September 1, 2015

White Collar Roundup - September 2015

Government Can't Freeze Assets Without Judicial Review

In *United States v. Cosme*, the U.S. Court of Appeals for the Second Circuit held that the government could not seize and hold assets in connection with criminal conduct without "a proper judicial determination of whether probable cause existed at the time of the seizure to support the forfeitability of his property." In the case, defendant William Cosme had been arrested for fraud. The day of his arrest, agents seized a Cadillac, a Ferrari, a Lamborghini and more than $600,000 in cash. They also froze two of his bank accounts, telling the banks they would obtain warrants but the seizures had to happen immediately because of "exigent circumstances." After he was indicted, the government moved for - and received - a pretrial order to maintain custody of the seized assets until the end of the criminal case. Cosme appealed, arguing that the pretrial seizure without a judicial determination of probable cause violated his Fourth, Fifth and Sixth Amendment rights. The Second Circuit agreed and remanded the case to the district court for a determination of whether probable cause supports the forfeitability of Cosme's assets.

But If Assets *Are* Forfeitable, Conflict-Free Counsel Is Not Required

The Second Circuit in *United States v. Cohan* held that "there is no Sixth Amendment right to counsel at a writ of garnishment hearing brought to satisfy forfeiture or restitution judgments." As a result, district courts are under no "duty to inquire" into the bona fides of any conflict of interest on the part of defense counsel. In the case, defendant Barry Cohan had been convicted of healthcare fraud and aggravated identity theft, and sentenced to pay restitution and to forfeit certain ill-gotten gains, including specific assets. He was represented by counsel during his criminal case. At his plea hearing, Cohan stated he agreed to forfeit specific assets to the government. Years later, the government moved for a writ of garnishment, seeking to seize a portion of Cohan's retirement account. Cohan objected, arguing (in essence) the government was seeking to garnish his account after having agreed at the time of the plea that it would not do so. The district court rejected his claim and granted the writ. On appeal, Cohan argued the district court should have conducted a hearing about whether his attorney, who had represented him in both the criminal case and the litigation over the writ, had a conflict of interest. Finding there is no Sixth Amendment right to counsel during a post-conviction hearing to enforce a restitution order, the Second Circuit held that "the district court was under no obligation to inquire as to a possible conflict of interest."

Businesses Beware: How a Carjacker's Use of His Uncle's Mobile Phone Implicates Your Rights Over Phones Provided to Employees

The U.S. District Court for the Eastern District of Michigan in *United States v. Scott* held that the "subscriber" of a mobile phone he gave to a third party did not have standing to move to suppress evidence obtained from the phone by law enforcement. Defendant Curtis Scott was indicted for making a false statement to law enforcement when he allegedly lied to FBI agents about whether he possessed a cell phone that was used by a suspected carjacker, Roland Hubbard. Scott filed motions to suppress evidence, including records of text messages sent to or from and calls made on the phone. In denying his motions, the court noted Scott had no reasonable expectation of privacy as to the phone's text messages or call records because he had given the phone to Hubbard. The court reasoned that "[a]part from identifying himself as the 'subscriber' of the Hubbard Phone, Scott has not identified any evidence in the record that would support a reasonable expectation of privacy in the phone under the relevant factors." The court concluded, "In short, Scott has not presented any evidence that he took any precautions to maintain the privacy of the Hubbard Phone once it left his possession or that Scott could have, or did,

exercise control over the phone." As a result, Scott's motion was denied for lack of standing. While this case involved an uncle's giving his phone to his nephew, the theory of the ruling might also implicate businesses that, absent necessary precautions, provide mobile phones to their employees.

More Government Requests of Twitter

Twitter Inc. in its most recent transparency report noted the U.S. government's requests for information regarding Twitter users rose 92% over the prior six-month reporting period. Twitter reported, "This is the largest increase in requests and affected accounts between reporting periods since we began publishing the Transparency Report in 2012." It also relayed that the United States remains the leading requestor, making 56% of the total requests. Twitter provided some information in response to 80% of the 2,436 requests made by the United States. Japan was a distant second in total requests, with 10%. Another perennial requestor is the United Kingdom, which made 7% of the total requests.

No Lump Sum? No Problem: It's Still Structuring

In *United States v. Sperrazza*, the Eleventh Circuit affirmed the structuring conviction of an anesthesiologist. Financial institutions are required to report cash transactions in excess of $10,000. "Structuring" is endeavoring to evade that reporting requirement by dividing large cash deposits into smaller amounts to avoid triggering a report. In the case, approximately every 10 days Dr. Robert Sperrazza cashed the checks earned at his medical practice rather than depositing them into his account. The 20 to 50 checks he cashed on each occasion often totaled more than $9,000 but never exceeded $10,000. Sperrazza argued, for the first time on appeal, that the indictment is defective because it does not allege he had a "'cash hoard' in excess of $10,000 that he divided into two or more amounts of less than $10,000." Not so, said the Eleventh Circuit. The court held that the indictment need not allege the defendant broke one lump sum of cash into smaller amounts to deposit. But the court cautioned that "each count of structuring must include two or more transactions that together exceed $10,000." More significantly, "[t]he key allegation in the indictment is not that Sperrazza engaged in a series of transactions under $10,000, but that he did so 'for the purpose of evading the reporting requirements.'" As a result, the court rejected Sperrazza's argument and affirmed. One judge dissented, contending the government's interpretation - embraced by the court - puts in peril anyone who "goes to the bank often enough to create the appearance to the government of engaging in a pattern of financial transactions of $10,000 or less."