is the entire hard drive of a computer.[50] Under this approach, once an analyst has legally accessed a file on the hard drive, all other files on the hard drive are accessible without additional warrants. Such an approach essentially opens up vast portions of a suspect's life to law enforcement scrutiny. The physical analogue would be that a warrant for a gun would allow police to upend a suspect's entire house and seize absolutely anything that was immediately apparent evidence of a crime.

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[46] *Id.* at 1006.

[47] There remains the question of whether the Ninth Circuit has the power to "require law enforcement officers to waive their constitutional right to rely on a Fourth Amendment exception to obtain[ing] a search warrant." Susan W. Brenner, *Internet Law in the Courts*, J. INTERNET L., Oct. 2009, at 18, 19.

[48] Minnesota v. Dickerson, 508 U.S. 366, 375 (1993); *accord* United States v. Bulacan, 156 F.3d 963, 968 (9th Cir. 1998) ("Once an officer has observed an object in 'plain view,' the owner's privacy interest in that object is lost.").

[49] Thomas K. Clancy, *What Is a "Search" Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 23 (2006) (citing United States v. Dunn, 480 U.S. 294, 304–05 (1987); California v. Ciraolo, 476 U.S. 207, 213 (1986)).

[50] Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 555 (2005). Kerr notes that the physical device approach was adopted by the Fifth Circuit in *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001). Kerr, *supra*, at 555.

The court's opinion reflected this concern: "Why stop at the list of all baseball players when you can seize the entire Tracey Directory? Why . . . not the entire hard drive? Why just this computer and not the one in the next room . . . ?"[51]

Academic criticisms of the application of the plain view doctrine in digital contexts hinge upon the idea that hard drives are different from living rooms.[52] Indeed, electronic discovery proceeds differently than physical discovery. But the difference is primarily in the search method: because of computers' vast ability to store information, the seizure of the hard drive happens first, and the search of it happens second.[53] Once agents cull the responsive documents, however, the differences between physical and electronic spaces disappear. The challenge is to balance privacy and law enforcement interests to the same extent in both physical and electronic evidence cases. In this regard, Chief Judge Kozinski exaggerated the dangers of the plain view doctrine because a restricted version of the doctrine could strike an acceptable balance. Kerr identified one restricted option for the plain view doctrine that was used by the Tenth Circuit in *United States v. Carey*.[54] In *Carey*, a search of the defendant's computer for evidence of drug dealing resulted in the discovery of an image of child pornography.[55] Although an intentional search for child pornography yielded 243 other such images, the Tenth Circuit held that the images beyond the first one were inadmissible.[56] *Carey*, in Professor Kerr's terms, represents a "virtual file approach"[57] to defining the "zone"[58] of an electronic search: that is, the "relevant unit of a search . . . is an individual file,"[59] where nonresponsive information is seizable so long as the investigating agent did not intend to see it.

While the virtual file approach is preferable to eliminating the plain view doctrine altogether, there is at least one significant drawback: admissibility of evidence outside the scope of the warrant hinges primarily on the investigating agent's subjective intent, which may be impossible to discern with certainty.[60] A better solution would be to alter the approach taken in *Carey* and adopt what one might call a "responsive document approach." As the name suggests, the relevant

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[51] *Comprehensive Drug Testing*, 579 F.3d at 998.

[52] *Cf.* Kerr, *supra* note 50, at 538–40.

[53] *See id.* at 574 (citing *In re* 3817 W.W. End, 321 F. Supp. 2d 953, 958–59 (N.D. Ill. 2004)).

[54] 172 F.3d 1268 (10th Cir. 1999).

[55] *Id.* at 1270–71.

[56] *Id.* at 1273 & n.4.

[57] Kerr, *supra* note 50, at 554.

[58] *Id.*

[59] *Id.* at 555.

[60] *See id.* at 578 (describing the *Carey* court as "focused on the subjective intent of the officer to either stay within or look beyond the scope of the warrant").

unit of such an approach would be any document containing responsive information. Designated computer personnel or a third party would perform a search of the entire hard drive. All responsive information would be culled; if a responsive document contained any other evidence of immediately apparent illegality, that information would be seizable.

A responsive document approach would provide a better analogue to Fourth Amendment plain view jurisprudence in physical discovery cases. Imagine that officers have a warrant to search an individual's office for evidence of tax evasion, and officers find a paper document containing such evidence as well as evidence of narcotics trafficking. Under the plain view doctrine, the evidence of narcotics trafficking is seizable. Now imagine that the paper document were instead a word-processing document culled from an electronic search. There is no justification for applying different standards to information contained in the same document depending on whether that document is still on a computer or has been printed out. The same version of the plain view doctrine should apply: once responsive documents in an electronic discovery case have been culled, there is no functional difference between a responsive piece of paper and a responsive word-processing document, and there is thus no legitimate reason to require law enforcement to close their eyes to criminality in one situation but not the other. To depart from using the plain view doctrine within a responsive document would lead to absurd results: the outcome would differ depending on whether evidence was a product of physical or electronic discovery, despite the fact that there is no functional difference.[61] Further, a responsive document approach would offer far more protection of privacy rights than the physical device approach, while preserving law enforcement's ability to pursue outright criminal activity.

Fourth Amendment doctrine in the realm of electronic discovery cases is unclear. While the recent Ninth Circuit opinion in *Comprehensive Drug Testing* attempted to provide clarity by eliminating the use of the plain view doctrine in such cases, doing so was unnecessary to protect the MLB players' privacy interests and was an unwise mechanism for balancing privacy interests with law enforcement agents' ability to investigate crimes. Courts should adopt a responsive document approach or a similar approach that would, at the very least, prevent a given document from being treated differently on the sole basis of its format.

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[61] *See, e.g.*, David J. S. Ziff, Note, *Fourth Amendment Limitations on the Execution of Computer Searches Conducted Pursuant to a Warrant*, 105 COLUM. L. REV. 841, 872 (2005) ("In fact, courts have been dealing with the problems raised by computer search issues for years, just without the computers.").