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White Collar Roundup - November 2015

Fourth Circuit to Address Cell Phone Location Rules En Banc

The U.S. Court of Appeals for the Fourth Circuit has agreed to rehearing en banc in *United States v. Graham*. A three-judge panel had previously decided that law enforcement officers would have to get a warrant to collect cell phone location data from private service providers. The panel held "that the government's warrantless procurement of the [cell site location information] was an unreasonable search in violation of [the defendants'] Fourth Amendment rights." But the panel held that the evidence should not be suppressed "because the government relied in good faith on court orders issued in accordance with Title II of the Electronic Communications Privacy Act, or the Stored Communications Act." After the panel opinion was issued, the government sought en banc rehearing regarding the Fourth Amendment violation, and the defendants sought en banc rehearing regarding the exclusionary rule. The court granted the government's en banc rehearing request, but denied the defendants' request. The case has tentatively been set for oral argument during the week of March 22–25, 2016. For the panel opinion, click here. For the en banc order, click here.

Warrant for Certain Evidence on Cell Phone Limits Scope of Search

The Supreme Court of Colorado added a wrinkle to law enforcement's ability to obtain evidence from cell phones. In *People v. Herrera*, the court ruled that a warrant to obtain certain evidence from a cell phone limits the officers executing the warrant to look for and obtain only those records alone. In the course of its criminal investigation, an undercover police officer had posed as a juvenile girl and exchanged sexually explicit text messages and photographs with defendant Matthew Herrera. The officers arrested Herrera and seized his cell phone. They then obtained a warrant to search the phone to determine its owner and to locate the offending text messages and photographs exchanged with Herrera. During their search, the police explored other text-message folders on the phone and located other improper text messages and photographs. Herrera moved to suppress that evidence as being outside the scope of the warrant. The trial court granted the motion, and the state appealed. The supreme court affirmed, holding that allowing the police to use the narrow warrant as an entrée to search the entire cell phone would turn it into an improper general warrant, which would violate the Fourth Amendment. The court rejected the state's arguments that the other messages were in "plain view" because the officer searching the cell phone had to open the folder to see the text messages and photographs, likening the folder to a closed container and taking it outside the plain-view doctrine.

Government and Apple Inc. in Search Warrant Row

The U.S. Attorney's Office for the Eastern District of New York and Apple Inc. spent much of October fighting about whether Apple had to help the prosecutors execute a search warrant on an Apple device seized by the government. The government had filed an application under the All Writs Act to direct Apple to help the government by disabling the security of an Apple device the government had seized. Apple resisted, arguing that it values users' privacy and noted that the All Writs Act might not even authorize the court to order it to help. Apple also advised the court that while it might be able to assist in this case because the device runs operating system iOS 7, it would not in any event be able to help with devices running iOS 8 or

higher because those operating systems do not give Apple any ability to access the information on the device. For articles about this litigation, click here.

DOJ Corporate Prosecutions Waning

According to a report by Syracuse University's Transactional Records Access Clearinghouse (TRAC), prosecution of companies by the U.S. Department of Justice (DOJ) has declined by 29% between fiscal year 2004 and 2014. The report notes that the DOJ claims to be increasing prosecutions of corporate violators, but the numbers do not bear that out. The TRAC looked at hundreds of thousands of individual records in the course of a 17-year litigation effort under the Freedom of Information Act. The report concludes that "The Justice Department's own records make it clear that when it comes to criminal enforcement against corporate violators, the agency is falling far short of its goals."

SEC Ups Its Game in Enforcement

The U.S. Securities and Exchange Commission (SEC) announced the results of its enforcement activities for fiscal year 2015. The agency said that in its last fiscal year, which ended in September 2015, "the SEC filed 807 enforcement actions covering a wide range of misconduct, and obtained orders totaling approximately $4.2 billion in disgorgement and penalties." The SEC said that of those actions, "a record 507 were independent actions for violations of the federal securities laws and 300 were either actions against issuers who were delinquent in making required filings with the SEC or administrative proceedings seeking bars against individuals based on criminal convictions, civil injunctions, or other orders." The agency's press release broke down the types of cases that had been brought and compared them with prior years. Notably, the reported amount of disgorgement orders and penalties rose from $3.4 billion in 2013 to $4.16 billion in 2014, and to $4.19 billion in 2015.

No Laughing Matter

The Ninth Circuit in *United States v. Ochoa* affirmed a two-year sentence imposed for a violation of supervised release after the district court had initially imposed a sentence of a year and a day in the proceeding. In the case, defendant Ramon Ochoa had been convicted for being a felon-in-possession of a firearm and sentenced to 70 months in prison. During his post-incarceration, supervised-release term, Ochoa had not been behaving. During the sentencing hearing for his violations of supervised release, the district court imposed a sentence of a year and a day. The court asked whether there was "[a]nything else," and then noted that Ochoa was laughing. The court then said that Ochoa "just talked [himself] into more time" and said it had "just lectured [him] about respect for the system and now you laugh at the court." On appeal, Ochoa argued that under Federal Rule of Criminal Procedure 35, the sentence was final upon the court's initial, oral statement of a year and a day. The Ninth Circuit disagreed, concluding that "Rule 35 was not intended to deprive the district court of jurisdiction to alter the sentence during the same hearing." One judge dissented, noting "[t]he majority's ruling upholds the draconian decision of the sentencing court to suddenly double the term of incarceration initially pronounced and impose the statutory maximum sentence based solely on a perception that the defendant was laughing at the court."

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